**FINAL**

August 13, 2018

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Christopher Kirkpatrick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581
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**Re: Commodity Futures Trading Commission's Notice of Proposed Rulemaking: *De Minimis Exception to the Swap Dealer Definition*, 83 Fed. Reg. 27444 (published June 12, 2018) in RIN 3038-AE68:**

Dear Mr. Kirkpatrick:

The International Energy Credit Association ("IECA") appreciates the efforts of the Commodity Futures Trading Commission ("CFTC" or "Commission") and its Staff as set forth in the Commission's proposed revisions to the De Minimis Exception to the Swap Dealer Definition ("De Minimis Exception"), as set forth in the above-captioned notice of proposed rulemaking ("NOPR").

First and foremost, we commend the Commission and its Staff for deciding to maintain the aggregate gross notional amount ("AGNA") threshold for the De Minimis Exception to registration as a swap dealer ("SD") at $8 billion in swap dealing activity entered into by a person over the preceding 12 months. That is the correct decision and we thank you.

As summarized in the Commission's NOPR (83 Fed. Reg. at 24271), the Commission actually proposes the following five modifications to the definition of SD ("SD Definition"):

"The Proposal amends the de minimis exception in paragraph (4) of the SD Definition in § 1.3 by: (1) Setting the de minimis exception threshold at $8 billion in AGNA of swap dealing activity, the same as the current phase-in level, and removing the phase-in process; (2) adding an exception from the de minimis threshold calculation for swaps entered into by IDIs in connection with originating loans to customers; (3) adding an exception from the de minimis threshold calculation for swaps entered into by a person for purposes of hedging financial or physical positions; (4) codifying prior DSIO guidance regarding the treatment of swaps that result from multilateral portfolio compression exercises; and (5) providing that the Commission may determine the

methodology to be used to calculate the notional amount for any group, category, type, or class of swaps, and delegating to the Director of DSIO the authority to make such determinations."

Throughout the NOPR, the Commission asks questions regarding fundamental elements affecting both the Commission's application of, and market participants' compliance with, the De Minimis Exception to the Swap Dealer Definition. We think that how the Commission answers those questions can have a profound impact on commodity market participants. On that basis, the IECA respectfully submits these comments ("Comments") offering suggestions in response to several of the questions raised by this NOPR.

**INDEX OF DE MINIMIS EXCEPTION QUESTION COMMENTS:**


**I. Maintain the Current $8 Billion De Minimis Threshold**
**II. Notional Amount Calculation**
**III. Definition of Hedging**
**IV. Responses to Other Enumerated Questions in NOPR**
V. **Endorsement of Comments by Others**




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## I. MAINTAIN THE CURRENT $8 BILLION THRESHOLD

The IECA fully supports the Commission's proposed decision to maintain the $8 billion threshold for the De Minimis Exception to SD registration.

IECA's members are regular participants in the markets for non-financial commodity ("NFC") swaps, primarily as end-users of NFC swaps using those swaps to hedge their exposure to commercial risks, both physical and financial. Based on the CFTC Staff's 2015 Preliminary Report and Tables 1 through 13 of the NOPR, there does not appear to be any legitimate regulatory objective that would be achieved by reducing the current $8 billion De Minimis threshold to $3 billion. The IECA therefore fully supports the Commission's proposed decision to maintain the current $8 billion threshold.

We also confirm to the Commission that our members have observed that with respect to many currently unregistered entities, that are dealing in NFC swaps, their NFC swap dealing is a smaller part of those entities' overall business activities, which are generally non-financial in nature, so that their swap dealing activity is ancillary to their primary role in the energy industry. As a result, these entities' swap dealing activities will not likely support the costs associated with SD registration. As such, these entities will likely reduce or stop dealing activity if a lower threshold would subject them to SD registration.

In this regard, we urge the Commission to issue a final rule maintaining and fixing the de minimis threshold at $8 billion by no later than December 31, 2018, in order to provide certainty to commodity market participants.

Under the existing definition of SD in Section 1.3 of the Commission's regulations (the "SD Definition"), the so-called phase-in period for the $8 billion de minimis threshold will expire on December 31, 2019, thereby dropping to $3 billion on December 31, 2019. Since the obligation to register as a SD is based on the aggregate gross notional amount ("AGNA") of swap dealing activity during the preceding 12 months, currently unregistered entities, unable to justify the expense of SD registration, will have to begin monitoring their swap dealing activities on January 1, 2019, and will simultaneously begin scaling back their swap dealing activities to ensure that the AGNA of their dealing activities for the preceding 12 months (i.e., for calendar year 2019) is less than $3 billion on December 31, 2019.

The IECA submits that failure to issue a final rule on or before December 31, 2018, will lead to reduced liquidity for NFC swaps, negatively impacting end-users and commercial entities who utilize NFC swaps for hedging.

The IECA supports the Commission's statement in the NOPR (83 Fed. Reg. at 27457), which says: "the Commission expects that maintaining an $8 billion threshold would foster the efficient application of the SD Definition by providing continuity and addressing the uncertainty associated with the end of the phase-in period."



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Regarding its proposed decision to maintain the current $8 billion de minimis threshold, the Commission requested comments on the following enumerated questions 1 – 12 (83 Fed. Reg. at 27458) and the IECA offers the following responses:

*(1) Based on the data and related policy considerations, is an $8 billion de minimis threshold appropriate? Why or why not?*

**Yes. Sustaining the threshold in effect at the $8 billion level is appropriate, to provide needed market certainty. The NFC market place will be able to emerge from under the cloud of a potential "step-down" to the $3 billion figure, and function more efficiently from a liquidity perspective.**

*(2) Should the de minimis threshold be reduced to $3 billion? Why or why not?*

**No, it should not be reduced to $3 billion. Liquidity in the NFC swap markets is already limited and any additional deterrent to existing or new entrants threatens a well-functioning market place. Liquidity to provide hedges for medium term or long term construction finance projects is presently very constrained and further limitations will result in badly needed projects in the gas/oil and electricity generation industries being abandoned.**

*(3) Should the de minimis threshold be increased? If so, to what threshold? Why or why not?*

**The IECA is not advocating an increase in the de minimis threshold at this time. If, however, the Commission deems it appropriate to facilitate the development of hedge markets for long tenured commodity asset classes to enable the construction of power plants, gas distribution facilities, pipelines, oil and natural gas gathering facilities, natural gas liquids midstream processing facilities, LNG liquefaction/export terminals, and any similar high-capital cost energy infrastructure projects that will recover their costs over a 10-year or longer term, the Commission should consider an increase in the de minimis threshold. The IECA reminds the Commission that currently unregistered entities providing NFC swap dealing activity in energy commodities, particularly those which are non-financial entities with a presence in the physical commodity markets whose primary business is generally non-financial, generally pose less systemic risk than financial market SDs.**

