CLEARY GOTTLIEB

ALERT MEMORANDUM

CFTC Proposes Amendments to the Swap Dealer *De Minimis* Exception

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On June 5, 2018 the Commodity Futures Trading Commission (the "CFTC") released a Notice of Proposed Rulemaking (the "Proposal") proposing amendments to the *de minimis* exception to the definition of "swap dealer" under the Commodity Exchange Act (the "CEA") and the CFTC's regulations thereunder (the "*De Minimis* Exception").[1]

The *De Minimis* Exception currently provides that a person will not be deemed to be a swap dealer unless its swaps entered into in connection with swap dealing (together with those of its affiliates not registered as swap dealers) exceed $8 billion aggregate gross notional amount ("AGNA") over the prior 12-month period. This $8 billion threshold is scheduled to drop to $3 billion on December 31, 2019.[2] The proposed amendments would permanently fix the AGNA threshold at $8 billion and delegate authority to the Director of the Division of Swap Dealer and Intermediary Oversight (the "DSIO") or his or her designee to approve or establish methodologies for calculating notional amounts.

The proposed amendments also include new exclusions from the *de minimis* calculation for (1) swaps between an insured depository institution (an "IDI") and its customer in connection with loan origination ("Loan-Related Swaps"), (2) swaps entered into to hedge physical or financial positions ("Hedging Swaps") and (3) swaps resulting from multilateral compression exercises. These exclusions would parallel and, in some cases, expand existing exceptions and no-action relief.

In addition to proposing these changes, the Proposal seeks comment on:

(1) including a minimum dealing counterparty count and/or transaction count threshold as criteria within the *De Minimis* Exception in addition to AGNA;
(2) excluding exchange-traded and/or cleared swaps from the *de minimis* calculation; and

1 83 Fed. Reg. 27444 (Jun. 12, 2018).

2 The phase-in period was originally scheduled to terminate on December 31, 2017, but the CFTC has extended its effect to December 31, 2019.

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(3) excluding non-deliverable foreign exchange forwards ("NDFs") from the *de minimis* calculation.

Because the current phase-in period for the AGNA threshold expires on December 31, 2019 and the threshold is measured on a rolling 12-month basis, the CFTC will face pressure to either issue a final regulation fixing the $8 billion threshold before the end of 2018 or provide another extension. This timing will make it challenging for the CFTC to address the additional issues covered by its requests for comment as part of the same rulemaking. Since Chairman Giancarlo has stated that he does not intend to seek reappointment to a second term following the expiration of his current term in April 2019, resolution of these issues might be left to his successor.

This Memorandum provides an overview of the Proposal and summarizes the key issues that it raises. Comments on the Proposal are due by August 13, 2018.

Background

Section 712(d) of the Dodd-Frank Act requires the CFTC and the Securities and Exchange Commission (the "SEC"), in consultation with the Federal Reserve Board, to further define "swap dealer" and certain other terms relevant to Title VII of the Dodd-Frank Act. Pursuant to this requirement, the CFTC and SEC issued a joint rulemaking (the "SD Adopting Release") in May 2012 further defining the term "swap dealer", among other terms.[3]

In accordance with CEA Section 1a(49)(D), which provides that the CFTC shall "exempt from designation as a swap dealer an entity that engages in a *de minimis* quantity of swap dealing", the SD Adopting Release and related agency guidance have stated that a person would not be considered a swap dealer unless its swaps connected with swap dealing activity (together with those of its affiliates not registered as swap dealers) exceed an AGNA threshold of $3 billion measured on a rolling 12-month basis, subject to a phase-in period during which the AGNA threshold is set at $8 billion.

In addition to this *De Minimis* Exception, the SD Adopting Release provided that certain swaps would not be considered in determining whether a person is a swap dealer. These included swaps executed by IDIs in connection with originating loans to customers. This exception was an implementation of CEA Section 1a(49)(A), which states that "in no event shall an insured depository institution be considered to be a swap dealer to the extent it offers to enter into a swap with a customer in connection with originating a loan with that customer." The SD Adopting Release also included a safe harbor for certain swaps entered into for the purpose of hedging physical positions.

