

Swap Dealer De Minimis Exception On-Venue and Cleared Swaps

A Report by Staff of the
Division of Swap Dealer and Intermediary Oversight
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I. Background

Section 1a(49) of the Commodity Exchange Act (“CEA”) defines the term “swap dealer” to include any person who: (1) holds itself out as a dealer in swaps; (2) makes a market in swaps; (3) regularly enters into swaps with counterparties as an ordinary course of business for its own account; or (4) engages in any activity causing the person to be commonly known in the trade as a dealer or market maker in swaps (collectively referred to as “swap dealing,” “swap dealing activity,” or “dealing activity”).¹ The statute also requires the Commodity Futures Trading Commission (“CFTC” or “Commission”) to promulgate regulations to establish factors with respect to the making of a determination to exempt from designation as a swap dealer (“SD”) an entity engaged in a de minimis quantity of swap dealing.²

In May 2012, the CFTC and the Securities and Exchange Commission jointly issued an adopting release³ further defining, among other things, the term “swap dealer” in § 1.3 of the CFTC’s regulations (“SD Definition”) and providing for a de minimis exception in paragraph (4) therein (“DM Exception”).⁴ Pursuant to an amendment proposed in June 2018 (“2018 DM NPRM”),⁵ and adopted by the Commission in November 2018 (“2018 DM Final Rule,” and collectively with the 2018 DM NPRM, “2018 DM Releases”),⁶ the DM Exception now states that a person shall not be deemed to be an SD unless its swaps connected with swap dealing activities exceed an aggregate gross notional amount (“AGNA”) threshold of \$8 billion (measured over the prior 12-month period).⁷

In connection with the 2018 DM Final Rule, Chairman Giancarlo stated that he would ask Commission staff to “conduct a study on possible alternative metrics for the calculation of

¹ 7 U.S.C. 1a(49)(A). In general, a person that satisfies any one of these prongs is deemed to be engaged in swap dealing activity. *See also* the definitions of “swap” in CEA section 1a(47) and § 1.3 of the Commission’s regulations. 7 U.S.C. 1a(47); 17 CFR 1.3.

² 7 U.S.C. 1a(49)(D).

³ Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant,” 77 FR 30596 (May 23, 2012).

⁴ *See* 17 CFR 1.3, Swap dealer.

⁵ *See* De Minimis Exception to the Swap Dealer Definition, 83 FR 27444 (proposed June 12, 2018).

⁶ *See* De Minimis Exception to the Swap Dealer Definition, 83 FR 56666 (Nov. 13, 2018).

⁷ *See* 17 CFR 1.3, Swap dealer, paragraph (4)(i)(A).

the SD de minimis threshold drawing upon proposals in the June 2018 NPRM.”⁸ Among other things, the 2018 DM NPRM included a discussion regarding whether an exclusion from the de minimis calculation for swaps that are executed on an exchange (*e.g.*, a swap execution facility or designated contract market) (referred to as “on-venue” swaps) and/or cleared by a derivatives clearing organization is appropriate.

This report presents additional data and analysis Commission staff conducted with respect to on-venue and cleared swaps.

II. Analysis

A. Methodology

The data used in this analysis is drawn from the 2018 DM Releases, where the Commission considered reducing the AGNA de minimis threshold to \$3 billion, maintaining the threshold at \$8 billion, or increasing the threshold.⁹ As discussed in more detail in the 2018 DM Releases, this analysis is based on a January 1, 2017 through December 31, 2017 review period, and includes swap transactions reported to swap data repositories, excluding inter-affiliate and non-U.S. transactions. The total size of the swap market that was analyzed (after excluding inter-affiliate, non-U.S. transactions, and non-financial commodity swaps) was approximately \$221.1 trillion in AGNA of swaps activity, approximately 3.8 million transactions, and 34,774 counterparties.

Staff identified those entities that, based on their observable business activities, were potentially engaging in swap dealing activity (“In-Scope Entities”)¹⁰ versus those likely to be engaging in other kinds of transactions (*e.g.*, swaps entered into for hedging, investing, or proprietary trading purposes). Further, a minimum unique counterparty count of 10

⁸ 2018 DM Final Rule, 83 FR at 56690; Statement of Chairman J. Christopher Giancarlo Regarding the Final Rule on Swap Dealer De Minimis Calculation (Nov. 5, 2018), available at <https://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement110518>.