*(4) Are the assumptions discussed above regarding a $3 billion de minimis threshold, an $8 billion de minimis threshold, or a higher de minimis threshold accurate, including, but not limited to, compliance costs and market liquidity assumptions?*

**Yes. However, the Commission vastly underestimates the negative impact on market development due to its failure to provide a workable Capital Rule for Non-Bank SDs. Compliance costs to become a SD are also severely underestimated particularly in light of the technology spend for firms to be able to compete in the bank dominated SD market.**



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*(5) As an alternative or in addition to maintaining an $8 billion threshold, should the Commission consider a tiered SD registration structure that would establish various exemptions from SD compliance requirements for SDs whose AGNA of swap dealing activity is between the $3 billion and $8 billion?*

**No. The lack of legal certainty in maintaining the $8 Billion threshold is quite likely the principal cause of the lack of development of longer-tenured products in the NFC swaps markets over the past 8 years. Creating a tiered structure with multiple exemptions would simply introduce more unnecessary uncertainty into a situation that calls for legal and regulatory certainty, particularly with respect to longer-tenured energy infrastructure projects.**

*(6) What is the impact of the de minimis threshold level on market liquidity? Are there entities that would increase their swap dealing activities if the Commission raised the de minimis exception, or decrease their swap dealing activities if the Commission lowered the threshold? How might these changes affect the swap market?*

**The threshold has been a primary driver in shrinking liquidity in the NFC long and medium term markets. Many market participants are simply not willing to make markets, hire knowledgeable marketing staff, add technology staff and allocate proprietary capital to a business model that could result in a tripling or more in regulatory cost increases due to SD Registration, Capital, Margin and other regulatory compliance costs.**

*(7) Are there additional policy or statutory considerations underlying SD regulation or the de minimis exception that the Commission should consider?*

**Yes. The NFC swap markets did not cause the 2006-2008 financial crisis and those markets should not continue to be curtailed and artificially shrunk due to unnecessary regulation with respect to NFC swaps that did not cause the 2008 financial crisis.**

*(8) Have there been any structural changes to the swap market such that the policy considerations have evolved since the adoption of the SD Definition?*

**Policy considerations have begun to improve, but the NFC swaps markets have suffered over the past 8 years. Since the introduction of the SD Registration regime there has been a massive exit of firms willing to transact or make markets for medium to long term project finance related hedges. The regulatory definition of "dealing" in swaps is vague, but the Commission's decision to maintain the De Minimis Exception threshold at $8 billion will provide a bright line that can allow for businesses to plan and invest in growth strategies.**

*(9) Are entities curtailing their swap dealing activity to avoid SD registration at $8 billion or $3 billion thresholds, and if so, what impact is that having on the swap*



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*market? Are certain asset classes or product types more affected by such curtailed dealing activity than others?*

**Yes. In the NFC markets, presently it is next to impossible to obtain 3 or more competitive bids in medium to long-tenured project finance swaps for natural gas, power, oil and LNG assets. In 2004 to 2008, after enactment of the Commodity Futures Modernization Act of 2000, the medium to long term project finance swap hedge market for long-tenured NFC swaps was very competitive and liquid.**

*(10) Does registration as an SD allow persons to substantially increase their swap dealing activity, or is increased swap dealing activity constrained by capital requirements at the firm level and other considerations*

**See response to question 6 above. The mandatory swap margin rule and the lack of a reasonable Capital rule for non-bank SDs have damaged any growth potential or interest in becoming an SD. Coupled with material regulatory compliance costs and technology development costs, firms have reduced swap dealing activities to stay clear of having to become a registered SD.**

*(11) Should an entity's AGNA of swap dealing activity continue to be tested against the de minimis threshold for any rolling 12-month period, only for calendar year periods, or for some other regular 12-month period such as quarterly or semi-annual testing?*

**Firms are used to the current annual process with roll off after 12 months and have spent a material amount of human resources and IT resources to construct systems to monitor against and address the current process. Therefore, a rethink at this point will only add additional costs without any inherent benefits.**

*(12) What are the benefits and detriments to using AGNA of swap dealing activity as the relevant criterion for SD registration, as compared to other options, including, but not limited to, entity-netted notional amounts or credit exposures?*

**As noted above, resources have already been spent and systems have been built to comply with the current approach. To change that approach would add costs for no perceived benefit. Netting is certainly a reasonable idea and could be incorporated into existing analysis. However, in the NFC markets, netting would need to be done as a measure of credit exposure with physical and bilateral swaps being able to be offset against each other as it relates to a perceived "risk exposure" to a third party.**

## II. NOTIONAL AMOUNT CALCULATION

The IECA offers the following Comments in response to the Commission's questions regarding the calculation of the aggregate gross notional amount for purposes of applying the De Minimis Threshold. The Commission included the following questions 1 – 7 and 1



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– 13 (83 Fed. Reg. at 27465-27466) in its De Minimis Threshold NOPR and we offer the following responses.

*(1) Is the proposed process to determine the methodology to be used to calculate the notional amount for any group, category, type, or class of swaps appropriate? Why or why not*?

**We are concerned that the methodology for calculating notional amounts could become arbitrary in one or more instances when a request is made to DSIO, but for any number of reasons, the requester may accept the methodology as determined by DSIO without any protest. At that point, some flawed method for calculating notional amounts could now have precedential value in the minds of the Commission Staff working in DSIO and other market participants might find themselves stuck with a flawed method for calculating notional amounts. For this reason, we think that any and all determinations by DSIO of a method for calculating notional amounts should be subject to public notice and review.**

**In that way, interested members of the public could comment and be vigilant to ensure that any method proposed by DSIO will not be arbitrary and capricious, but will instead reflect reasoned decision making and will be "economically reasonable and analytically supported."**

*(2) Is the proposed process too narrowly or broadly tailored*?

**See Response #1.**

*(3) Is the restriction that a methodology be economically reasonable and analytically supported appropriate? Why or why not? What other standards may be appropriate for this purpose*?

**See Response #1. Our primary concern is that the process for deciding a method of calculating notional amounts be transparent, which requires public notice and an opportunity to comment on that method of calculating notional amounts. In addition, any decision by DSIO must be appealable to the Commission with an opportunity for the public to submit comments to the Commission on the method proposed by DSIO.**

*(4) How will the proposed process impact persons that enter into swaps where notional amount is not a stated contractual term*?

**[No Response is Provided.]**

*(5) Is the proposed delegation of authority too narrowly or broadly tailored*?