Considering the limited data available in 2012 regarding swap dealing activity, the SD Adopting Release required the CFTC staff to publish reports related to the "swap dealer" definition and the *De Minimis* Exception within 30 months of its publication. The CFTC staff issued a preliminary report concerning the *De Minimis* Exception in November 2015 and a final report reflecting additional data and market feedback in August 2016 (collectively the "Staff Reports").[4]

Although the phase-in period for the *De Minimis* Exception was originally scheduled to terminate on December 31, 2017, following the issuance of the Staff Reports, the CFTC twice extended the termination date, currently set to expire December 31, 2019, in order to allow further consideration of the appropriate threshold for the *De Minimis* Exception.[5]

Despite promulgating the "swap dealer" definition jointly with the SEC in 2012, the Proposal is being issued solely by the CFTC on the basis that Section 1a(49)(D) of the CEA states that the "Commission" shall create a *de minimis* exception.[6] It is notable, however, that the Proposal proposes not only to modify the threshold for the *De Minimis* Exception, but also to adopt new exclusions that would expand the jointly issued exceptions from the "swap dealer" definition, albeit by providing that such swaps would not count in the *de minimis* calculation.[7]

[3] Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant," 77 Fed. Reg. 30596 (May 23, 2012).

[4] Swap Dealer De Minimis Exception Preliminary Report (Nov. 18, 2015), available at http://www.cftc.gov/idc/groups/public/@swaps/documents/file/dfreport_sddeminis_1115.pdf; Swap Dealer De Minimis Exception Final Staff Report (Aug. 15, 2016), available at http://www.cftc.gov/idc/groups/public/@swaps/documents/file/dfreport_sddeminis081516.pdf.

[5] See Order Establishing De Minimis Threshold Phase-In Termination Date, 81 Fed. Reg. 71605 (Oct. 18, 2016); Order Establishing a New De Minimis Threshold Phase-In Termination Date, 82 Fed. Reg. 50309 (Oct. 31, 2017).

[6] See 77 Fed. Reg. at 30634 n.464 ("We do not interpret the joint rulemaking provisions of section 712(d) of the Dodd-Frank Act to require joint rulemaking here, because such an interpretation would read the term 'Commission' out of CEA section 1a(49)(D) (and [Securities] Exchange Act section 3(a)(71)(D)), which themselves were added by the Dodd-Frank Act.").

[7] Although excluding Loan-Related Swaps and Hedging Swaps from the *de minimis* calculation will generally have the same effect as excepting such swaps from the definition of "swap dealer," swap dealing activity that qualifies for the

The *De Minimis* Threshold

Fixing the AGNA Threshold at $8 billion

To determine the appropriate AGNA threshold, CFTC staff conducted an analysis of swap data depository ("SDR") data on interest rate, credit default, foreign exchange, and equity swaps from January 1, 2017 through December 31, 2017.[8] The staff used three metrics: (1) the AGNA involving at least one registered swap dealer as a counterparty; (2) the number of transactions involving at least one registered swap dealer as a counterparty; and (3) the number of swap counterparties transacting with at least one registered swap dealer.

The staff found that, if the AGNA threshold had been set at $3 billion during the review period, there would have been a 10% increase in the number of entities likely required to register as swap dealers, but only 0.01% of additional AGNA and 0.06% more transactions would have involved a registered swap dealer as a counterparty, and only 1.96% more counterparties would have transacted with at least one registered swap dealer.

The CFTC concluded that such small increases would not provide benefits in terms of systemic risk mitigation, counterparty protection or market efficiency sufficient to outweigh the sizable costs resulting from expanding the number of firms required to register and discouraging others from engaging in swap dealing.