⁹ The methodology described below is explained in more detail in those releases. *See* 2018 DM Final Rule, 83 FR at 56669-71; 2018 DM NPRM, 83 FR at 27749-50.

¹⁰ The majority of In-Scope Entities are banks, broker-dealers, non-bank financial entities, and affiliates thereof.

counterparties was utilized to better identify the entities that are likely to be engaged in transactions that have to be considered for the SD Definition.¹¹

Among other things, staff estimated regulatory coverage by assessing the extent to which the swap market would have been subject to SD regulation at different AGNA thresholds because at least one counterparty to a swap was identified as a “Likely SD” (“Estimated Regulatory Coverage”). The term “Likely SD” refers to an In-Scope Entity that exceeded a specified AGNA threshold level, and traded with at least 10 unique counterparties. With regard to Estimated Regulatory Coverage, staff identified the extent to which: (1) swaps activity, measured in terms of AGNA (see Table 1) or transaction count (see Table 2), would have been subject to SD regulation during the review period, at a specified AGNA threshold, because at least one counterparty to a swap was identified as a Likely SD at that AGNA threshold; and (2) counterparties (see Table 3) in the swap market would have transacted with at least one Likely SD during the review period, at a specified AGNA threshold.

Staff extended the analysis from the 2018 DM Releases to estimate regulatory coverage after excluding on-venue and/or cleared swaps from the DM Exception calculation. Staff compared the totals of all Likely SD activity in each scenario to the overall market size statistics from the 2018 DM Releases, described above. Staff notes that this analysis is based on historical data and does not account for any potential changes to market structure that would result if there was an exclusion from the de minimis calculation for on-venue and/or cleared swaps.

B. Preliminary Results

As noted in the SD Definition, “a person who is deemed to be a swap dealer shall be deemed to be a swap dealer with respect to each swap it enters into, regardless of the category of the swap or the person’s activities in connection with the swap.”¹² Therefore, the analysis compares the projected total activity (not just swaps counted in the relevant scenario) of all Likely SDs to the 2018 DM Releases baseline scenario totals. The analysis also compares the

¹¹ Adding this filter to the analysis reduced the likelihood of false positives – *i.e.*, reduced the potential that entities likely engaged in hedging or other non-dealing activity would be identified as potential SDs. *See* 2018 DM NPRM, 83 FR at 27449.

¹² 17 CFR 1.3, Swap dealer, paragraph (3).

total activity remaining in each scenario (after exclusions) of all Likely SDs to the 2018 DM Releases baseline scenario totals.

1. Transaction Exclusion Scenario Descriptions

All scenarios assume a de minimis threshold of \$8 billion in AGNA of swap activity. The totals for each exclusion scenario only include the activity of Likely SDs that exceeded the \$8 billion threshold after application of the relevant exclusion.¹³

“2018 DM Releases” Scenario (Column 1)

This baseline scenario is the analysis that was included in the 2018 DM Releases. All in-scope swap transactions are included in this baseline scenario, including swaps that were on-venue and/or cleared.

“On-Venue and Cleared” Exclusion Scenario (Column 2)

Swap transactions that are **both on-venue and cleared** are excluded from calculating a person’s AGNA total for purposes of the DM threshold calculation. Swap transactions that are on-venue and not cleared, off-venue and cleared, or off-venue and not cleared are included.

“On-Venue” Exclusion Scenario (Column 3)

Swap transactions that are **on-venue** (regardless of clearing status) are excluded from calculating a person’s AGNA total for purposes of the DM threshold calculation. Swap transactions that are off-venue and cleared, or off-venue and not cleared are included.

¹³ Paragraph (4) of the SD definition in § 1.3 requires that, in determining whether its swap dealing transactions exceed the de minimis threshold, a person must include the aggregate notional value of any swap dealing transactions entered into by its affiliates under common control. Therefore, a person would aggregate all swaps connected with its dealing activity with those of persons controlling, controlled by, or under common control with the potential SD to the extent that these affiliated persons are themselves required to include those swaps in their own de minimis thresholds, unless the affiliated person is itself a registered SD. Consistent with the analysis from the 2018 DM Releases, a small number of Likely SDs in a given scenario were counted despite AGNA below \$8 billion for the individual legal entity because the aggregate AGNA of unregistered entities in the corporate family exceeded \$8 billion in the given scenario.

