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Via Electronic Submission

To: Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Attn: Mr. Christopher J. Kirkpatrick
Secretary of the Commission

Re: Swap Dealer *De Minimis* Exception Preliminary Report

Dear Mr. Kirkpatrick:

I. Introduction

EDF Trading North America, LLC ("EDFTNA") submits these comments in response to the Swap Dealer *De Minimis* Exception Preliminary Report published by the Commodity Futures Trading Commission (the "CFTC" or the "Commission") on the November 18, 2015.

EDFTNA is a wholly-owned indirect subsidiary of Eléctricité de France, S.A., a global leader in energy production and supply with over 140.4 Gigawatts of generation capacity and approximately 39 million customers world-wide. In addition to being the fifth largest marketer of natural gas in North America, EDFTNA is also a leading provider of energy management and a provider of retail power and gas services to large-scale commercial and industrial customers through its affiliated companies.

In general, EDFTNA appreciates the Commission's efforts to clarify, further define, and establish a purposeful regulatory regime by seeking public comment on this preliminary report concerning the de minimis exception to the swap dealer definition in Regulation 1.3(ggg)(4) ("Preliminary Report"). The Preliminary Report highlights perceived complexities associated with establishing a general *de minims* exception to swap dealing based solely on a measure of Gross Notional Value (GNV) and suggests it may be necessary to look at additional metrics to assess the extent of a firm's swap dealing activity and the need or otherwise for registration as a Swap Dealer. One reason put forward by the CFTC for looking at additional metrics is that it believes there is not accurate data available on GNV levels incurred by market participants as it is not a defined data field for swap reporting to a respective Swap Data Repository (SDR). EDFTNA's view is that this does not necessarily mean that additional metrics should be considered. Rather, market participants should be required to report GNV as part of their swap reporting obligations. As such, the CFTC should amend the required reporting data fields to include GNV and provide guidance to facilitate robust reporting. If firms report in breach of such guidance then appropriate action should be taken by the CFTC.

The use of GNV as a measure to assess a firm’s activity footprint in a respective market is now well established both in the US and in other jurisdictions (such as the European Union under both EMIR and MiFID). Firms have developed extensive compliance processes and systems in order to manage their business against the prescribed limits under the Dodd-Frank Act. Introducing additional metrics will complicate the compliance (and regulatory) framework and could lead to unintended consequences. For example, if the Swap Dealer threshold limits are based on metrics using either transaction or counterparty count it will weigh significantly on firms’ abilities to provide hedging services (often involving small repeat transactions) to a wide customer base (which can include entities such as end-users and special entities). This will lead to a potential reduction in the ability of such counterparts to effectively and efficiently hedge their risks. Previously, the CFTC explicitly took this consequence into account when it wisely decided to roll in the Utility Special Entity swap limit with the wider Swap Dealer threshold in order to avoid distorting the market for provision of competitive hedging services to these type of counterparts. The CFTC should have this issue at the forefront of their thinking in deciding on any changes to the framework of how a Swap Dealer is designated.

The existing approach using GNV as the sole metric has the merit of simplicity as well as permitting flexibility in the type of business model pursued by firms that are active in swap markets. The introduction of additional metrics will impact how firms continue to operate in swap markets and it should not be an outcome (intended or otherwise) of regulation to dictate to firms the business model they should operate.

Until more reliable reported GNV transaction data is available to develop an accurate methodology for creating a *de minimis* threshold the Commission should strongly consider establishing the current $8 billion phase-in threshold as the *de minimis* exception in place of the proposed $3 billion threshold. Any subsequent consideration of the appropriate level of the threshold should take into account the real and significant costs of a firm becoming a Swap Dealer. For every firm that decides to restrict (or end) their participation in swap markets there is a direct consequence both on market liquidity, efficiency and the ability of counterparts to effectively and efficiently hedge their risks.

II. Commentary

Given the lack of a dealing field in the data, staff invites suggestions on how to best identify the dealing activity of market participants. Are the general approaches used in this Preliminary Report reasonable? If not, why not?

As a matter of priority, the CFTC should require market participants, as part of their swap reporting obligations, to report the GNV of each individual transaction. The CFTC should provide detailed guidance for the calculation of GNV – including for complex deals – in order to ensure consistent and accurate reporting. Reporting of GNV would help the CFTC to conduct better assessments of market participants’ activity against the *de minimis* threshold. We have already seen such requirements for reporting GNV under similar regulatory regimes in the EU (such as EMIR).

