United States Senate
WASHINGTON, DC 20510

July 5, 2018

The Honorable J. Christopher Giancarlo
Chairman
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington, DC 20581

Dear Chairman Giancarlo:

We write in response to the recent notice of proposed rulemaking on the de minimis threshold for swap dealers. We are concerned that the recently proposed rule leaves the swap dealer registration threshold at $8 billion instead of allowing it to fall to $3 billion as laid out in the final rule from May 2012.

The Commodity Futures Trading Commission (CFTC) twice delayed the phase-in period of the $3 billion de minimis threshold. During the phase-in period, the CFTC staff produced a preliminary report and a final report on the de minimis threshold. Neither report provided sufficient data on non-financial commodity swaps to justify leaving the threshold at $8 billion instead of lowering it to $3 billion. This has not changed with the proposed rule.

The proposed rule says that relevant notional data "was not available for non-financial commodity ('NFC') swaps" and lists five challenges to calculating notional amounts for these swaps. Therefore, unlike for other types of swaps, notional data was not used in considering the proposed changes. The data that was available for non-financial commodity swaps shows significantly less coverage under an $8 billion threshold than in other categories. In justifying this, the proposed rule notes the "unique characteristics" of these swaps; however, the analysis provided indicates a series of assumptions and possibilities rather than concrete data.

Our concerns are furthered by the decision to delegate the determination for calculating the notional amount to the Director of the Division of Swap Dealer and Intermediary Oversight. This is an important component of ensuring an appropriate de minimis threshold. The commissioners should not remove themselves from that decision-making, particularly given that one of the challenges related to non-financial commodity swaps was a lack of standard calculation for the notional amount. Finally, in addition to leaving the threshold at $8 billion, the proposal also considers additional exceptions that would further weaken its efficacy and undermine the intent of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).

Given the lack of relevant data by notional amount for non-financial commodity swaps, please explain why it is necessary to remove the phase-in period for energy swap dealers. Please also provide the CFTC's plans to analyze the impact of the de minimis thresholds of $8 billion and $3 billion on the energy swaps market measured in terms of notional amount. Additionally, please share what steps the CFTC will undertake to ensure that energy market users – particularly consumers and other end users – are not harmed by the CFTC's potential decision to maintain a higher de minimis threshold, exempting more swaps from important protections provided by Dodd-Frank.

Thank you for your consideration of our concerns. We hope that in your deliberation of the final rule, you consider additional measures to protect consumers and ensure energy market participants are appropriately regulated.

Sincerely,

Dianne Feinstein
United States Senator

Maria Cantwell
United States Senator

Kamala D. Harris
United States Senator

Patty Murray
United States Senator

Jeffrey A. Merkley
United States Senator

Ron Wyden
United States Senator

CC: Commissioner Brian Quintenz
Commissioner Rostin Behnam