Proposed Rules

Federal Register
Vol. 83, No. 231
Friday, November 30, 2018

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

COMMODITY FUTURES TRADING COMMISSION

17 CFR Chapter I

RIN Number 3038–AE79

Post-Trade Name Give-Up on Swap Execution Facilities

AGENCY: Commodity Futures Trading Commission.

ACTION: Request for comment.

SUMMARY: The Commodity Futures Trading Commission (Commission or CFTC) is requesting public comment regarding the practice of ''post-trade name give-up'' on swap execution facilities.

DATES: Comments must be received on or before January 29, 2019.

ADDRESSES: You may submit comments, identified by ''Post-Trade Name Give-Up on Swap Execution Facilities'' and RIN number 3038–AE79, by any of the following methods:

- *The agency's website: http://comments.cftc.gov.* Follow the instructions for submitting comments.
- *Mail:* Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Center, 1155 21st Street NW, Washington, DC 20581.
- *Hand Delivery/Courier:* Same as Mail, above.

All comments must be submitted in English or, if not, accompanied by an English translation. Comments will be posted as received to *http://www.cftc.gov.* You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act,[1] a petition for confidential treatment of the exempt information may be submitted according to the procedures established in Commission Regulation 145.9.[2]

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from *http://www.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of this request for comment will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT: Aleko Stamoulis, Special Counsel, (202) 418–5714, *astamoulis@cftc.gov*; or Nhan Nguyen, Special Counsel, (202) 418–5932, *nnguyen@cftc.gov,* Division of Market Oversight, Commodity Futures Trading Commission, 1155 21st Street NW, Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Background

Historically, swaps traded in over-the-counter (''OTC'') markets rather than on regulated exchanges. Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'')[3] amended the Commodity Exchange Act (''CEA'' or ''Act'')[4] to establish a new regulatory framework for swaps. This new framework included, among other reforms, the registration and regulation of swap execution facilities (''SEFs'')[5] and the mandatory clearing of certain swaps by derivatives clearing organizations (''DCOs'').[6] SEFs and DCOs have since become a significant part of swaps trading infrastructure and have helped to transition a large portion of swaps trading from unregulated, uncleared OTC markets to regulated trading venues and central clearing.

Many swaps are traded on SEFs through trading methods and protocols that are electronic, voice-based, or a hybrid of both; and that provide for anonymous trade execution, trade execution on a name-disclosed basis, or a combination thereof. This variety of trading methods and protocols has developed because of the broad and diverse range of products traded in the swaps market that trade mostly episodically rather than on a continuous basis. The decision by a market participant to use one execution method or another depends on considerations such as the type of swap, transaction size, complexity, the swap's liquidity at a given time, the number of potential liquidity providers, and the associated desire to minimize potential information leakage and front-running risks.

''Post-trade name give-up'' is a long-standing market practice in many swaps markets and originated as a necessary practice in OTC markets for uncleared swaps. Post-trade name give-up refers to the practice of disclosing the identity of each swap counterparty to the other after a trade has been matched anonymously. In the case of uncleared swaps, post-trade name give-up enables a market participant to perform a credit-check on its counterparty prior to finalizing a trade. Due to the bilateral counterparty relationship that exists in an uncleared swap agreement, post-trade name give-up is also necessary in order to keep track of credit exposure and payment obligations with respect to individual counterparties.

For trades that are cleared, however, the rationale for post-trade name give-up is less clear cut. That is because a DCO enables each party to substitute the credit of the DCO for the credit of the parties, thereby eliminating individual credit risk and counterparty exposure. Swaps that are intended to be cleared are subject to pre-execution credit checks and straight-through processing requirements, effectively eliminating counterparty risk and, presumably, the need for market participants to know the identities of counterparties to anonymously matched trades.

Post-trade name give-up continues today in some swaps markets, including with respect to swaps that are anonymously executed and cleared.

[1] 5 U.S.C. 552.

[2] 17 CFR 145.9. Commission regulations referred to herein are found at 17 CFR chapter I.

[3] Public Law 111–203, 124 Stat. 1376 (2010).

[4] 7 U.S.C. 1 *et seq.*

[5] *See* CEA section 5h, as enacted by section 733 of the Dodd-Frank Act; 7 U.S.C. 7b–3. *See also* Core Principles and Other Requirements for SEFs, 78 FR 33476 (June 4, 2013).