**See Responses #1 and #3.**



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*(6) How will the proposed delegation of authority impact persons that enter into swaps where notional amount is not a stated contractual term?*

**[No Response is Provided.]**

*(7) Is there a better alternative to this proposed process? If so, please describe.*

**See Responses #1 and #3.**

*(1) Should the notional amount (either stated or calculated) for transactions with embedded optionality be delta-adjusted by the delta of the underlying options, provided that the methods are economically reasonable and analytically supported? Should delta-adjusted notional amounts be used for all asset classes and product types, or only some?*[1]

**Yes, the delta-adjusted notional amount should be used for all types of options in all asset classes, including options embedded in a swap, swaptions (i.e., an option that is exercisable into a swap) and regular options (i.e., a call option that is financially settled). If a swaption is exercised into a swap, the notional amount will be adjusted and calculated in accordance with the methodologies set out in question #5 below based on the type of swap being entered into. Delta adjusting the notional amount of options is a common risk management practice that market participants use to measure the notional amount of options.**

**For the sake of clarity, the IECA views "delta" as a measure of the change in option premium generated by a change in the price of the underlying commodity. For example, if a call option generates a delta of approximately 50, that means the option premium will rise or fall by one-half point in reaction to a one-point move up or down in the underlying commodity. For example, if the underlying commodity (e.g., an MMBtu of natural gas) rallies by ten cents, the premium will increase by approximately five cents.**

**For purposes of calculating a delta-adjusted notional amount, we support the Letter from Futures Industry Association Principal Traders Group (Dec. 20, 2012) (proposing a methodology that does not utilize premium value or the strike price, but does include option delta in the calculation). We offer the following as an example:**

**Example: A producer interested in locking the price of future natural gas production may hedge price exposure by selling a swap at a fixed price of $3.00/MMBtu for a volume of 75,000 MMBtu of natural gas.[2] Alternatively, the**

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[1] See *NOPR, 83 Fed Reg at 27465.*

[2] When we use the term "volume" in these comments we mean the notional quantity per calculation period.



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**producer may sell an option to hedge a comparable level of exposure by selling a call with a strike price of $3.50/MMBtu for a volume of 300,000 MMBtu. If you assume that the delta of the option is 0.25, the resulting delta-adjusted position (300,000 MMBtu * .25) equals the volume of the swap (75,000 MMBtu).**

**In this example, the notional amount of the fixed price swap would be $225,000 ($3.00/MMBtu x 75,000 MMBtu = $225,000). The notional amount of the option would be $1,050,000 ($3.50/MMBtu x 300,000 MMBtu = $1,050,000). The delta-adjusted notional amount of the option would be $262,500 ($3.50/MMBtu x 300,000 x 0.25).**

*(2) For swaps without stated contractual notional amounts, should "price times volume" generally be used as the basis for calculating the notional amount?*[3]

**Yes, the calculation generally should be price times volume. If a swap does not have a stated notional amount (*e.g.*, a floating monthly notional quantity), then absent CFTC-staff guidance, market participants should be able to rely on current commercially reasonable practice for calculating the notional amount of the swap.**

*(3) What other notional amount calculation methods, aside from "price times volume," could be used for swaps without a stated notional amount that renders a calculated notional amount equivalent more directly comparable to the stated contractual notional amount typically available in IRS, CDS, and FX swaps? (Footnote 155: "Price times volume" is similar to a cash flow calculation, while "stated contractual notional" is usually the basis that forms a cash flow calculation when combined with price, strike, fixed rate, coupon, or reference index. Therefore, "stated contractual notional amount" may be described as more similar to "volume" than "price times volume." For example, for a $100 million interest rate swap, the stated notional amount is typically the basis of the periodic calculated cash flows instead of the actual cash flows, which are calculated using the stated notional amount and the stated "price" per leg (such as a fixed or floating rate index).*[4]

**We are not aware of a gross notional amount calculation for commodity swaps other than price times volume. However, as discussed in response to question 5 below, the price and volume will vary by product type (e.g. a basis swap will use the spread between legs 1 and 2 prices, multiplied by the volume of one leg and a fixed vs floating rate swap will use the fixed price as the price multiplied by the volume of the fixed leg).**

*(4) For swaps without a stated contractual notional amount, does calculation guidance exist in other jurisdictions and/or regulatory frameworks, such as in banking, insurance,*

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[3] See *NOPR, 83 Fed Reg at 27465.*

[4] See *NOPR, 83 Fed Reg at 27466.*



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*or energy market regulations? Should persons be permitted to use such guidance to calculate notional amounts for purposes of a de minimis threshold calculation?*[5]

**We are not aware of other gross notional amount calculation methodologies in energy market regulations. The Federal Energy Regulatory Commission's electric quarterly reports (EQR) and Form 552 do not address a notional amount calculation for physical transactions and do not apply to financial transactions. If a swap does not have a stated notional amount (e.g., a floating monthly notional quantity), then absent CFTC Staff guidance, market participants should be able to utilize current commercially reasonably methodologies.**

*(5) What should be used for "price" when calculating notional amounts for swaps without a stated contractual notional? Contractual stated price, such as a fixed price, spread, or option strike? The spot price of the underlying index or reference? The implied forward price of the underlying? A different measure of price not listed here?*[6]

**The answer depends on the type of swap (e.g., fixed vs float, basis swap, heat rate swap, option, etc.). In the CFTC's FAQ about Swap Entities from October 2012, the FAQ provides that if the asset underlying the swap is a physical commodity (e.g., natural gas), the notional amount calculation should take into account the "fair market value" of the commodity at the time the swap is executed. For the most commonly traded commodity swaps, members continue to follow the calculation methodologies set out in our September 20, 2012 joint comment letter and summarized briefly below:**

- **For a <u>fixed vs float swap</u> involving the same commodity, the "fair market value" would be the fixed price. For example, in a monthly on-peak power swap, the buyer of a notional quantity of electricity would pay a fixed price and the seller would pay the day-ahead locational marginal price or an index price.**
- **For a <u>float vs float</u> swap involving the same commodity, the "fair market value" would be the price differential between the two floating indices. In the market, each spread product type is quoted and transacted as a spread; therefore, the spread value (price) is appropriate when determining the notional amount.**
    - **<u>Index Spread</u>: A gas index spread is where one party exchanges the variability of one index for another. For example, in the natural gas markets, one counterparty might pay a First of the Month Index price and receive a *Gas Daily* price in exchange. The "fair market value" or "price", is the spread or difference between the two indices. Often, the**

[5] See *NOPR, 83 Fed Reg at 27466.*

[6] See *NOPR, 83 Fed Reg at 27466.*



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**notional amount of an index spread swap is small given the similarity in the market price of both indices in the forward months.**

  - **In electricity markets, an electric index trade is typically used to manage the price risk difference between the day-ahead and real-time markets. For example, a counterparty might pay the RTO Day Ahead LMP price and receive the RTO Real Time LMP price in exchange. The "fair market value" or "price", is the spread or difference between the two indices.**

- **Basis Spread: For a gas basis spread swap, payments are based on the value of the price spread between two locations (for natural gas it is typically the price spread between the Henry Hub and another location). A basis trade is typically used in the electricity market to manage the price risk between two locations. For example, a counterparty might pay the fixed price for the difference between AEP Dayton Hub (ADHUB) and Northern Illinois Hub (NIHUB) and receive the floating price difference between those two locations. The "fair market value" or "price", is the spread or difference between the two price locations.**

