



January 19, 2016

Christopher J. Kirkpatrick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st St, N.W.
Washington, D.C. 20581

Re: Swap Dealer *De Minimis* Exception Preliminary Report

Dear Mr. Kirkpatrick:

The International Swaps and Derivatives Association, Inc. (“ISDA”) and the Securities Industry and Financial Markets Association (“SIFMA”) (together, the “Associations”)¹ appreciate the opportunity to submit these comments on the Swap Dealer *De Minimis* Exception Preliminary Report (the “Preliminary Report”) published by the Commodity Futures Trading Commission (“CFTC” or the “Commission”) regarding the definition of the term “swaps dealer” and the calculation of the *de minimis* threshold as required by Regulation 1.3(ggg)(4)(ii)(B).²

¹ Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 800 member institutions from 68 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's web site: www.isda.org.

SIFMA is the voice of the U.S. securities industry, representing the broker-dealers, banks and asset managers whose 889,000 employees provide access to the capital markets, raising over \$2.4 trillion for businesses and municipalities in the U.S., serving clients with over \$16 trillion in assets and managing more than \$62 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

² 17 CFR §1.3(ggg)(4)(ii)(B).

We appreciate and support the Commission’s decision to seek public comment given the impact that any reduction in the size of the *de minimis* threshold would have on the swap markets and especially on regional banks and dealers that facilitate access of smaller commercial end-users to swaps.

We believe it is important that the current \$8 billion threshold remain unchanged and note that maintaining the current threshold is consistent with Congressional intent, as evidenced the House Appropriations Committee’s report accompanying the recently-passed 2016 spending bill. The language in this report directs the Commission to maintain the current \$8 billion threshold or *raise* it even higher depending on comments received.³ In addition, given that the size of the overall swaps market is about \$500 trillion in notional value,⁴ the \$8 billion figure represents only a tiny fraction of the gross notional value of the market. Currently registered Swap Dealers and Major Swap Participants already account for over 80% of the gross notional in the swaps market.⁵

We further note that five years ago, the CFTC issued a proposed rule on the swap dealer *de minimis* threshold for comment. Hundreds of market participants voiced concern that the \$3 billion *de minimis* threshold for swap dealer registration was too low. After review of numerous comment letters and dozens of meetings with market participants, the Commission raised the threshold to \$8 billion.⁶ However, absent an affirmative CFTC action, the *de minimis* threshold is scheduled to be reduced automatically to \$3 billion at the end of 2017.

Although that date seems far away, the application of a significantly lower threshold actually may be a lot closer than December 2017. In October 2012 when firms globally began conducting their *de minimis* calculations, they all did so on a forward-looking basis beginning on October 12, 2012, the effective date of the CFTC “swap” definition. This was done in accordance with CFTC Rule 1.3(ggg)(4). This forward-looking calculation made sense, as the relevant rules were all newly-effective and were not applied retroactively because the *de minimis* calculation trigger was specifically established as the effective date of the “swap” definition. That said, since the relevant rules are no longer new and the swap definition has been effective for over three years, the language

³ “Swap Dealer *de Minimis*.--The Committee notes the Commission’s decision to provide for a public comment period on the study related to the Swap Dealer *de Minimis* level. While this is a positive step by the Commission in providing certainty to market end-users, it does not entirely comply with the letter of the directive in Public Law 113-235. The Committee directs the Commission to promulgate a rulemaking either maintaining the Swap Dealer *de Minimis* threshold at \$8,000,000,000, the amount currently set forth in regulation, or above this amount pursuant to the results of the study currently being conducted as well as stakeholder input, within 60 days of enactment of this Act.” H.R. Rep. No. 114-205, at 76 (2015) <https://www.congress.gov/114/crpt/hrpt205/CRPT-114hrpt205.pdf>

⁴ <http://www.cftc.gov/MarketReports/SwapsReports/L1GrossExpPT>

⁵ *Id.*

⁶ 77 FR 30596 (April 27, 2012) (Swap Dealer Definition Adopting Release).

in CFTC Rule 1.3(ggg)(4) that the *de minimis* threshold is calculated based on the person's dealing activities during the "preceding 12-months" could be read to apply a new and lower *de minimis* threshold retroactively, to activity engaged in during the 12-month period before the new *de minimis* threshold was established.⁷ The possibility of retroactive application of a \$3 billion *de minimis* threshold will cause a great deal of uncertainty among market participants. Market participants not wanting to trigger a retroactively applied \$3 billion *de minimis* threshold (that may or may not take effect in December 2017) will need to presume that the *de minimis* threshold is \$3 billion as of January 1, 2017. Such a presumption will require changes in market activity beginning on January 1, 2017, which will require devoting significant resources to legal entity planning, business strategy and counterparty engagement in early to mid-2016.