Rejection of a Higher AGNA Threshold

The CFTC staff also assessed how higher AGNA thresholds of $20 billion, $50 billion or $100 billion would affect the scope of coverage. The analysis found that if such higher thresholds had been in place during the review period, they would have caused a minimal decrease (less than 1%) in the AGNA and number of transactions involving a registered swap dealer as a counterparty. However, increasing the AGNA threshold to $20 billion, $50 billion or $100 billion would, according to the CFTC staff's analysis, have decreased the number of counterparties transacting with at least one registered swap dealer by 2.8%, 5.7% or 7.6%, respectively. The CFTC cited these decreases as the reason not to decrease the AGNA threshold, but welcomed comments on this issue.

Although the CFTC pointed to counterparty protection as the reason not to raise the AGNA threshold, the staff's data suggests that, had the AGNA threshold been $20 billion, $50 billion or $100 billion during the review period, 86%, 83% or 81% of counterparties, respectively, would have transacted with at least one registered swap dealer during the review period. These estimates also probably understate counterparty coverage because the staff treated each invalid counterparty identifier as a separate counterparty even though one counterparty may have been associated with multiple invalid identifiers. They also treated affiliates separately. Finally, they could not take into account behavioral changes, such as counterparties opting to shift their trading to registered swap dealers.

De Minimis Exception may remain subject to the Volcker Rule because the Volcker Rule prohibits the purchase or sale of financial instruments by certain swap dealers to the extent the purchase or sale is "in connection with the activities that require" the swap dealer to register as such and by persons engaged in the business of a swap dealer outside the United States to the extent the purchase or sale is "in connection with the activities of such business". See, e.g., 17 C.F.R. § 75.3(b)(1)(iii).

[8] The SDR data analyzed excluded data on interaffiliate and non-U.S. transactions. The SDR data also had certain important limitations, including the absence of reporting fields to indicate whether a swap was part of dealing activity or eligible for one or more of the exceptions to the swap dealer definition. These limitations could lead the CFTC to propose adding new data fields covering this information. The CFTC has previously proposed adding those fields. See Draft Technical Specifications for Certain Swap Data Elements (Dec. 22, 2015), available at https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/specificationsswapdata122215.pdf.

Methodologies for Calculating Notional Amounts

The Proposal also proposes to delegate authority to approve and establish methods for calculating notional amounts to the Director of the DSIO (or his or her designee). As noted in the Proposal, DSIO has issued FAQs in the past regarding how the notional amount of physical commodity swaps should be calculated.[9] The formal delegation of authority by the CFTC would therefore effectively formalize this process.

The Proposal states that the delegation would be helpful in light of potential conflicts among industry practice of calculating notional amounts, the methodologies described in the DSIO FAQs and the methodologies contained in guidance recently issued by the Committee on Payments and Market Infrastructure ("CPMI") and the Board of the International Organization of Securities Commissions ("IOSCO").[10]

Additional Thresholds

In addition to requesting comment on permanently fixing the AGNA threshold at $8 billion, the Proposal seeks feedback on whether the AGNA threshold should be supplemented by a dealing counterparty count threshold and/or a dealing transaction count threshold. Notably, the Proposal does not suggest that such thresholds would replace the AGNA threshold, but that an entity's swap dealing activity would need to exceed one or both of these thresholds in addition to the AGNA threshold.

Among other questions, the Proposal asks commenters to address:

- Whether a dealing counterparty count threshold of 10 counterparties and a dealing transaction count threshold of 500 transactions would be appropriate;
- Whether entities subject to common control should be treated as a single counterparty for purposes of a dealing counterparty count threshold;
- Whether transactions with swap dealers and major swap participants should be excluded from the calculation under a dealing counterparty count threshold;
- Whether the counterparty and/or transaction counts should be aggregated across unregistered affiliates similar to the AGNA threshold; and
- Whether an independent AGNA backstop should be used to require registration regardless of counterparty or transaction count and, if so, whether a backstop of $20 billion would be appropriate.