  **The CFTC's FAQ about Swap Entities from October 2012 supports use of the spread as the "price" for locational basis swaps.**

  - **Time Spread: In this type of swap, the payments are based on the spread value between two different delivery periods or points in time (such as natural gas or agricultural winter/summer seasonal spreads). For instance, a market participant could buy a summer month while simultaneously selling a winter month, hedging or locking in the value of the summer-winter spread. The "fair market value" or "price", the difference between the price for the two different delivery months.**

  - **Spark Spread: An electric heat rate trade is typically used to manage price risk by using the prices of two commodities: electricity and natural gas. For example, a counterparty would pay the heat rate multiplied by NYMEX Gas (i.e., 9.50 * $3.00) and receive a fixed price for power ($30). The "fair market value" or the "price" to be used is the spark spread of $1.50 ($30 – ($3 * $9.50)).**

- **For the most commonly traded commodity options, members generally follow either the calculation methodologies set out in the Edison Electric Institute's ("EEI") September 20, 2012 joint comment letter or the Letter from Futures Industry Association Principal Traders Group (Dec. 20, 2012) (proposing a methodology that does not utilize premium value or the strike price, but does include option delta in the calculation).**



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*(5.a) Should the price of the last available transaction in the commodity at the time the swap is entered into be used for this calculation?*[7]

**No. The price should not be the last available transaction in the commodity because market participants may not capture the last available transaction data in their trading systems. To the extent that the swap transaction references the spot price, the "price" should be the spot price. To the extent that the swap transaction references a forward price, the "price" should be the forward curve price.**

*(5.b) Is it appropriate to use a "waterfall" of prices to calculate notional amount, depending on the availability of a price type? (Footnote 156 For example, contractual stated fixed price might be required to be used first. Lacking a stated fixed price in the swap, spot price of the underlying would then be used instead.).*[8]

**A waterfall concept is not necessary if the Commission follows the industry standard pricing approach as set forth above in this question 5. The price should be the price referenced in the swap at the time of executing the transaction for the forward curve as applicable.**

*(6) What metric should be used for "price" for certain basis swaps with no fixed price or fixed spread?*[9]

**As described in response to question 5, the "price" should be the spread or price differential between the two floating prices.**

*(7) How should the "price" of swaps be calculated for swaps with varying prices per leg, such as a predetermined rising or falling price schedule?*[10]

**For fixed-for-floating swaps with a varying fixed price, we recommend using a weighted average price.**

*(8) What metric should be used for "volume" when calculating notional amounts for swaps without a stated contractual notional amount? Should the Commission assume that swaps with volume optionality will be exercised for the full quantity or should volume options be delta-adjusted, too?*[11]

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[7] See *NOPR, 83 Fed Reg at 27466.*

[8] See *NOPR, 83 Fed Reg at 27466.*

[9] See *NOPR, 83 Fed Reg at 27466.*

[10] See *NOPR, 83 Fed Reg at 27466.*

[11] See *NOPR, 83 Fed Reg at 27466.*



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**For swaps with a predetermined fixed or varying volume, we recommend using a weighted average volume for a settlement period. For swaps with embedded volume optionality, the volume options should be delta-adjusted in the same way as other options are. The fact that the option is embedded into the swap does not change the risk management profile of the option.**

*(9) Should the total quantity for a "leg" be used, or an approximation for a pre-determined time period, such as a monthly or annualized quantity approximation? (Footnote 157: For an example of "monthly notional amount approximation" rather than aggregated total notional quantity, see Proposed Instrument, supra note 154, at 24-26.*[12]

**Consistent with the current Commission staff guidance, the duration of a swap should not be a factor in calculating the gross notional amount of a swap.[13] The volume used to calculate the gross notional amount should be the notional quantity used to calculate the payments between the parties per settlement period. Typically, commodity swaps settle monthly, therefore the volume used to measure the gross notional amount of swaps that settle monthly should be the notional quantity used to calculate the monthly settlement. As noted in response to question 2, if a swap does not have a stated notional amount (e.g., a floating monthly notional quantity), then absent CFTC-staff guidance, market participants should be able to rely on current commercially reasonable practice for calculating the notional amount of the swap.**

*(10) How should the "volume" of swaps be calculated for swaps with varying notional amount or volume per leg, such as amortizing or accreting swaps?*[14]

**For swaps with a varying quantity per calculation period, the volume should be a weighted average of the notional quantity per settlement period.**

*(11) Should the U.S. dollar equivalent notional amount be calculated across all "legs" of a swap by calculating the U.S. dollar equivalent notional amount for each leg and then calculating the minimum, median, mean, or maximum notional amount of all legs of the swap?*[15]

**Yes, and the calculation should allow for a netted notional amount across all legs of a swap or option that is traded and priced as one transaction. The CFTC's October 2012 FAQ about Swap Entities provides that a collar should be treated as having a single notional amount.**

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[12] See *NOPR, 83 Fed Reg at 27466.*

[13] *See* Frequently Asked Questions (FAQ) – Division of Swap Dealer and Intermediary Oversight ("DSIO") Responds to FAQs About Swap Entities, page 2-3 (Oct. 12, 2012) (available here).

[14] See *NOPR, 83 Fed Reg at 27466.*

[15] See *NOPR, 83 Fed Reg at 27466.*



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*(12) Should the absolute value of a price times volume calculation be used, or should the calculation allow for negative notional amounts?*[16]

**The calculation should net notional amounts in the context of a multi-leg structured swap or option where multiple legs are traded and priced as one transaction, but documented as separate transactions. For example, in a three-way option collar, similar to the option collar, the calculation should be based upon a netted delte-adjusted notional amount across all legs. If the netted notional amount is a negative value, the absolute value of the net amount should be used in the calculation.**

*(13) Given that a derivatives clearing organization ("DCO") has to mark a swap to market on a daily basis, it may be possible to determine "implied volatilities" for swaptions and options that are regularly marked-to-market, such as cleared swaps, in order to delta-adjust them. Should DCO evaluations be used when there are not better market prices available?* [17]

**We don't believe this is applicable to commodity swaps and options as such products are not generally cleared by a DCO.**

## III. DEFINITION OF HEDGING

The IECA offers the following Comments in response to the Commission's questions 1 – 4 regarding the definition of hedging. In the De Minimis Threshold NOPR, the Commission requested comments on the following enumerated questions 1 – 4 (83 Fed. Reg. at 27463). To the extent possible, we have attempted to quantify the impact of issues discussed in the comments, including costs and benefits as applicable.