[6] *See* Section 2(h)(1)(A) of the CEA, as enacted by section 723 of the Dodd-Frank Act; 7 U.S.C. 2(h)(1)(A). In 2012, the Commission issued final rules to implement the clearing requirement determination under section 723 of the Dodd-Frank Act. The final rules required certain classes of credit default swaps and interest rate swaps to be cleared by DCOs registered with the Commission. Clearing Requirement Determination Under Section 2(h) of the CEA, 77 FR 74284 (Dec. 13, 2012).

Such disclosure may be made by a SEF as part of its trading protocols, or through middleware used for trade processing and routing trades to DCOs. For example, when a swap is matched using a voice-based execution method, a SEF employee may verbally disclose to a party the name of the other party to the trade. For swaps executed electronically on an anonymous order book, disclosure of counterparty names can occur through an electronic notification provided by the SEF after the trade is matched. Post-trade name give-up can also occur through third-party middleware and associated trade processing and affirmation services that provide counterparties with various trade details captured from SEF trading systems, including the identity of the party on the other side of a trade.[7]

As the swaps market increasingly becomes a cleared market, the Commission believes that it is reasonable to ask whether the post-trade name give-up practice continues to serve a valid industry purpose in facilitating swaps trading. A variety of views exist on both sides of this issue, depending on one's position in the market. Some industry participants have criticized the continued practice of post-trade name give-up in cleared swaps markets. During a meeting of the Commission's Market Risk Advisory Committee held in April 2015, several participants in a panel on SEFs identified post-trade name give-up as a concern with respect to SEF trading.[8] Post-trade name give-up is said to deter buy-side participation on some SEFs due to the prospect of information leakage, whereby disclosing the identity of a market participant could potentially expose the participant's trading intentions, strategies, positions, or other sensitive information to competitors or dealers.[9] Some industry participants have also alleged that post-trade name give-up serves as a policing mechanism used by swaps dealers to retaliate against non-dealer firms that attempt to trade on interdealer markets.[10] Such interdealer markets provide for competitive execution of large-sized trades at wholesale prices. Buy-side participants that have interest in trading on interdealer markets and otherwise meet participation criteria to join these platforms are said to be deterred because of post-trade name give-up.[11] Based on these concerns, critics of post-trade name give-up have argued that the practice is anticompetitive, hinders liquidity, and lacks credible justification in cleared swaps markets where participants are not exposed to counterparty credit risk.[12]

Other industry participants have claimed that post-trade name give-up is an important tool used to mitigate liquidity risk or the risk that traders will game the market.[13] Some participants argue that as bank market-making capital becomes further constrained by regulations,[14] liquidity providers need to more precisely allocate their bank capital among their customer base in coordination with their overall bank cross-marketing strategies. Without the information provided by post-trade name give-up, the ability to make such allocations would become more difficult. As a result, liquidity providers would be less willing to provide liquidity to the market, especially in times of crisis, and charge higher prices to customers.[15] This outcome arguably would hurt all market participants.

Another reported concern is that buy-side clients may undercut prices from dealers, for example, by posting aggressive bids or offers on an interdealer order book and then soliciting dealers through a request-for-quote (''RFQ'') on a dealer-to-client platform, hoping to motivate dealers to provide more favorable quotes based on prices posted in the order book.[16] Post-trade name give-up is said to mitigate these concerns because it can help to identify a client that is attempting to game the market.

II. Request for Comment

The Commission requests comment from the public relating to the practice of post-trade name give-up on SEF markets where trades are anonymously executed and intended to be cleared. The Commission encourages all comments, including relevant background information, actual market examples, best practice principles, expectations for possible impacts on market structure and market liquidity, and estimates of any asserted costs and expenses. The Commission also encourages substantiating data, statistics, and any other information that supports any such comments. In particular, the Commission requests comment on the following questions:

Question 1: What utility or benefits (*e.g.,* commercial, operational, legal, or other) does post-trade name give-up provide in SEF markets where trades are anonymously executed and cleared? Is post-trade name give-up a necessary or appropriate means to achieve such benefits?

Question 2: Does post-trade name give-up result in any restraint of trade, or impose any anticompetitive burden on swaps trading or clearing?

Question 3: Should the Commission intervene to prohibit or otherwise set limitations with respect to post-trade name give-up? If so, what regulatory limitations should be set and how should they be set in a manner that is consistent with the CEA? What would be the potential costs and/or benefits of doing so? What might be the potential impacts on liquidity, pricing, and trading behavior? Would a prohibition cause dealers to remove liquidity from the market or charge higher prices? Would new liquidity makers fully and consistently act in the market to make up any shortfall in liquidity?