Before any decision to identify transactions using a "dealing data field" is determined the CFTC should review current regulatory requirements and consider issuing clearer guidance for determining swap dealing activity in order to ensure market participants are properly classifying transactions when using the proposed "dealing data field".

Are Counterparty and Transaction Counts useful metrics for identifying potential swap dealing activity?

Counterparty and transaction counts are not appropriate metrics for identifying potential swap dealing activity. Rather a market participant's GNV is the best and most useful metric for identifying potential swap dealing activity. The use of counterparty and transaction counts are, as stated by Commissioner Giancarlo, "a poor proxy for dealing activity". Conceivably, a given entity could be enabled to conduct swap transactions with several counterparties but not transact with all of the counterparties within a given time frame. Likewise, as further stated by Commissioner Giancarlo, counterparty and transaction counts "…could also fit the description of a prop trading firm or a hedge fund or a lot of firms" whose intentions or business strategy is essentially not to become a registered swap dealer or conduct swap dealing activity. They would effectively constrain the type of business models firms could pursue for the swap dealing activities.

The use of a single GNV threshold is easier for market participants to manage. It also provides regulatory clarity and transparency which will make it easier for the CFTC to monitor adherence to the designated threshold. In addition, a single GNV threshold gives market participants flexibility in the form of business models they want to pursue in respect of the swap activity. Moreover, market participants have developed and have implemented compliance regimes based on the single metric *de minimis* threshold. Introducing additional metrics would result in unnecessary compliance expenditure.

Is focusing on the Counterparty and Transaction Count ranges at which the majority of Potential Swap Dealing Entities were registered as swap dealers an appropriate strategy to identify potentially significant swap dealing activity? Should another approach for using Counterparty and/or Transaction Counts be considered?

As previously stated, focusing on the counterparty and transaction count ranges is not an appropriate approach for identifying potentially significant swap dealing activity. Although the CFTC should be able to monitor a market participants' counterpart and transaction counts, the CFTC should not use these metrics to identify potential swap dealing activity. The CFTC should focus on using the single *de minimis* swap dealing threshold and requiring market participants to report GNV as part of their swap reporting obligations. Therefore, the Commission should amend the reporting data fields to include individual transaction GNV and provide guidance to facilitate reporting.

Are there additional policy considerations underlying swap dealer regulation or the *de minimis* exception that the Commission should consider?

It is not clear what additional benefits would be provided from any lowering of the *de minimis* threshold such that a larger number of potential Swap Dealers became liable for registration. All swap transactions are executed under standard contractual terms and there is no immediate reason why a swap transaction entered into with a Swap Dealer as opposed to a transaction with a *de minimis* swap trading entity would provide additional protection to the counterpart. Rather, it is likely the commercial terms on offer will be less flexible and competitive reflecting the regulatory obligations faced by the Swap Dealer.

A higher *de minimis* threshold would rather encourage market participation (both from existing and new parties) thereby promoting competition. A liquid and competitive swaps market, where there are a large number of buyers and sellers, leading to efficient pricing and transparency will always provide the best outcome for swap users.
The greater transparency in and regulatory oversight of swap markets that has been delivered by Dodd-Frank means that policy measures should be designed to facilitate development in this sector of the commodity market rather than bringing forward changes that would further constrain liquidity. Swap markets are an integral part of the financial system providing a flexible tool for a wide range of users to manage their commodity risks.

Are entities curtailing their swap dealing activity to avoid swap dealer registration, and if so, what impact does that have on the swap market?

Entities are limiting their swap dealing activity consistent with their business strategy of being a non-swap dealer. This means less swap activity and liquidity within the market that would otherwise be the case with a higher de minims threshold. This restriction reduction in swap dealing activity has real and direct consequences on the ability of users to efficiently and effectively manage their commodity risk.

What would be the impact of lowering the *de minimis* threshold to $3 billion or raising it above $8 billion on each of the Commission's policy objectives?

The following commentary details the impact of lowering the de minimis threshold to $3 billion on each of the Commission's policy objectives:

> **Reduction in systemic Risk**: there has been no evidence that commodity traders have a systemic impact on the wider financial system. Therefore, there would be no reduction in systemic risk from lowering the de minimis threshold.
>
> **Counterparty Protections**: the best counterparty protection is a competitive and liquid market. Effective competition ensures that end-users will receive the best and most competitive prices. A lower threshold would cause existing participants to either restrict activity or exit the market. A lower de minims threshold would therefore impact on the level of competition and efficiency in the market. It is not clear that the Swap Dealer regulatory provisions offer better protections than having a liquid competitive market and they would come at additional (passed through) costs to swap users.