*(1) Based on the policy considerations, is the proposed Hedging De Minimis Provision appropriate? Why or why not?*

**Yes. Generally the concept of excluding hedging from the De Minimis Exception is appropriate, however, the current definition of "swaps entered into for the purpose of hedging" is confusing and should be clarified. Specifically, subsection (2) which provides "for that swap, the person is not the price maker and does not receive or earn a bid/ask spread, fee, commission or other compensation for entering into the swap" should be clarified. First, the price maker requirement seems to inject an undefined SD standard into the hedging definition which we do not believe is necessary and leads to confusion – especially in the situation where a**

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[16] See *NOPR, 83 Fed Reg at 27466.*

[17] See *NOPR, 83 Fed Reg at 27466.*



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**party seeking to hedge actively pursues and negotiates its hedging options in the market. We ask that the Commission delete this condition as it is not a condition to the current physical hedge exemption. Additionally, the requirement that the party not receive or earn a spread, fee, commission or other compensation for entering into the swap also raises concerns – especially where the pricing of the hedge trade is different than the pricing of the original trade that is being hedged. Thus we would request that the Commission clarify that any such spread, fee, commission or other compensation limitation is solely with respect to the hedge trade alone and is not to be determined by taking into consideration differences between the pricing of the hedge trade and the original trade that is being hedged.**

*(2) Is the proposed Hedging De Minimis Provision too narrowly or broadly tailored?*

**See response to comment (1) above, the hedging provision is currently too narrowly tailored in that subsection (2) includes requirements that are confusing and will be difficult to satisfy in practice. Thus, we request that the Commission either eliminate the requirements in subsection (2) or remove the "price maker" requirement and clarify the spread, fee, commission or other compensation requirement. Aside from our concerns with subsection (2), we believe that having a definitive number ($8 billion) creates clarity for the industry and creates regulatory certainty allowing businesses to develop, plan and grow.**

*(3) How will the proposed Hedging De Minimis Provision impact entities that enter into swaps to hedge financial or physical positions?*

**In the commodities market it is very common for commercial end-users to utilize both physical and financial hedges for their day-to-day operations. Thus having a highly liquid, active market is particularly important to the commercial end-users. The hedging exemption is particularly important to the market because it allows other market participants to engage in a needed spectrum of market transactions without triggering the $8 billion De Minimis Exception threshold and the resulting cost-prohibitive and burdensome SD registration requirement. Without the hedging exemption there would likely be fewer market participants, which would likely lead to concentration risk and higher prices for commercial end-users. Accordingly, the proposed De Minimis Exception threshold of $8 billion should allow the NFC markets to freely develop particularly in support of project finance hedging, which has been largely curtailed since 2010.**

*(4) The proposed Hedging De Minimis Provision would be used to determine whether a person has exceeded the AGNA threshold set forth in paragraph (4)(i)(A) of the SD Definition, whereas the Physical Hedging Exclusion in paragraph (6)(iii) of the SD Definition addresses when a swap is not considered in determining whether a person is an SD. How might this distinction impact how entities analyze their swap dealing activity and whether they would exceed the de minimis threshold?*



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**The proposed hedge definition is helpful to the NFC Markets and its market participants, not only should it be utilized in connection with the De Minimis Exception threshold, it also should be used in other CFTC regulations (e.g., position limits as a definition of bona fide hedge). We do not believe that the distinction between the exemption from the AGNA threshold for financial hedging versus the exclusion from dealing activity with respect to physical hedges will have a material impact on how market participants will analyze their swap dealing activity.**

## IV. RESPONSES TO OTHER ENUMERATED QUESTIONS IN NOPR

The IECA offers the following Comments in response to other fundamental questions asked by the Commission in this NOPR. In the De Minimis Threshold NOPR, the Commission requested comments on the following enumerated questions. To the extent possible, we have attempted to quantify the impact of issues discussed in these Comments, including costs and benefits, as applicable.

### Request for Comments: Insured Depository Institution (IDI) Exception

No comments are provided by the IECA to these requests 1 – 10 for comments (83 Fed. Reg. at 27462).

### Request for Comments: Dealing Counterparty Count and Dealing Transaction Count Thresholds

*(1) Taking into account the Commission's policy objectives, should minimum dealing counterparty counts and minimum dealing transaction counts be considered in determining an entity's eligibility for the de minimis exception?*

**No. The current definition of "dealing" is sufficiently ambiguous, that we need not impose additional conditions in the form of minimum dealing counterparty counts or minimum dealing transactions counts as additional conditions to be satisfied in determining eligibility for the De Minimis Exception**.

*(2) Would a dealing counterparty count threshold of 10 dealing counterparties be appropriate? Why or why not? Is another dealing counterparty count threshold more appropriate?*

**No. There is not necessarily a logical connection between the number of counterparties or transactions, without more, to indicate that an entity is a SD. For example, if an NFC hedger (such as an airline) transacted 10 swaps with 10 different counterparties who happen to be Bank Dealers or other commodity**



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**counterparties within one year, that activity would not transform an end-user seeking to hedge its genuine commercial risk into a SD**.

*(3) Would a dealing transaction count threshold of 500 dealing transactions be appropriate? Why or why not? Is another dealing transaction count threshold more appropriate?*

**No. An intermediary that transacts and moves physical Gas, Oil, Products or Power may have business hedging needs that require transacting significantly more than 500 swaps in a given year. Such activity should not force the intermediary into a registered status as an SD.**

*(4) Under what circumstances might entities have a relatively high AGNA of swap dealing activity, but low dealing counterparty counts or low dealing transaction counts?*

**Multi-billion dollar long term project finance-related swap transactions, for example an LNG liquefaction and export facility could have a very large AGNA with only a handful of bank-lender counterparties as dealers and, perhaps, a low number of transactions. Currently the only participants that take on such projects tend to be lenders that have an affiliated SD.**

*(5) Would an AGNA backstop of $20 billion be appropriate? Why or why not? Is another AGNA backstop level more appropriate?*

**If the proposed exemption for hedges included medium and long term structured finance transactions as exempt transactions, the $8 billion threshold would be appropriate and no AGNA backstop will be necessary.**

*(6) Would adding dealing counterparty count and dealing transaction count thresholds simplify the SD analysis for certain market participants, and if so, how and for which categories of participants?*

**No. More conditions or qualifiers to the $8 billion threshold are unnecessary. Sticking with the KISS initiative is strongly preferred by the industry and there is no need for added regulations.**

*(7) Would adding dealing counterparty count and dealing transaction count thresholds complicate the SD analysis for certain market participants, and if so, how and for which categories of participants?*

**Yes, it would complicate the SD analysis. A simple Gross Notional Amount calculation (PxQ) is adequate based on the answers and methodologies set forth herein based on the type of swap entered into.**



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*(8) Should registered SDs or MSPs be counted towards the dealing counterparty count threshold?*

**Yes. The rule should be agnostic to counterparty if the transacting party is executing back to back swaps as a market maker in an effort to make revenue, and markets itself as a Dealer, the party should be registered as a SD.**