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[7] Trade affirmation refers to a process that occurs after a trade is executed whereby counterparties verify and affirm the details of the trade before submitting it for settlement. Third-party trade processing and affirmation services commonly used for SEF trades include MarkitWire and ICE Link. The Commission has provided that SEFs may use such services to route trades to DCOs if the routing complies with § 37.702(b). *See* Core Principles and Other Requirements for SEFs, 78 FR 33476, 33535 (June 4, 2013).

[8] *See* Transcript of CFTC Market Risk Advisory Committee Meeting (April 2, 2015) (''MRAC Transcript'') at 133 *et seq., available at https://www.cftc.gov/About/CFTCCommittees/MarketRiskAdvisoryCommittee/mrac_meetings.html.*

[9] *See* MRAC Transcript at 142–144, 164. *See also* Managed Funds Association Position Paper: Why Eliminating Post-Trade Name Disclosure Will Improve the Swaps Market (Mar. 31, 2015) (''MFA Position Paper''), p. 4–5. The Commission notes that other factors, such as the current lack of certain trading features, *e.g.,* the ability to calculate volume-weighted average pricing on an order book may have also deterred buy-side participation on certain SEFs.

[10] *See* In re: Interest Rate Swaps Antitrust Litigation, 261 F.Supp.3d 430, 458–59 (S.D.N.Y. 2017) (''The compulsory disclosure of swap counterparties, plaintiffs claim, serves as a policing mechanism, allowing the Dealers to retaliate against entities that attempt to trade on all-to-all platforms.'').

[11] The argument is that swap dealers threaten to shun platforms in the interdealer markets that attempt to execute trades between dealers and non-dealers.

[12] *See* MRAC Transcript at 169–71; MFA Position Paper at 4–5, 8.

[13] *See, e.g.,* Tom Osborn, *How to game a Sef: Banks fear arrival of arbitrageurs,* Risk.net (Mar. 19, 2014).

[14] Such post-financial crisis regulatory reforms include the Volcker Rule, Basel III Accords, capital charges and other bank capital-based restrictions. *See* Anthony J. Perrotta, Jr., *An E-Trading UST Market 'Flash Crash'? Not So Fast,* TABB Group, Nov. 24, 2014, *http://tabbforum.com/opinions/an-e-trading-treasury-market-'flash-crash'-not-so-fast* (discussing regulatory capital constraints and declining market liquidity).

[15] Peter Madigan, *CFTC to Test Role of Anonymity in Sef Order Book Flop, Risk.net*, Nov. 21, 2014, *available at http://www.risk.net/risk-magazine/feature/2382497/cftc-to-test-role-of-anonymity-in-sef-order-book-flop.* Short of exiting the market entirely, some swaps dealers might become more selective in providing liquidity (holding back in times of market stress and volatility, for example) out of concern that they may not be able to adequately hedge their risk in interdealer markets.

[16] *See id.*

Question 4: Should post-trade name give-up be subject to customer choice or SEF choice given the flexible execution methods in the Commission's recent SEF notice of proposed rulemaking?

Issued in Washington, DC, on November 6, 2018, by the Commission.

Christopher Kirkpatrick,

Secretary of the Commission.

Note: The following appendix will not appear in the Code of Federal Regulations.

Appendix to Post-Trade Name Give-Up on Swap Execution Facilities—Commission Voting Summary

On this matter, Chairman Giancarlo and Commissioners Quintenz, Behnam, Stump, and Berkovitz voted in the affirmative. No Commissioner voted in the negative.

[FR Doc. 2018–24643 Filed 11–29–18; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 36

Loan Guaranty: Revisions to VA-Guaranteed or Insured Cash-Out Home Loans

AGENCY: Department of Veterans Affairs.

ACTION: Advanced notice of rulemaking.

SUMMARY: The Department of Veterans Affairs (VA) is issuing this document in compliance with the Economic Growth, Regulatory Relief, and Consumer Protection Act (the Act). The Act requires VA to amend its regulation on VA-guaranteed or insured cash-out refinance loans and to publish the amended regulation within a shortened time frame. If VA determines that urgent or compelling circumstances make compliance with the advance public notice and comment requirements of the Administrative Procedure Act impracticable or contrary to public interest and publishes notice of that determination in the **Federal Register**, the Act permits VA to amend the regulation through an interim final rule or final rule. VA has determined that urgent and compelling circumstances do exist and is, therefore, issuing this **Federal Register** document announcing VA's intent to promulgate an interim final rule implementing the Act.