“Cleared” Exclusion Scenario (Column 4)

Swap transactions that are **cleared** (regardless of venue status) are excluded from calculating a person’s AGNA total for purposes of the DM threshold calculation. Swap transactions that are not cleared and on-venue, or not cleared and off-venue are included.

“On-Venue or Cleared” Exclusion Scenario (Column 5)

Swap transactions that are **either on-venue or cleared** are excluded from calculating a person’s AGNA total for purposes of the DM threshold calculation. Only swap transactions that are off-venue and not cleared are included.

2. Metric Descriptions

“Baseline AGNA/Trades/CPs Included in DM Analysis” (Row A)

“Baseline AGNA /Trades/CPs Included in DM Analysis” represents the total market size of all AGNA, transactions, and counterparties, as discussed in the 2018 DM Releases. All in-scope swap transactions are included in this scenario, including on-venue and/or cleared swaps. Transactions are included regardless of whether a Likely SD is a counterparty to the transaction.

“AGNA/Trades/CPs Excluded from DM Analysis under Exclusion Scenario” (Row B)

“AGNA/Trades/CPs Excluded from DM Analysis under Exclusion Scenario” represents the total market size of all AGNA, transactions, and counterparties that are excluded in a given scenario. Transactions are excluded regardless of whether a Likely SD is a counterparty to the transaction.

“AGNA/Trades/CPs Included in DM Analysis under Exclusion Scenario” (Row C)

“AGNA/Trades/CPs Included in DM Analysis under Exclusion Scenario” represents the total market size of all AGNA, transactions, and counterparties that remain in a given scenario after excluding the relevant transaction type (on-venue and/or cleared). The transactions included in this market would be counted towards a person’s DM Exception threshold. Transactions are included regardless of whether a Likely SD is a counterparty to the transaction.

“No. of Likely SDs” (Row D)

“No. of Likely SDs” represents the total count of all Likely SDs projected to have to register as an SD in the given transaction exclusion scenario.

“Non-Excluded AGNA/Trades/CPs of Likely SDs after Applying Exclusion” (Row E)

This represents the total AGNA, transactions, or counterparties of the projected Likely SDs, after application of the relevant transaction exclusion. Only transactions that meet the requirements of the scenario **and** include at least one Likely SD as a counterparty are included in these totals.

“Total AGNA/Trades/CPs of Likely SDs” (Row F)

This represents the total AGNA, transactions, or counterparties of the projected Likely SDs in the given transaction exclusion scenario. For each exclusion scenario, AGNA of **all swaps** entered into by the Likely SDs for that exclusion scenario are included, **including** the on-venue and/or cleared swaps of the Likely SDs.

3. Likely SD Coverage Ratio Descriptions

“Non-Excluded AGNA/Trades/CPs of Likely SDs After Applying Exclusion v. Baseline AGNA/Trades/CPs” (Row E divided by Row A)

This metric indicates the activity of all Likely SDs at the \$8 billion AGNA threshold that **remains** after exclusions in the relevant scenario compared to the **baseline scenario** market size.

As seen in Table 1, for example, assuming **on-venue** swaps were excluded, the projected 92 Likely SDs would be a counterparty to \$115.2 trillion AGNA of **off-venue** swaps, covering 52.11% of the baseline market size of \$221.1 trillion AGNA (which includes both on-venue and off-venue swaps).

“Non-Excluded AGNA/Trades/CPs of Likely SDs after Applying Exclusion v. AGNA/Trades/CPs Included in DM Analysis under Exclusion Scenario” (Row E divided by Row C)

This metric indicates the activity of all Likely SDs at the \$8 billion AGNA threshold that **remains** after exclusions in the relevant scenario compared to the **exclusion scenario** market size.

As seen in Table 2, for example, assuming **cleared** swaps were excluded, the projected 95 Likely SDs would be a counterparty to 2.96 million swap transactions that are **not cleared**, covering 99.69% of the exclusion scenario market size of 2.97 million transactions that are **not cleared**.

“Total AGNA/Trades/CPs of Likely SDs v. Baseline AGNA/Trades/CPs” (Row F divided by Row A)

This metric indicates the **total activity** of all Likely SDs at the \$8 billion AGNA threshold in the relevant scenario compared to the **baseline scenario** market size. This is a broader measure of all the activity of the Likely SDs, not just the transactions that were counted in a given transaction exclusion scenario towards the \$8 billion threshold. As discussed above, a person who is deemed to be an SD is deemed to be an SD with respect to each swap it enters into, not just those swaps used for counting towards the de minimis threshold in a given scenario.