*(9) Should dealing counterparty and dealing transaction counts be aggregated across multiple potential swap dealing entities, similar to the existing AGNA aggregation standard?*

**See Discussion above.**

*(10) For counterparty count purposes, should counterparties that are all part of one corporate family be counted as distinct counterparties, or as one counterparty?*

**We do not think that counterparty count is dispositive of SD status, but if the Commission is determined to do so, then counterparties that are all part of one corporate family but are located in different cross border jurisdictions, they could be counted separately.**

*(11) Should a facts and circumstances analysis apply to determine if an amendment or novation to an existing swap is swap dealing activity that counts towards a person's dealing transaction count? Why or why not?*

**Assuming "novation" is defined as stepping into another parties shoes to assume the risk of a transaction, the action of assuming a novated swap should not constitute "Dealing" as there can be a variety of reasons to assume such risk and the party accepting the novated swap does not necessarily have a business model that constitutes a "Dealing" enterprise.**

*(12) Would adding dealing counterparty count and dealing transaction count thresholds address the impact of differences in transaction sizes across asset classes?*

**No. Please see reasons stated above.**

*(13) Would it be more appropriate for a multi-factor threshold to only include a dealing counterparty count threshold or a dealing transaction count threshold, rather than adding both criteria?*

**Please keep with the KISS initiative. More regulations are not necessary and over complicate matters unnecessarily.**

*(14) Are there other criteria that should be included in the de minimis exception? If so, what are they and how could the Commission efficiently collect, calculate, and track them?*



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**We continue to think that a simple rule will produce more legal and regulatory certainty, which will encourage competition and growth.**

**<u>Request for Comments: Exchange-Traded and/or Cleared Swaps</u>**
**(Questions 1 – 25, 83 Fed. Reg. at 27469-27470)**

*(1) How would an exception for exchange-traded swaps from a person's de minimis calculation impact the policy considerations underlying SD regulation and the de minimis exception?*

**Exchange traded and/or Exchange cleared swaps should be exempt from the Swap Dealer de minimis count due to the fact that the transfer of credit risk from counterparties to the CCP is one of the corner stones of the Dodd Frank Act and should be encouraged.**

*(2) How would an exception for cleared swaps from a person's de minimis calculation impact the policy considerations underlying SD regulation and the de minimis exception?*

**Such an exception would promote the policy of counterparty risk mitigation and foster the growth of cleared activity with more transparency.**

*(3) How would an exception for exchange-traded and cleared swaps from a person's de minimis calculation impact the policy considerations underlying SD regulation and the de minimis exception?*

**See response #1 above.**

*(4) Should all exchange-traded swaps be excepted from the de minimis calculation, or only certain transactions? If so, which transactions? Should only those trades that are anonymously executed be excepted? How would the Commission judiciously differentiate, monitor, and track such transactions apart from other exchange traded swaps?*

**If the policy goal of the Commission's Swap regulations is to promote cleared activity in a transparent fashion, the Commission should remain indifferent as to parties executing and posting swaps in an anonymous fashion. The credit risk is mitigated if the counterparties execute bilaterally and post a transaction for clearing or if they meet on Exchange in an anonymous fashion. It will be challenging for the Exchanges to create generic Swap contracts that will be successful due to the bespoke nature of swaps in the NFC markets, so in some instances the bespoke nature of the swap may not be achievable on an exchange.**



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*(5) Should all cleared swaps be excepted from the de minimis calculation, or only certain transactions? If so, which transactions? Should the Commission differentiate between trades that are intended to be cleared and trades that are actually cleared? How would the Commission judiciously differentiate, monitor, and track such transactions apart from other cleared swaps?*

**See response #4 above.**

*(6) Should all exchange-traded and cleared swaps be excepted from the de minimis calculation, or only certain transactions? If so, which transactions? How would the Commission judiciously differentiate, monitor, and track such transactions apart from other exchange-traded and cleared swaps?*

**See response #4 above.**

*(7) If exchange-traded swaps are excepted from a person's de minimis calculation, what other conditions, if any, should apply for the trade to qualify for the exception?*

**None.**

*(8) If cleared swaps are excepted from a person's de minimis calculation, what other conditions, if any, should apply for the trade to qualify for the exception?*

**None.**

*(9) If exchange-traded and cleared swaps are excepted from a person's de minimis calculation, what other conditions, if any, should apply for the trade to qualify for the exception?*

**None.**

*(10) If exchange-traded swaps are excepted from the de minimis calculation, should the Commission establish a notional backstop above which an entity must register? If so, what is the appropriate level for the backstop?*

**No. Added regulation is contrary to the KISS initiative.**

*(11) If cleared swaps are excepted from the de minimis calculation, should the Commission establish a notional backstop above which an entity must register? If so, what is the appropriate level for the backstop?*

**No. Added regulation is contrary to the KISS initiative.**



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*(12) If exchange-traded and cleared swaps are excepted from the de minimis calculation, should the Commission establish a notional backstop above which an entity must register? If so, what is the appropriate level for the backstop?*

**No. Added regulation is contrary to the KISS initiative.**

*(13) Should persons be able to haircut the notional amounts of their exchange traded swaps for purposes of the de minimis calculation? If so, would a 50 percent haircut be appropriate? Why or why not?*

**No. Added regulation is contrary to the KISS initiative.**

*(14) Should persons be able to haircut the notional amounts of their cleared swaps for purposes of the de minimis calculation? If so, would a 50 percent haircut be appropriate? Why or why not?*

**No. Added regulation is contrary to the KISS initiative.**

*(15) Should persons be able to haircut the notional amounts of their exchange traded and cleared swaps for purposes of the de minimis calculation? If so, would a 50 percent haircut be appropriate? Why or why not?*

**No. Added regulation is contrary to the KISS initiative.**

*(16) Would an exception for exchange-traded swaps increase the volume of swaps executed on SEFs or DCMs?*

**Yes. However, the Exchanges will have a difficult time crafting enough generic swaps to attract significant liquidity due to the bespoke nature of the NFC swap markets.**

*(17) Would an exception for cleared swaps increase the volume of swaps that are cleared?*

**Yes, absolutely. Clearport was a thriving platform from approximately 2005 – 2008 and can be such again if the Commission were to allow exemption from the de minimis count for posted cleared swaps.**

*(18) Would an exception for exchange-traded and cleared swaps increase the volume of swaps executed on SEFs or DCMs and the volume of swaps that are cleared?*

**See responses #16 and #17 above.**

*(19) Are there any unique costs or benefits associated with excepting exchange-traded swaps from an entity's de minimis calculation?*



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**Exchange execution fees would be nominal.**

*(20) Are there any unique costs or benefits associated with excepting cleared swaps from an entity's de minimis calculation?*