In addition to soliciting comments related to dealing counterparty count and dealing transaction count thresholds, the Proposal notes that the CFTC considered, but rejected, possible alternatives to AGNA, including, among others, "entity-netted notional amounts", even though both Commissioner Quintenz and Chairman Giancarlo have criticized the use of AGNA in the past because it does not effectively increase the riskiness of swaps activity.

Exclusions from the *De Minimis* Calculation

Loan-Related Swaps

As noted above, the "swap dealer" definition currently contains an exception for certain swaps entered into by an IDI in connection with the origination of a loan to a customer (the "Existing Loan Origination Exception"). The Proposal proposes a parallel, but broader, exclusion from the *De Minimis* Threshold. Under this exclusion (the "Proposed Loan Origination Exclusion"):

- A Loan-Related Swap could be entered into at any time during the term of the loan, not just

[9] See Frequently Asked Questions (FAQ) – [DSIO] Responds to FAQs About Swap Entities (Oct. 12, 2012), available at https://www.cftc.gov/idc/groups/public/@newsroom/documents/file/swapentities_faq_final.pdf.

[10] CPMI and Board of IOSCO, Technical Guidance – Harmonisation of critical OTC derivatives data elements (other than UTI and UPI) (Apr. 2018), available at https://www.bis.org/cpmi/publ/d175.pdf.

the first 180 days after the IDI transferred principal to the customer pursuant to the loan;

- A Loan-Related Swap could be entered more than 90 days before the funding of the loan if an executed commitment or forward agreement for the applicable loan exists;
- The IDI's underwriting requirements would not need to require the Loan-Related Swap, as long as the swap was "commercially appropriate";
- The IDI would not be required to fund a specified percentage of a syndicated loan;
- The aggregate notional of all swaps entered into by the customer related to the loan would not be capped by the principal amount outstanding under the loan, but an IDI that funded less than 5% of a syndicated loan would be subject to a notional amount cap equal to the amount it funded; and
- Loan total return swaps and loan credit default swaps could potentially be considered Loan-Related Swaps.

In Appendix A to this Memorandum we have included a blackline showing differences between the Existing Loan Origination Exception and the Proposed Loan Origination Exclusion.

> Although the Proposed Loan Origination Exclusion would cover a broader range of swaps than the Existing Loan Origination Exception, the entities eligible to use that exclusion would still be limited to IDIs. In the SD Adopting Release, the CFTC and SEC responded to concerns raised by commenters regarding the competitive effect of allowing only certain types of entities to rely on the Existing Loan Origination Exception by noting that the statute's "swap dealer" definition itself only refers to swaps entered into by an IDI. As noted above, however, the Proposed Loan Origination Exclusion would be promulgated under the CEA's *de minimis* exception, rather than the loan origination exception to the statute's "swap dealer" definition. As a result, to the extent the CFTC has the authority to promulgate the Proposed Loan Origination Exclusion, it should have the authority to extend the exclusion to non-IDIs.[11]

Notably, the Proposed Loan Origination Exclusion would not generally provide greater clarity regarding what constitutes a loan for purposes of the exclusion. Instead, the Proposal reiterates the view articulated in the SD Adopting Release that "loan" would be defined by reference to its common law meaning. The Proposal also states, however, that the CFTC would consider any "loan" within the meaning of the Volcker Rule to be a "loan" for purposes of the Proposed Loan Origination Exclusion.[12]

Hedging Swaps

As noted above, the SD Adopting Release provided that certain swaps entered into to hedge physical positions ("Physical Hedges") would not be considered in determining whether a person is a swap dealer. Although there is no corresponding exception for swaps entered into to hedge other risks, the CFTC stated that swaps entered into for the purpose of hedging should not generally constitute swap dealing activity, depending on the other facts and circumstances.

Nonetheless, the Proposal notes that there may be uncertainty as to what requirements a Hedging Swap that is not a Physical Hedge must meet in order to fall outside the swap dealing definition. The Proposal accordingly proposes an exclusion for Hedging Swaps that parallels the exclusion for Physical Hedges. Like that exception, the proposed exclusion would be a safe harbor; swaps that do not fall within it may still not be considered swap dealing activity, but the analysis would be fact- and circumstance-dependent.