As seen in Table 1, for example, assuming swaps that were both **on-venue and cleared** were excluded, the projected 104 Likely SDs would be a counterparty to \$221.0 trillion total AGNA swaps activity, covering 99.95% of the baseline market size of \$221.1 trillion AGNA.

4. Projected Impact of Exclusions at \$8 Billion AGNA Threshold

**Table 1 – Likely SD Market Coverage
AGNA (in USD Trillions)**

	Data Row	Transaction Exclusion Scenario				
		Column 1	Column 2	Column 3	Column 4	Column 5
		2018 DM Releases	On-Venue and Cleared	On-Venue	Cleared	On-Venue or Cleared
Baseline AGNA Included in DM Analysis	A	221.1	221.1	221.1	221.1	221.1
AGNA Excluded from DM Analysis under Exclusion Scenario	B	0.0	93.3	105.8	159.2	171.7
AGNA Included in DM Analysis under Exclusion Scenario	C	221.1	127.9	115.3	62.0	49.4
No. of Likely SDs	D	108	104	92	95	85
Non-Excluded AGNA of Likely SDs after Applying Exclusion	E	221.0	127.8	115.2	61.9	49.3
v. Baseline AGNA	E / A	99.95%	57.80%	52.11%	27.99%	22.32%
v. AGNA Included in DM Analysis under Exclusion Scenario	E / C	99.95%	99.95%	99.91%	99.87%	99.84%
Total AGNA of Likely SDs (<i>i.e.</i> , AGNA of all swaps entered into by Likely SDs, including on-venue and/or cleared swaps)	F	221.0	221.0	220.6	220.6	220.5
v. Baseline AGNA	F / A	99.95%	99.95%	99.76%	99.75%	99.72%

**Table 2 – Likely SD Market Coverage
Transactions (in Millions)**

	Data Row	Transaction Exclusion Scenario				
		Column 1	Column 2	Column 3	Column 4	Column 5
		2018 DM Releases	On-Venue and Cleared	On-Venue	Cleared	On-Venue or Cleared
Baseline Trades Included in DM Analysis	A	3.80	3.80	3.80	3.80	3.80
Trades Excluded from DM Analysis under Exclusion Scenario	B	0.0	0.57	1.06	0.84	1.32
Trades Included in DM Analysis under Exclusion Scenario	C	3.80	3.23	2.74	2.97	2.48
No. of Likely SDs	D	108	104	92	95	85
Non-Excluded Trades of Likely SDs after Applying Exclusion	E	3.80	3.22	2.74	2.96	2.47
v. Baseline Trades	E / A	99.77%	84.70%	71.90%	77.75%	64.96%
v. Trades Included in DM Analysis under Exclusion Scenario	E / C	99.77%	99.76%	99.70%	99.69%	99.64%
Total Trades of Likely SDs (i.e., trades of all swaps entered into by Likely SDs, including on-venue and/or cleared swaps)	F	3.80	3.80	3.79	3.79	3.79
v. Baseline Trades	F / A	99.77%	99.77%	99.55%	99.52%	99.51%

Table 3 – Likely SD Market Coverage Counterparties (“CPs”)

	Data Row	Transaction Exclusion Scenario				
		Column 1	Column 2	Column 3	Column 4	Column 5
		2018 DM Releases	On-Venue and Cleared	On-Venue	Cleared	On-Venue or Cleared
Baseline CPs Included in DM Analysis	A	34,774	34,774	34,774	34,774	34,774
CPs Excluded from DM Analysis under Exclusion Scenario	B	0	249	489	1,326	1,571
CPs Included in DM Analysis under Exclusion Scenario	C	34,774	34,525	34,285	33,448	33,203
No. of Likely SDs	D	108	104	92	95	85
Non-Excluded CPs of Likely SDs after Applying Exclusion	E	30,879	30,631	30,146	28,621	28,375
v. Baseline CPs	E / A	88.80%	88.09%	86.69%	82.31%	81.60%
v. CPs Included in DM Analysis under Exclusion Scenario	E / C	88.80%	88.72%	87.93%	85.57%	85.46%
Total CPs of Likely SDs (<i>i.e.</i> , CPs of all swaps entered into by Likely SDs, including on-venue and/or cleared swaps)	F	30,879	30,879	30,631	29,947	29,946
v. Baseline CPs	F / A	88.80%	88.80%	88.09%	86.12%	86.12%