

## CFTC Variation Margin Rule No Action Relief

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### **CFTC Issues No-Action Relief to September 1, 2017 for Variation Margin Rule for Uncleared Swaps, But for Swap Dealers under Prudential Regulators' VM Rule the March 1, 2017 Deadline Remains**

On February 13, 2017, the Staff of the U.S. Commodity Futures Trading Commission (“CFTC”) issued time-limited no-action relief ([Letter No. 17-11](#)) for swap dealers subject to the CFTC’s final margin rule for uncleared swaps, which requires compliance with the CFTC’s variation margin requirements (“VM Requirements”) for trades with certain counterparties by March 1, 2017.

The CFTC’s final rule on Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants ([81 Fed. Reg. 636, January 6, 2016](#)) requires such swap dealers to post and/or collect variation margin on certain uncleared swaps entered into on and after March 1, 2017. Such swap dealers are required to have amended or entered into new credit support annexes (“CSAs”) and other margining documents with their affected counterparties by the March 1, 2017 compliance deadline, in order to be able to begin posting and/or collecting variation margin on certain uncleared swaps in compliance with the CFTC’s VM Requirements by the March 1, 2017 deadline. By most accounts (including comments by CFTC Acting Chairman Giancarlo), despite diligent efforts, with the deadline approaching such swap dealers have been able to enter into or amend the necessary CSAs and other margining documentation with less than 10 percent of their affected counterparties.

As such, affected swap dealers and their buy-side counterparties and other end users face the prospect of being unable to enter into new swap transactions on and after March 1, 2017; trading on or after this date without the necessary agreements in place would mean trading in violation of the VM Requirements. The CFTC Staff’s no-action relief (Letter No. 17-11) will certainly be a relief to swap dealers that are subject to the CFTC’s VM Requirements along with their buy-side and end user counterparties rushing to put in place or amend necessary CSAs and other margining documentation before the deadline.

Market participants, however, should keep in mind that the scope of the relief granted will only apply to a limited number of swap dealers. Many swap dealers are subject to the VM Requirements of the Prudential Regulators, which presently have not been extended beyond the March 1, 2017 deadline.

The Prudential Regulators (which includes the Office of the Comptroller of the Currency, the Federal Reserve System, the Federal Deposit Insurance Corporation, the Farm Credit Administration, and the Federal Housing Finance Agency) issued their final rule on Margin and Capital Requirements for Covered Swap Entities ([80 Fed. Reg. 74840, November 30, 2015](#)), which includes comparable VM Requirements that must be implemented for trades with affected counterparties by March 1, 2017. The Prudential Regulators have not granted an extension or other relief comparable to the relief granted by CFTC Staff’s Letter No. 17-11. Accordingly, swap dealers subject to the Prudential Regulators’ VM Requirements continue to face the same March 1, 2017 deadline for swap dealers and major swap participants to begin posting and/or collecting variation margin, which includes amending or entering into new CSAs and other margining documentation.

So, until and unless the Prudential Regulators elect to issue some form of relief comparable to the CFTC Staff's no-action relief under Letter No. 17-11, swap dealers subject to the Prudential Regulators VM Requirements will remain obligated to amend or enter into new CSAs and other margining documentation with their affected counterparties to uncleared swaps to comply with the Prudential Regulators' VM Requirements by March 1, 2017.

In addition, relief under CFTC Staff's Letter 17-11 is also limited in scope: The March 1, 2017 compliance date itself is not postponed, and instead (as with other letters from the CFTC Staff granting time-limited no-action relief) the letter simply provides that, subject to certain conditions, until September 1, 2017, the CFTC will not recommend an enforcement action against a swap dealer who fails to post and/or collect variation margin on uncleared swaps with relevant counterparties subject to the March 1, 2017 compliance date. In order to qualify for such time-limited relief, a swap dealer's failure to comply must be solely due to an inability to complete necessary credit support documentation, or a good-faith need for more time to implement necessary operational processes. Further, the swap dealer must use best efforts to comply with respect to each affected counterparty as soon as possible after the March 1, 2017 deadline and the swap dealer must continue to post and/or collect variation margin under existing variation margin arrangements (if any) until new compliant arrangements are put in place. In any event, the time-limited no-action relief expires by September 1, 2017.

It is important also for market participants to appreciate that in the CFTC's final rule (Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants), as well as the Prudential Regulators' final rule, there is an exclusion from both initial and variation margin requirements for swaps in which one of the counterparties (i) qualifies for an exemption from clearing under CEA Section 2(h)(7)(A) (the end-user exception to clearing) or CEA Section 2(h)(7)(D) (affiliate rule exception to clearing), or (ii) qualifies for an exemption from clearing under a rule, regulation or order issued by the CFTC applicable to cooperative entities that would otherwise be subject to CEA Section 2(h)(1)(A). As a result, in many cases, particularly in the energy and other nonfinancial commodities sectors, an end user's swaps may already fall outside the category of counterparties that are subject to the March 1, 2017 deadline VM Requirements. [View Prudential Regulators' discussion of exemption from margin requirements.](#)

Finally, we note that some European banks, as swap dealers, are subject to the variation margin requirements of the European Union under its European Markets Infrastructure Regulation ("EMIR"). Under EMIR, the date for implementation of its variation margin requirements for trades with in-scope counterparties is also March 1, 2017, which has similarly not yet been extended.

As such, given the multiple permutations among swap dealers and counterparties subject to different regulatory regimes, it remains critical for market participants to maintain awareness of what rules will apply and/or what exemptions or exclusions may be available for each trading relationship.

If you have any questions, please contact any of the Commodities Practice Group lawyers focused on CFTC-regulatory matters listed below.

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