The proposed exception for Hedging Swaps would apply to any swap entered into "for the primary

[11] See also 88 Fed. Reg. at 30621 ("Regarding some commenters' statements about the competitive effect of this interpretation of the term 'insured depository institution,' we believe that the scope of application of the swap dealer definition to various entities should be treated in the *de minimis* exception, which is available to all persons").

[12] See, e.g., 17 C.F.R. § 75.2 (s) ("*Loan* means any loan, lease, extension of credit, or secured or unsecured receivable that is not a security or derivative.").

purpose of reducing or otherwise mitigating one or more specific risks" faced by the person. Like the exception for Physical Hedges, the Hedging Swap would need to be economically appropriate to the reduction of risks in the conduct of the relevant person's business and entered into in accordance with sound business practices. Additionally, the swap could not be entered into in connection with activity structured to evade swap dealer designation.

However, unlike the Physical Hedges exception, the exclusion for Hedging Transactions would only apply if the person is not "the price maker and does not receive or earn a bid/ask spread, fee, commission, or other compensation from entering into the swap." The Proposal explains that this requirement is necessary to ensure that the exclusion does not improperly exclude swap dealing activity.

It is unclear how the requirement that a person not be a price maker or receive commissions or fees in connection with a Hedging Swap would apply in the context of swaps traded on a trading platform. Market participants may engage in hedging strategies that involve submitting limit orders, which could be viewed as price-making activity, but are done in order to reduce the execution costs of hedging activity. Additionally, firms may receive volume rebates or other fees from a platform or clearing organization or clearing member that would apply regardless of whether the relevant swaps are connected with dealing activity or part of a market maker program. It is unclear whether those fees/rebates would prevent such swaps from qualifying as a Hedging Swaps. Also, the reference to "other compensation" does not address what the CFTC would consider to be "compensation" in connection with a swap, particularly since the profitability of a swap varies over its term and is not appropriately viewed in isolation from related activity that it hedges.

Although an exclusion for swaps entered into "for the primary purpose of reducing or otherwise mitigating one or more risks" would be broad, the Proposal fails to clarify whether swaps that hedge swaps entered into as part of swap dealing activity would be within the scope of the exclusion. Instead, it simply reiterates the language from the SD Adopting Release that such swaps would not need to be counted in the *de minimis* calculation "if they meet the requirements of the proposed exception".

Multilateral Portfolio Compression Exercises

The Proposal also proposes to codify DSIO no-action relief from 2012 (the "DSIO No-Action Relief").[13] That relief allows persons to exclude from the *de minimis* calculation the termination of swaps or swaps entered into as replacement swaps as part of a multilateral portfolio compression exercise. Multilateral portfolio compression is a mechanism employed by market participants to reduce the risk of their swaps portfolio.

Like the DSIO No-Action Relief, the *De Minimis* Exception would define "multilateral portfolio compression exercises" by reference to CFTC Regulation 23.500(h), which defines the term as "an exercise in which multiple swap counterparties wholly terminate or change the notional value of some or all of the swaps submitted by the counterparties for inclusion in the portfolio compression exercise and, depending on the methodology employed, replace the terminated swaps with other swaps whose combined notional value (or some other measure of risk) is less than the combined notional value (or some other measure of risk) of the terminated swaps in the compression exercise."

This definition may not capture the full range of risk-reducing compression exercises, such as those conducted bilaterally or that involve entering into new transactions (without terminating or amending existing ones) to reduce a portfolio's risk sensitivity.

[13] CFTC Letter 12-62 (Dec. 21, 2012).

Exchange-Traded and/or Cleared Swaps

In addition to proposing exclusions from the *de minimis* calculation for Loan-Related Swaps, Hedging Swaps and swaps resulting from multilateral compression exercises, the Proposal requests comment on whether swaps executed on an exchange and/or cleared by a derivatives clearing organization ("DCO") should be excluded from the *de minimis* calculation. It notes that such swaps do not present the same systemic risk and customer protection concerns as over-the-counter or uncleared swaps and that such an exclusion could encourage more exchange-trading and clearing.