DATES: November 30, 2018.

ADDRESSES: Loan Policy & Valuation, Loan Guaranty Service (26), Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420.

FOR FURTHER INFORMATION CONTACT: Greg Nelms, Assistant Director for Loan Policy & Valuation, Loan Guaranty Service (26), Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 632–8862. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On May 24, 2018, the President signed into law the Economic Growth, Regulatory Relief, and Consumer Protection Act (the Act), Public Law 115–174, 132 Stat. 1296. Section 309 of the Act, codified at 38 U.S.C. 3709, provides new statutory criteria for determining when, in general, VA may guarantee a refinance loan. The Act also requires, among other things, VA to promulgate regulations, within 180 days after the date of the enactment of the Act, for cash-out refinance loans, specifically those where the principal of the new loan to be VA-guaranteed or insured is larger than the payoff amount of the loan being refinanced. Public Law 115–174, 132 Stat. 1296.

Section 309(a)(2) of the Act permits VA to waive the requirements of the Administrative Procedure Act (APA), 5 U.S.C. 551 through 559, if the Secretary determines that urgent or compelling circumstances make compliance with such requirements impracticable or contrary to public interest. Public Law 115–174, 132 Stat. 1348–1349.

VA believes there are several urgent and compelling circumstances that make advance notice and comment on this rule contrary to the public interest. First, VA is concerned about lenders who seem to continue to exploit legislative and regulatory gaps related to seasoning, recoupment, and net tangible benefit standards, despite anti-predatory lending actions that VA and Congress have already taken. VA's regulatory impact analysis for this rule indicates that perhaps more than 50 percent of cash-out refinances remain vulnerable to predatory terms and conditions until this rule goes into effect. VA believes that VA must immediately seal these gaps to fulfill its obligation to veterans, prudent lenders, and those who invest in securities that include VA-guaranteed loans.

VA is also gravely concerned about constraints in the availability of program liquidity if VA does not act quickly to address early pre-payment speeds for VA-guaranteed cash-out refinance loans. In large part, cashflows derived from investors in mortgage-backed securities (MBS) furnished by the Government National Mortgage Association (Ginnie Mae) provide liquidity for lenders that originate VA-guaranteed refinance loans. When pricing MBS, investors rely on pre-payment models to estimate the level of pre-payments and any resultant potential losses of revenue expected to occur in a set period, given possible changes in interest rates. These pre-payment models tend to drive, at least in significant part, the valuation of Ginnie Mae MBS. Ginnie Mae, buyers of VA-guaranteed loans, and other industry stakeholders have expressed serious concerns that early pre-payments of VA-guaranteed loans are devaluing these investments. See ''Slowing Down VA Refi Churn Proving More Difficult Than Expected'', National Mortgage News (November 12, 2018), *https://www.nationalmortgagenews.com/news/slowing-down-va-refi-churn-proving-more-difficult-than-expected.* If such stakeholders view MBS investments that include VA-guaranteed refinance loans as less desirable, even prudent lenders could be deprived of the cashflows, *i.e.* liquidity, necessary to make new VA-guaranteed loans to veterans.

In a hearing before the House Veterans' Affairs Committee's Subcommittee on Economic Opportunity, the Government National Mortgage Association (Ginnie Mae) issued warnings to Congress regarding the ripple effects that risky refinancing practices had on the valuing of VA-guaranteed loans, as well as Ginnie Mae pools at-large. See *Hearing on Home Loan Churning Practices and How Veteran Homebuyers are Being Affected Before the Subcomm. on Econ. Opportunity of the House Comm. on Veterans' Affairs,* 115 Cong. (2018). Thus, VA believes that, unless VA promulgates rules quickly, a loss of investor optimism in the VA product could further restrict veterans from being able to utilize their earned VA benefits.

Exacerbating the issue is the lending industry's varied interpretation of the Act, which has led to lender uncertainty in how to implement a responsible cash-out refinance program. VA believes this uncertainty has caused prudent lenders to employ a high degree of caution, (*e.g.* refraining from providing veterans with crucial refinance loans that are not predatory or risky). Absent swift implementation of clear regulatory standards, cautious lenders are less likely to make cash-out refinance loans, which means that veterans do not enjoy the widest range of competitive, responsible credit options that can, when used properly, result in placing the veteran in a better financial position than the veteran's current circumstances afford. Unfortunately, such caution has the potential to compound the risk of predatory lending, as irresponsible