Macquarie Energy LLC
500 Dallas St., Level 33 Telephone 1 (713) 275 6200
Houston, TX 77002 Facsimile 1 (713) 275 6115

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<u>*Submitted Electronically*</u>
Mr. Christopher Kirkpatrick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street N.W.
Washington D.C. 20581

Re: Swap dealer *de minimis* exception threshold,
<u>CFTC Regulation 1.3(ggg)</u>

Dear Mr. Kirkpatrick:

Macquarie Energy LLC ("Macquarie Energy") appreciates the opportunity to submit these comments in response to the Swap Dealer *De Minimis* Exception Preliminary Report (the "Report") issued by the staff of the Division of Swap Dealer and Intermediary Oversight ("DSIO") and the Office of the Chief Economist ("OCE") of the U.S. Commodity Futures Trading Commission ("CFTC" or "Commission"). The Report requests comment on a range of potential revisions or modifications to the CFTC's *de minimis* exception to the definition of the term "swap dealer" under the Commodity Exchange Act (the "CEA"), as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank" or the "Dodd-Frank Act"). As discussed in greater detail below, we support the steps that the Commission and DSIO and OCE are taking to reassess the application of the swap dealer definition, in light of the data and regulatory experience gained in the initial Dodd-Frank implementation process, with a view towards tailoring the *de minimis* exception in a way that continues to further the policy goals of

Dodd-Frank and the Commission without unduly burdening markets and market participants through an overly broad swap dealer registration requirement.

Introduction

Macquarie Energy, an indirect subsidiary of Macquarie Bank Limited ("MBL"), is a U.S. gas and power trading company and one of the largest physical gas marketers in North America. Macquarie Energy also provides predominantly North American customers with various energy-related products, including risk management solutions, structured finance, credit intermediation and equity participation in energy projects. Macquarie Energy and MBL are both provisionally registered as swap dealers.

Bases for the De Minimis Exception

The *de minimis* exception was included in the CEA, as part of the amendments to the statute under Dodd-Frank, based on Congress's recognition that swap dealer registration by those entities engaged in a limited dealing business would be unwarranted. Congress therefore not only gave the CFTC the authority to adopt a *de minimis* exception by regulation, but expressly directed it to do so, in light of the strong public policy reasons for an exception that would allow entities engaged in limited swap dealing business to continue to do so without the burdens of registration.

In adopting its regulations requiring registration of swap dealers, and again in the Report, the Commission re-endorsed these public policy considerations as the basis for a *de minimis* exemption. In particular, the Commission noted, among other things, that the *de minimis* exception would promote competition in the market and that it would allow unregistered entities to accommodate their clients' needs for swaps in conjunction with the provision of other financial or commercial services without being subject to the burdens of registration.[1]

Similarly, in the Report, the staff noted that among the policy bases for the *de minimis* exception were: "providing regulatory certainty, allowing limited swap dealing in connection with other client services, encouraging new participants to enter the market and providing greater regulatory efficiency."[2] With respect to non-financial commodity swap dealing in particular, the Report observed that many entities engaged in non-financial commodity businesses enter into swaps with counterparties in connection with other types of commodity market transactions. The Report as well, therefore, highlights the policy rationales for the *de minimis* exception.

We agree with all of these bases for the *de minimis* exception and believe that the market experience with the registration requirement and the *de minimis* exception over the past few

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[1] *See* Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major-Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant" (the "Final Entity Definitions"), 77 Fed. Reg. 30596, at 30629 (May 23, 2012).

[2] Report at 36.

years has demonstrated the utility and appropriateness of the approach adopted by the Commission. In addition, the Commission noted at the time of the adoption of the exception that it would allow the Commission to focus its, and the National Futures Association's ("NFA's"), limited resources more effectively on those entities that are conducting major swap dealing businesses and to which the regulatory scheme should most clearly be applied. This also provided a compelling policy basis for the exception.

The CFTC Should Maintain the Existing De Minimis Standard of $8 Billion

As the Commission and the Securities and Exchange Commission ("SEC") noted in the release adopting the swap dealer definition and the *de minimis* exception based on a gross notional amount threshold, it was "appropriate to allow a degree of latitude in applying the threshold over time in the event that subsequent developments in the markets or the evaluation of new data from swap reporting facilities suggest that the thresholds should be adjusted."[3] The Commission and the SEC concluded that a threshold of $8 billion would be appropriate to accomplish the policy objectives outlined above, avoid the imposition of a burdensome regulatory framework on those engaged in limited dealing businesses and preserve the Commission's and NFA's resources for the more active and significant sectors of the market. Specifically, the CFTC and the SEC stated that: "In light of the available data [as of the adoption of the Final Entity Definitions]—and the limitations of that data in predicting how the full implementation of Title VII [of Dodd Frank] will affect dealing activity in the swap markets—the Commissions believe that the appropriate threshold for the phase-in period is an annual gross notional level of swap dealing activity of $8 billion or less. In particular, the $8 billion level ***should still lead to the regulation of persons responsible for the vast majority of dealing activity within the swap markets***."[4] While the staff's Report has now been prepared with the benefit of a few years of Dodd-Frank data, the Report does not suggest that the $8 billion threshold has been under inclusive.