The Proposal requests comments on various aspects of such an exclusion, including:

- Whether to include an AGNA backstop;
- Whether instead to haircut notional amounts of exchange-traded and/or cleared swaps;
- Whether an exclusion for exchange-traded swaps should be limited to anonymously executed transactions; and
- Whether an exclusion for cleared swaps should apply to swaps intended to be cleared.

The Proposal does not indicate whether any potential exclusion for exchange-traded and/or cleared transactions would include transactions executed on non-U.S. trading venues or cleared at non-U.S. clearinghouses, in each case not registered with the CFTC. The discussion of the exclusion, however, appears to contemplate that only swaps traded on CFTC-registered facilities or cleared at CFTC-registered DCOs would be excluded. This limitation would be consistent with current exceptions from the *de minimis* threshold calculations under the CFTC's cross-border guidance as well as certain business conduct requirements for certain swaps executed on CFTC-registered trading facilities, but does not have a significant policy justification in cases where the trading venue or clearinghouse does not itself trigger registration.[14]

Non-Deliverable Forwards

The Proposal seeks comment on whether non-deliverable foreign exchange forwards should be excluded from the *de minimis* calculation. By way of background, Section 1a(47) of the CEA provides that deliverable foreign exchange swaps and foreign exchange forwards are "swaps" unless the Secretary of the Treasury makes a written determination that such transactions should not be regulated as swaps. In November 2012, the Treasury Secretary made such a determination (the "Treasury Determination") and exempted deliverable foreign exchange swaps and forward exchange forwards from the definition of "swap." Such exemption, however, does not apply to, among other transactions, NDFs.

The Proposal notes that NDFs are economically very similar to deliverable foreign exchange forwards and that market participants have in some cases altered documentation and settlement practices in the foreign exchange market simply to come within the scope of the Treasury Determination.[15] Given the economic equivalencies between NDFs and deliverable foreign exchange forwards, and that deliverable foreign exchange forwards are excluded from the *de minimis* calculation, the Proposal requests comment on whether NDFs should also be excluded from the *de minims* calculation.

Legacy Portfolios

A modification to the *De Minimis* Exception, especially a modification that involves the use of a dealing counterparty count or dealing transaction count threshold or an exclusion for exchange-traded or cleared swaps, may cause some firms to restructure their swap dealing activities. Following any such

[14] See Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 45292, 45325; CFTC Letter 13-70 (Nov. 15, 2013).

[15] Specifically, the CFTC noted that "[i]n some cases, market participants that previously had settled deliverable foreign exchange forwards on a net basis (whether to minimize counterparty risk or for other reasons) now take steps so as to ensure they are able to avail themselves of the exemption from swap status afforded by the Treasury Determination, including settlement of foreign exchange forwards on a gross basis."

restructuring, firms may have one or more affiliates that have discontinued swap dealing activity but continue to maintain and hedge outstanding swap positions.

The Proposal, however, does not clarify that transactions entered into by such an entity for the purpose of maintaining, hedging or unwinding its legacy swap portfolio, e.g., partial or full novations out, would not count for purposes of the *de minimis* calculation.

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Appendix A

(~~5~~C) *Insured depository institution swaps in connection with originating loans to customers.* ~~Swaps entered into by~~Solely for purposes of determining whether an insured depository institution has exceeded the aggregate gross notional amount threshold set forth in paragraph (4)(i)(A) of this definition, an insured depository institution may exclude swaps entered into by the insured depository institution with a customer in connection with originating a loan ~~with~~to that customer ~~shall not be considered in determining whether the insured depository institution is a swap dealer~~, subject to the requirements of paragraphs (4)(i)(C)(*1*) through (4)(i)(C)(*6*) of this definition.