**Exchange Clearing fees would be nominal.**

*(21) Are there any unique costs or benefits associated with excepting exchange-traded and cleared swaps from an entity's de minimis calculation?*

**See response above.**

*(22) Has the Floor Trader Exclusion encouraged additional trading on SEFs and DCMs?*

**No Response is Provided.**

*(23) Has the Floor Trader Exclusion encouraged additional clearing of swaps?*

**No Response is Provided.**

*(24) Should the Commission consider additional modifications to the Floor Trader Exclusion in lieu of a broader exception for all exchange-traded and/or cleared swaps?*

**No Response is Provided.**

*(25) How should transactions executed on exempt multilateral trading facilities, exempt organized trading facilities, and/or exempt DCOs be treated?*

**No Response is Provided.**

## Request for Comments: NDFs
## (Questions 1 – 8, 83 Fed. Reg. at 27470)

*(1) Should the Commission except NDFs from consideration when calculating the AGNA of swap dealing activity for purposes of the de minimis exception? Why or why not?*

**Yes. Non delivered offsets are common in the Commodities industry (entitled Book Outs). Although Book Outs may not result in delivery the intent at the time of the physical transaction is to deliver the relevant product. Therefore, the NDF is not a "swap" but actually a physical transaction that happens to offset another physical transaction that may be transacted by another trader in the**



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**organization at a different point in time. The same analysis is applicable to the FX market.**

*(2) Are there other foreign exchange derivatives that the Commission should except from consideration for counting towards the de minimis threshold?*

**The FX market should not be considered a "swap" market. The FX market already has certain exemptions for FX spot activity and the only difference between NDF and FX spot is the duration of time to effectuate delivery. As noted in response to the above referenced questions, FX spot can be offset against other transactions as Book Outs. As such, FX Spot and non-deliverable forwards should be exempt from the SD de minimis count as they are economic equivalents.**

*(3) Do NDFs pose any particular systemic risk in a manner distinct from foreign exchange swaps and foreign exchange forwards?*

**No. A custom of industry practice should not cause a physical contract to be treated as a derivative for Swap Dealer purposes.**

*(4) If the Commission were to except NDFs from consideration when calculating the AGNA for purposes of the de minimis exception, are there particular limits that the Commission should consider in connection with this exception?*

**No. Please keep to the KISS initiative.**

*(5) What would be the market liquidity impact if the Commission were to except NDFs from counting towards the de minimis threshold?*

**Additional liquidity would be introduced for the physical markets.**

*(6) Is there material benefit to the market in requiring participants that transact in NDFs to register with the Commission, while not imposing similar obligations on participants that transact in deliverable foreign exchange forwards? If so, what benefits accrue from imposing such registration obligations?*

**We do not see any benefit. Added regulation for a market place that did not cause the financial crisis is unnecessary and costly.**

*(7) Please provide any relevant data that may assist the Commission in evaluating whether to except NDFs from counting towards the de minimis threshold.*

**No Response is Provided.**



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*(8) Please provide any additional comments on other factors or issues the Commission should consider when evaluating whether to except NDFs from counting towards the de minimis threshold.*

**No Response is Provided.**

**Request for Comments: Cost-Benefit Considerations**
**(Questions 1 – 12, 83 Fed. Reg. at 27478)**

*(1) What are the costs and benefits to market participants associated with each proposed change? Please explain and, to the extent possible, quantify these costs and benefits.*

**The benefits of maintaining ($8 Billion) or expanding the de minimis exemption level for Swap Dealer registration will clearly result in more participation in the swap markets that will add to liquidity and allow those that need to hedge risk (short, medium and long term) the ability to receive tighter bid/ask quotes and more efficiently lay off risks that are not desired to manage as a primary business function. The costs associated with arbitrarily lowering the de minimis level to $3 Billion would result in further curtailment of the NFC Swaps markets and ultimately chill any interest in hedging medium to long term project finance tractions. The result of such a reduction in the de minimis threshold would likely be less liquidity for those seeking to hedge commercial risk, particularly of long-tenure transactions, greater price volatility, and less ability to manage and mitigate commercial risks, which could drive up costs for all US consumers of natural gas, electricity, oil, refined products and other NFCs.**

*(2) What are the direct costs associated with SD registration and compliance? What is the smallest notional amount of dealing swaps that an entity must enter into in order for the profitability of its swap dealing activity to exceed SD registration and compliance costs?*

**The costs of becoming a non-Bank SD are undefined and potentially unlimited due to the operational differences between a Bank SD and a non-Bank SD. Drafting capital requirements for non-Bank SDs based on the capital requirements normally applied to Banks disregards the fact non-banking businesses do not hold their assets in cash or other liquid assets, but are much more likely to own physical assets in which their capital has been invested. We encourage the Commission to recognize that basic difference between Bank SDs and non-Bank SDs in establishing capital requirements for non-Bank SDs. In addition, we have been advised that the cost for staffing in connection with hiring knowledgeable Sales representatives, IT staff, Risk staff, Legal and Compliance staff to effectively comply with the numerous SD regulatory compliance requirements could easily**



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**exceed $3 million per annum. Additionally, the costs of upgrading or purchasing software to comply with reporting, record keeping and valuations would exceed multiple millions in the first year of upgrade and additional millions in subsequent years due to contract costs.**

*(3) Are there are indirect benefits to registering as an SD? For example, does being a registered SD make an entity a more desirable counterparty? Are many of the benefits of transacting with an SD not relevant because many requirements are part of standard ISDA agreements?*

**We are not aware of any benefits. For market participants that are end-users in the NFC markets for energy commodity swaps, because such agreements were typically entered into for hedging purposes, the end-users and their counterparties essentially always entered into written agreements that memorialized each hedging transaction. Generally, that swap documentation involved an ISDA Master Agreement, Schedule, Credit Support Annex, and one or more Transaction Confirmations. As a result, most of the business conduct rules applicable to SDs simply codify the business practices that energy company end-users were already generally fulfilling.**

*(4) Besides the direct costs of registration and compliance, are there any indirect costs to becoming a registered SD? What are these costs?*

**Please see response #2 above.**

*(5) Would the entities with dealing activity between $3 billion and $8 billion incur similar registration and compliance costs as compared to entities with dealing activity above $8 billion? Would those dealers be impacted differently by those costs?*

**The level of dealing activity is not relevant to the aforementioned costs but the threshold event of becoming a SD will impose substantial additional costs on the entity providing swaps, which costs are often underestimated by the regulators.**

*(6) What are the costs and benefits to the public associated with each proposed change? Please explain and, to the extent possible, quantify these costs and benefits.*

**The direct benefit for the public to maintaining an $8 Billion de minimis threshold exception to SD registration is allowing each unregistered entity dealing in swaps to know, with some level of regulatory certainty, that it can enter into longer-tenured transactions without fearing that sometime within the next 2 to 3 years the Commission may dramatically reduce the de minimis exception threshold so that the unregistered entity will have to either exit one or more transactions or incur substantial expense associated with registration as an SD. By creating regulatory certainty, this unregistered entity can safely enter**