The Preliminary Report acknowledges significant limitations of the data the CFTC is currently receiving and does not provide any insight into the potential impact of the lower threshold on the swap markets.⁸ The Preliminary Report simply concludes that reducing the *de minimis* threshold to \$3 billion would result in up to 83 additional entities being subject to swap dealer registration,⁹ but fails to identify any sound regulatory policy for reducing the threshold¹⁰ or the costs associated with reducing the threshold and imposing unnecessary registration obligations on smaller financial institutions.

We reiterate our concern from five years ago that decreasing the size of the *de minimis* threshold would lead to a reduction in the number of swap market participants willing to engage in swap dealing activity with commercial end-users for fear of going above the \$3 billion threshold and triggering the swap dealer registration requirement. This will lead to reduced liquidity and a greater concentration of swaps transactions with larger financial institutions.

We note that this risk is far from theoretical. In October 2014, the Commission recognized the same risk when a narrower threshold for counterparties of government and

⁷ For instance, if the *de minimis* threshold is automatically lowered to \$3 billion on December 31, 2017, calculating whether a *de minimis* threshold was exceeded over the course of the "preceding 12-months" could be read to require market participants to apply a *de minimis* threshold that becomes effective on December 31, 2017 retroactively to activity dating all the way back to January 1, 2017. The retroactive application of a *de minimis* threshold change will cause a great deal of uncertainty among market participants; uncertainty that may not have been intended when the "preceding 12-months" language in CFTC Rule 1.3(ggg)(4) was drafted.

⁸ Swap Dealer *De Minimis* Exception Preliminary Report (November 18, 2015) at 11-13, http://www.cftc.gov/idc/groups/public/@swaps/documents/file/dfreport_sddeminis_1115.pdf

⁹ *Id.* at 49.

¹⁰ Statement of Commissioner J. Christopher Giancarlo Swap Dealer De Minimis Exception Preliminary Report (November 18, 2015), <http://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement111815> ("The Report provides no reason to believe that the threshold has anything to do with optimizing the safety, soundness, liquidity or vibrancy of U.S. swaps markets.").

municipal utilities ("utility special entities") led to a decreased number of available counterparties and diminished liquidity. As a result, the Commission increased the *de minimis* level to the same \$8 billion dollar threshold that currently applies to all swaps.¹¹ A lower *de minimis* threshold for swap dealer registration would have the same effect, not only for utilities, but all companies that use swaps to manage risk.

Additionally, it is crucial to assess the full impact of other regulations, including the upcoming capital and liquidity requirements and the overall structural changes to the swap markets, before making any threshold adjustments. A number of the new rules will be phased in over time through 2019. Presently, it is impossible to assess the overall costs of complying with the new regulatory regime. Even a slight reduction in the *de minimis* threshold will incur additional compliance costs for smaller institutions. In this regard we would like to emphasize that the 109 currently registered Swap Dealers incur substantial costs in personnel, time and expense to comply with numerous CFTC requirements regarding recordkeeping, reporting, clearing, business conduct, trading and compliance.

Based on the above, we urge the Commission to move quickly to assure market participants that the *de minimis* threshold will not be reduced and retroactively applied so market participants can avoid the substantial uncertainty associated with not knowing when and whether to devote resources to planning for the application of a possible automatic *de minimis* threshold reduction. We believe it is critical that the Commission promptly issue a notice of proposed rulemaking that would amend Rule 1.3(ggg)(4) by removing references to a \$3 billion *de minimis* threshold, the phase-in period, and the phase-in period automatic termination date. This will allow the Commission to consider, if it so chooses, any potential future adjustments to the *de minimis* threshold via an orderly rulemaking notice and comment process, whereby it can consider complete, robust, and accurate data without the prospect of a looming deadline established long before the Commission had any meaningful data to consider.

Moreover, we caution the Commission against proposing alternative approaches to calculating the *de minimis* exception. Due to the lack of quality data, the Preliminary Report cannot evaluate the impact of modifying the threshold on non-financial commodities. Instead the Preliminary Report relies on "alternate indicators of dealing activity,"¹² that it acknowledges are not determinative in identifying dealing activity. We caution the Commission that any determination to modify the *de minimis* threshold that is not supported by reliable data will create uncertainty and disruption in the swap markets

¹¹ 77 FR 57767 (Sept. 26, 2014).

¹² See *supra* note 4 at 19-20 (The alternative indicators are the number of counterparties that a firm had over a 12-month period and the firm's total number of transactions over that same timeframe).

as some firms (especially firms that don't engage in a high volume of swaps trading) will decide to drop out of the market rather than incur additional expenses in adopting a new calculation methodology.

The Associations appreciate the opportunity to provide comment and look forward to working with the Commission as it continues to review and analyze the issues discussed in the Preliminary Report.

Sincerely,



Christopher D. Young
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ISDA



Kyle Brandon
Managing Director
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