~~(i) An insured depository institution shall be considered to have entered into a swap with a customer in connection with originating a loan, as defined in paragraphs (5)(ii) and (iii) of this definition, with that customer only if:~~

(~~A~~*1) Timing of execution of swap.* The insured depository institution enters into the swap with the customer no earlier than 90 days before ~~and no later than 180 days after the date of~~ execution of the applicable loan agreement, or no earlier than 90 days before ~~and no later than 180 days after any~~ transfer of principal to the customer by the insured depository institution pursuant to the loan, unless an executed commitment or forward agreement for the applicable loan exists, in which event the 90 day restriction does not apply;

(~~B)(*1*~~*2) Relationship of swap to loan.* (*i*) The rate, asset, liability or other ~~notional i~~term underlying such swap is, or is ~~directly~~ related to, a financial term of such loan, which includes, without limitation, the loan's duration, rate of interest, the currency or currencies in which it is made and its principal amount; or

(~~*2*~~*ii*) Such swap is required~~,~~ as a condition of the loan, either under the insured depository institution's loan underwriting criteria~~, to be in place~~ or as is commercially appropriate, in order to hedge ~~price~~ risks incidental to the borrower's business ~~and arising from potential changes in the price of a commodity~~ (other than for risks associated with an excluded commodity) that may affect the borrower's ability to repay the loan;

(~~C)~~*3) Duration of swap.* The duration of the swap does not extend beyond termination of the loan;

~~(D) The insured depository institution is:~~

~~(*1*) The sole source of funds to the customer under the loan;~~

(~~*2*~~*4*) *Level of funding of loan. (i)* The insured depository institution is ~~C~~committed to be, under the terms of the agreements related to the loan, the source of at least ~~10~~5 percent of the maximum principal amount under the loan; or

(~~*3*~~*ii*) If the insured depository institution is ~~C~~committed to be, under the terms of the agreements related to the loan, the source of ~~a~~less than 5 percent of the maximum principal amount ~~that is greater~~under the loan, th~~a~~en ~~or equal to~~ the aggregate notional amount of all swaps entered ~~into~~ by the insured depository institution with the customer in connection with the financial terms of the loan cannot exceed the principal amount of the insured depository institution's loan;

~~(E) The aggregate notional amount of all swaps entered into by the customer in connection with the financial terms of the loan is, at any time, not more than the aggregate principal amount outstanding under the loan at that time; and~~

~~(F) If the swap is not accepted for clearing by a derivatives clearing organization, the insured depository institution reports the swap as required by section 4r of the Act, 7 U.S.C. 6r (except as otherwise provided in section 4r(a)(3)(A), 7 U.S.C. 6r(a)(3)(A), or section 4r(a)(3)(B), 7 U.S.C. 6r(a)(3)(B) of the Act).~~

(~~ii~~<u>*5*</u>) ~~An insured depository institution shall be~~<u>The swap is</u> considered to have <u>been entered into in connection with</u> originat~~ed~~<u>ing</u> a loan with a customer if the insured depository institution:

(~~A~~<u>*i*</u>) Directly transfers the loan amount to the customer;

(~~B~~<u>*ii*</u>) Is a part of a syndicate of lenders that is the source of the loan amount that is transferred to the customer;

(~~C~~<u>*iii*</u>) Purchases or receives a participation in the loan; or

~~(D) Otherwise is the source of funds that are transferred to the customer pursuant to the loan or any refinancing of the loan.~~

<u>(*iv*) Under the terms of the agreements related to the loan, is, or is intended to be, the source of funds for the loan;</u>

(~~iii~~<u>*6*</u>) The ~~term~~ loan <u>to which the swap relates</u> shall not include:

(~~A~~<u>*i*</u>) Any transaction that is a sham, whether or not intended to qualify for the ~~exclusion from the definition of the term *swap dealer* in this rule~~<u>exception from the de minimis threshold in this definition</u>; or

(~~B~~<u>*ii*</u>) Any synthetic loan~~, including, without limitation, a loan credit default swap or loan total return swap~~.