Responding specifically to certain questions raised in the Report, we do not support permitting the *de minimis* threshold to automatically decrease to $3 billion, which would occur in late 2017 if the CFTC fails to take action. The potential impact of rising commodity prices, coupled with the CFTC permitting the *de minimis* threshold to decrease to $3 billion, could result in a sudden and dramatic contraction in liquidity and hedging opportunities in many markets which already lack liquidity – in particular the markets for swaps and other derivatives on non-financial commodities. These markets tend to incorporate a higher degree of participation from commercial and other non-financial firms, the majority of which are unlikely to consider swap dealer registration as an option for their business model. One should expect that many market

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[3] Final Entity Definitions at 30634.

[4] Final Entity Definitions at 30634 (*emphasis added*). Later in the Final Entity Definitions, the CFTC evaluated data provided by the SEC regarding index credit default swaps ("index CDS"), estimating that while the $8 billion *de minimis* level would require only 11.3% of total index CDS market participants to register as swap dealers, that relatively small group accounted for 97.8% of the total notional amount of index CDS entered into that year. *See* Final Entity Definitions at 30707.

participants will simply leave these markets if the *de minims* threshold is reduced to a level that would impose an ongoing risk of inadvertently triggering a registration requirement.

The Commission expressly acknowledged this fact when it finalized rules excluding swaps with certain utility special entities from the smaller *de minimis* threshold that applies to swaps with certain special entities. "[B]ecause the swaps used by utility special entities are typically conducted in localized and specialized markets and the number of available counterparties may be limited, the $25 million amount of the existing Special Entity De Minimis Threshold may deter those counterparties from engaging in utility operations-related swaps. Given the obligations of utility special entities to provide continuous service to customers, the Commission concluded that [. . .] ***the public interest would be better served if the likely counterparties for utility operations-related swaps are able to provide liquidity to this limited segment of the market without registering as swap dealer***s solely on account of exceeding the Special Entity De Minimis Threshold."[5] On this basis, the Commission excluded transactions with certain types of utility special entities from the threshold for special entities, thereby allowing a number of entities to continue to transact with these and other counterparties. If the Commission permits the general *de minimis* threshold to now decrease to $3 billion, it similarly risks forcing many market participants to reduce or eliminate their swaps-related activity, which will in turn undermine the ability of commercial entities to find counterparties willing to meet their hedging needs.

The *de minimis* exception has allowed a variety of entities to conduct their business activities efficiently and effectively, without the imposition of burdensome and unnecessary regulatory costs and responsibilities. Most commercial entities in particular need to enter into swaps in connection with their businesses in order to provide a complete set of services to their customers. Much of this activity would need to be limited or terminated if these commercial entities were required to register as swap dealers, which would operate to the detriment of their commercial customers and market liquidity. The availability of the *de minimis* exception has therefore facilitated the operation of many commercial businesses and the functioning and growth of the physical commodity markets generally.

Conclusion

We therefore believe that setting the *de minimis* threshold at $8 billion was appropriate and warranted, and has been highly effective in accomplishing the Commission's objectives. We also note that the registration requirement resulted in the registration of a substantial number of entities, including what we believe include all major dealers. Indeed, there is no evidence or indication in the report that the $8 billion threshold has allowed entities engaged in major swap dealing businesses to avoid registration and the threshold, therefore, appears to have performed in the manner intended and expected by the Commission. We are similarly not aware of any problems having been reported with respect to abuses by unregistered entities relying on the *de minimis* exception. We also note that the Commission retains anti-fraud jurisdiction over

5 *See* Exclusion of Utility Operations-Related Swaps With Utility Special Entities From De Minimis Threshold for Swaps With Special Entities, 79 Fed. Reg. 57767, at 57769 (Sept. 26, 2014) (*emphasis added*).

unregistered entities and such entities remain subject to certain of the CFTC's regulatory requirements, including reporting. The *de minimis* exception, therefore, has been highly effective in requiring registration of those entities regularly engaged in swap dealing businesses while allowing those with more limited swap-related activities to continue to operate without the burden and expense of registration and without giving rise to market problems.[6] Therefore, we believe the *de minimis* threshold should be retained at $8 billion.

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Macquarie Energy appreciates the opportunity to submit these comments in response to the Report. Please do not hesitate to contact me at 713-275-6338 or via email at David.Louw@macquarie.com with any questions or if we can be of assistance to the Commission with respect to these issues.

Sincerely,

David Louw
Chief Compliance Officer
Macquarie Energy LLC

Cc: Chairman Timothy G. Massad
Commissioner Sharon Y. Bowen
Commissioner J. Christopher Giancarlo

CFTC Division of Swap Dealer and Intermediary Oversight
Eileen Flaherty, Director (eflaherty@cftc.gov)
Erik Remmler, Deputy Director (eremmler@cftc.gov)
Lauren Bennett, Special Counsel (lbennett@cftc.gov)
Margo Dey, Special Counsel (mdey@cftc.gov)
Rajal Patel, Special Counsel (rpatel@cftc.gov)

CFTC Office of the Chief Economist
Sayee Srinivasan, Chief Economist (ssrinivasan@cftc.gov)
Esen Onur, Economist (eonur@cftc.gov)