Swap Market Transparency, Orderliness, and Efficiency: this policy objective will be negatively impacted by lowering the de minimis threshold. Market efficiency – including competitive and transparent pricing outcomes – are driven crucially by liquidity and market participation.

Regulatory Certainty: the Commission needs to set a final *de minimis* level to provide certainty but crucially allow flexibility that such a *de minimis* be reviewed periodically in light of significant changes in the market. For example, if the overall size of the swaps market grows it may be appropriate to increase the de minims threshold. It will be important that any process to review the de minims threshold is transparent and evidence based. This trade-off between certainty and flexibility is appropriate.

Allowing Limited Ancillary Dealing: adversely affect this policy objective by eliminating or prohibiting market participants from accommodating existing clients' demand for swaps in addition to other associated services.

Encouraging New Participants: serve as a barrier and discourage new participants from market entry. Firms would not enter the market if the de minimis threshold were lowered. Swap dealership comes with very significant regulatory obligations and costs and it is unlikely given the dynamics and commercial nature of swap markets that a new entrant would consider registering as a swap dealer as a condition of market entry.

Regulatory Efficiency: no perceived impact**.**

The following commentary details the impact of raising the *de minimis* threshold above $8 billion on each of the Commission's policy objectives:

Reduction in systemic Risk: As previously stated, there is no evidence to suggest that commodity traders have a systemic impact on the wider financial system and as such an increase in the *de minimis* threshold would not increase the level of risk.

Counterparty Protections: counterparty protection will increase in proportion to the increase in competition and liquidity within the market. The larger de minimis threshold will encourage greater market participation and new market entry thereby increasing competition and liquidity. Customers will enjoy greater transparency and confidence in market prices.

Regulatory Certainty: Furthermore, as stated above, the Commission needs to set a final *de minimis* level to provide certainty but crucially allow flexibility that such a *de minimis* be reviewed periodically in light of significant changes in the market. There may be market conditions that would require a revision of the *de minimis* threshold, therefore the Commission should provide flexibility within its approach. This trade-off between certainty and flexibility is appropriate.

Allowing Limited Ancillary Dealing: Increase in the amount of ancillary dealing because of an increase in activity, an increase in market participants, and an increased willingness to transact with counterparties.

Encouraging New Participants: Would facilitate and encourage new participants' entry into the market by working to eliminate apprehension with regard to any immediate swap dealer registration cost. An influx of new market participants would provide more competition and liquidity within the market.
Regulatory Efficiency: no perceived impact.

If the *de minimis* threshold is lowered to $3 billion or raised above $8 billion, what would be the effect on market participants' behavior?

The Preliminary Report shows the changes in market participants' behavior being influenced by the *de minimis* threshold. Market participants will decrease their swap dealing activity in response to lowering the *de minimis* threshold, since the majority of market participants do not wish to become a swap dealer. Inversely, raising the *de minimis* threshold above $8 billion would result in increases in swap dealing activity. Presumably it is a conscious decision by most market participants to perform more than the *de minimis* threshold; a decision that is made after thoughtful deliberation, analysis, and preparation.

Should Counterparty and/or Transaction Count be considered as possible metrics for the *de minimis* exception?

For reasons stated above, counterparty and/or transaction count should not be considered as possible metrics for the *de minimis* exception. To restate, the only metric that should be considered for the *de minimis* exception is the aggregate gross notional volume of swap dealing activity.

If a multi-factor approach is used, what approach should be used and what should the thresholds be for the various metrics, taking into account the Commission's policy objectives?

An approach that incorporates metrics other than GNV is inconsistent with the Commission's objectives for regulatory efficiency, regulatory certainty, encouraging new participation, and allowing limited ancillary dealing. It would create additional regulatory metrics for market participants to monitor and manage. Whereas the single gross notional threshold allows for compliance efforts to focus on a single objective test with a limited degree of complexity.

The single gross notional threshold establishes an industry standard most market participants have built compliance and trading strategies around.

Overall conclusion

The Commission should continue to use the single gross notional threshold for determining swap dealer registration. It should ensure that GNV reporting is added to the required data fields for swap reporting to allow it to have better oversight of GNV levels in swaps markers. The Preliminary Report seems insufficient for making a proper determination of the GNV threshold being ineffective. Such data neither confirms any shortfalls of using only a single threshold nor justifies the need to consider alternative approaches. The alternative approaches suggested by the CFTC will have significant impacts and costly modification to market participants and will essentially lead to an outcome where firms will not be free to pursue their existing swap market business models. This will negatively impact the efficient operation of swap markets leading to higher prices for swap users.