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**into medium and long term NFC swaps in support of structured finance markets to be effectively hedged in a competitive and cost effective fashion to allow both the upstream producers and the midstream construction of power plants, natural gas gathering, midstream processing and distribution facilities, crude and refined product distribution facilitates and pipelines, and LNG liquefaction and export facilities, that will reduce prices and delivery costs to the ultimate consumers.**

*(7) How does each proposed change affect the efficiency, competitiveness, and financial integrity of markets?*

**Regulatory and legal certainty is the corner stone of a well-functioning market that allows commercial parties to freely transact, enter into long-term contracts, and develop business models that will spur further competition and economic growth.**

*(8) How does each proposed change affect price discovery for the swap market?*

**As referenced above the deferred structured finance commodities markets have suffered greatly over the past 8 years due to the continued reduction in participation due to the threat of the lowering of the SD registration de minimis exception threshold from $8 billion to $3 billion and forcing firms to register at great cost with not assured upside profitability.**

*(9) How does each proposed change affect sound risk management for swap market participants?*

**Sound risk management is in the best interest of the firm transacting in the swap markets and thus the regulatory changes that enhance liquidity in the NFC swap markets should have a favorable impact on those end-users which follow best practices in relation to risk management.**

*(10) How does each proposed change affect other public interests that the Commission may elect to consider?*

**As indicated by the CFTC in the Proposed Rule, lowering the *De Minimis Exception* threshold would not materially increase the transactions subject to SD regulation although it could require more market participants to register as SDs unless they further reduce their dealing activity.[1] Because of the high costs associated with registration, many commercial commodity market participants are more likely to move out of swaps markets than to register as swap dealers as the result of a reduced *De Minimis Exception* threshold.[2] This would further**

[1] Proposed Rule at 27,450-27,454.

[2] In addition to the known costs of registration, including costs for IT infrastructure to deal with a panoply of dealer requirements, such as onboarding, disclosures and portfolio reconciliation, risk management, valuations, settlement and reporting, as well as significant compliance and legal staffing costs, there are still unknown costs. Market participants still are not able to fully account for the cost of



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**concentrate dealer activity in the hands of a few, thereby reducing competition and increasing systemic risk. This further concentration of dealing in a few large entities also means fewer swaps counterparties for physical commodity companies seeking to hedge.**

**In bringing legal certainty to the regulatory status of unregistered entities providing swaps with an AGNA that is less than $8 billion, the Commission should also consider increasing the incredibly low $25 million De Minimis Exception threshold applicable to all swap transactions with Special Entities that are not "utility operations-related swaps" with a "utility special entity." Rather than providing additional protections to such "special entities," a $25 million De Minimis Exception threshold merely ensures that no unregistered entity will enter into any swap transaction with a "special entity," that is not a "utility operations-related swap" with a "utility special entity." Rather than protecting small municipalities from manipulation and fraud, this rule simply ensured that any unregistered entity would not enter into a swap with a special entity.**

**This is not hypothetical harm. <u>We have seen the harmful results on liquidity when the *de minimis exception* threshold was set too low in the case of utility special entities</u>. The CFTC acknowledged the negative effect that the lower special entity *de minimis exception* threshold might have on utility special entities because of the decrease in the number of counterparties willing to execute hedges with them in an already illiquid market. As a result, the CFTC provided relief to allow entities to exclude from the special entity *de minimis exception* threshold swaps with utility special entities related to utility operations.[3] Under the amended rule, those swaps now are subject to the higher $8 billion *de minimis exception* threshold. The Commission issued the relief to ensure that special entities would have counterparties with which to trade because it recognized that utility operations-related swaps are an integral part in providing electricity and natural gas production and/or distribution continuously and at a manageable cost.**

**We would suggest that the Commission consider opening a notice of inquiry to ascertain whether "special entities" would like to see the $25 million de minimis exception threshold raised to a more realistic number that would encourage unregistered entities to provide swaps to such "special entities."**

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registration because the capital rule has yet to be finalized. Moreover, the limitations on eligible collateral under the margin rule only permit collateral in the form of highly liquid instruments (essentially cash and treasuries). This will be disproportionately more difficult for commercial commodity companies who do not have the same access as financial institutions to liquid collateral. These requirements pose a significant new cost on physical market participants who might have to register because of an arbitrary decrease in the *de minims* threshold.

[3] Exclusion of Utility Operations-Related Swaps with Utility Special Entities from *De Minimis* Threshold for Swaps with Special Entities, 79 Fed. Reg. 57,767 (Sept. 26, 2014).



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*(11) Has the Commission identified all of the relevant categories of costs and benefits in its preliminary consideration of the costs and benefits? Please describe any additional categories of costs or benefits that the Commission should consider.*

**The Commission has identified all that might be applicable.**

*(12) The Commission preliminarily believes that cross-border aspects of this rulemaking are similar to domestic applications. Do the costs and benefits of the proposed changes, as applied in cross-border contexts, differ from those costs and benefits resulting from their domestic application, and, if so, in what ways and to what extent?*

**Regulatory arbitrage is a real possibility and for the Commission to fail to act in a commercially reasonable fashion, firms may move operations offshore to a different jurisdiction that will allow for less costly compliance. The US was the beneficiary of such regulatory arbitrage when the impacts of EU regulation caused ICE Futures to transfer several products from its European exchange to its US exchange in order to remain competitive with other exchanges.**

## V. Endorsement of Comments by Others

The IECA fully endorses (i) the comments submitted jointly by the Edison Electric Institute and the Electric Power Supply Association (the "Joint Associations") and (ii) the comments submitted by the Commercial Energy Working Group ("Working Group"). The IECA, the Joint Associations and the Working Group all represent commercial firms in the energy industry that have a strong interest of ensuring that energy commodity markets provide market participants with the tools they need to meet the physical requirements of the energy industry and manage and mitigate the commercial risks faced by the commercial participants in the energy industry.

## VI. Correspondence Regarding These Comments

Please direct correspondence concerning this Request to:

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**CONCLUSION**

The IECA appreciates the opportunity to submit these Comments in response to the Commission's NOPR proposing modifications to the De Minimis Exception to the Swap Dealer Definition and respectfully requests that the Commission consider these Comments as it moves forward to improve its regulations affecting the commodity markets, market participants, and the fundamental benefits to our economy provided by well-functioning commodity markets. We would welcome the opportunity to discuss these Comments further should you require any additional information on any of the topics discussed herein.

Yours truly,
INTERNATIONAL ENERGY CREDIT ASSOCIATION


| /s/ Phillip G Lookadoo_ _ | /s/ Jeremy D Weinstein _________ |
| --- | --- |
| Phillip G. Lookadoo, Esq. | Jeremy D. Weinstein |
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