August 13, 2018

DE MINIMIS EXCEPTION
TO THE SWAP DEALER DEFINITION
- RIN 3038-AE68

Via Electronic Submission

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

RE: Notice of Proposed Rulemaking, De Minimis Exception to the Swap Dealer Definition, 83 Fed. Reg. 27444 (June 12, 2018) (RIN 3038-AE68)

Dear Mr. Kirkpatrick:

The National Rural Electric Cooperative Association ("NRECA") and the American Public Power Association ("APPA") (collectively referred to as the not-for-profit or "NFP Electric Associations"),[1] respectfully submit these comments in response to the Commodity Futures Trading Commission ("CFTC" or "Commission") Notice of Proposed Rulemaking, De Minimis Exception to the Swap Dealer Definition, 83 Fed. Reg. 27444 (June 12, 2018) (RIN 3038-AE68) (the "NOPR").

The NFP Electric Associations have been active participants in rulemakings implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"),[2] which expanded the Commission's jurisdiction to include regulation of "swaps," and particularly in the rulemakings regarding the definition of "swap dealer," and the swap

[1] See Attachment A for a description of the members of each of the NFP Electric Associations. The comments contained in this filing represent the comments and recommendations of the NFP Electric Associations, but not necessarily the views of any particular member of any NFP Electric Association. The NFP Electric Associations are authorized to note to the Commission the involvement of ACES in preparing these comments, and to indicate its full support of these comments and recommendations. ACES provides commercial risk management and energy advisory and operations services for electric cooperatives and government-owned electric utilities in various regional transmission organization and independent system operator ("RTO/ISO") regions of North America.

[2] Pub.L. No.111-203 (2010)

dealer de minimis threshold (the "SD De Minimis Threshold").[3] The NFP Electric Association members are not "swap dealers," "major swap participants," "financial entities," or otherwise registered with or regulated by the Commission. The NFP Electric Association members do not engage in swap dealing activities, do not trade or speculate in (*i.e.*, buy and sell to profit from a change in commodity prices) commodities, swaps or other commodity interests, and do not buy, sell, "hold positions in," invest in or trade such commodities or commodity interests as financial instruments or investment assets.

The NFP Electric Association members are "non-registrants," "non-swap dealers/major swap participants ("non-SD/MSPs")," and are not "financial end-users." They are "end-users" and "commercial end-users,"[4] as such terms are used in various Commission rulemakings, interpretations and guidance. The NFP Electric Association members are in the electric utility industry, not the financial markets industry. They buy and sell energy and energy-related commodities (under spot and forward contracts and nonfinancial commodity trade options) as inventory and supplies, or as products and services – inputs and outputs -- for electric operations. They also enter into swaps, or execute futures contracts or exchange-traded options, derived on nonfinancial energy and energy-related commodities to hedge or mitigate commercial risks that arise in the ordinary course of ongoing electric operations.

The NFP Electric Associations and their members have a direct and significant interest in the Commission amending Rule 1.3(ggg)(4) as proposed in the NOPR.[5] The members rely on robust markets for the types of customized utility operations-related swaps that are cost-effective methods to hedge or mitigate commercial risks arising from ongoing electric utility operations in various regions of the country. In its region, each NFP Electric Association member relies on a diversity of swap counterparties for its transactions, including registered swap dealers, non-registrants engaged in a regular business of swap dealing activity under the SD De Minimis Threshold or ancillary to other commercial businesses, and other commercial end users hedging

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[3] See Attachment B for a list of NFP Electric Association comment letters in the Commission's rulemaking dockets regarding the "swap dealer" definition and the SD De Minimis Threshold, with links to the Commission's website.

[4] Although this term is not defined in the Commission's rules, we use the term to mean a nonfinancial (or commercial) entity that enters into a swap to hedge or mitigate commercial risks (as such phrase is used in CEA2(h)(7) and CFTC Regulation 50.50(c)) arising from its ongoing business operations.

[5] Congress did not intend the Commission to regulate commercial end-users that enter into swaps to hedge or mitigate commercial risks in the same way it regulates financial institutions, and financial markets traders, dealers and speculators trading in the financial markets. Congress intended the Commission to protect commercial end-users' continued access to NFC swaps and other derivatives as cost-effective commercial risk management tools. See the letter from Chairmen Christopher Dodd and Blanche Lincoln to Chairmen Barney Frank and Colin Peterson, 156 Cong. Rec. H5248 (June 30, 2010) ("Dodd-Lincoln Letter") letter expressing clear and concurrent Congressional intent (available at http://online.wsj.com/public/resources/documents/dodd-lincoln-letter070110.pdf). The Dodd-Lincoln Letter discusses the "swap dealer" definition and the SD De Minimis Threshold, and cautions regulators against imposing indirect burdens on end-users. "Congress does not intend to regulate end-users as...Swap Dealers just because they use swaps to hedge or manage the commercial risks associated with their business." "Congress incorporated a de minimis exception to the Swap Dealer definition to ensure that smaller institutions that are responsibly managing their commercial risk are not inadvertently pulled into additional regulation." And "[r]egulators must carefully consider the potential burdens that Swap Dealers…may impose on end user counterparties – especially if those requirements will discourage the use of swaps by end users or harm economic growth."

commercial risks arising from their own operations. Regulatory uncertainty about the SD De Minimis Threshold and how to measure swap dealing activity has resulted in fewer available swap counterparties, reduced price competition and limited customization of the terms of swaps, particularly in smaller regional markets where global financial institution swap dealers choose not to participate without significant profit potential.

Fixing the de minimis threshold at $8 billion will provide needed regulatory certainty for counterparties that maintain or might consider starting a business of swap dealing in one of these illiquid regional swaps markets. Clarifying that hedging swaps can be excluded from ongoing swap dealing activity, for purposes of the SD De Minimis Threshold, will provide needed regulatory certainty for swap counterparties that may be entering into such swaps to hedge commercial risks of their own ongoing operations or offering such swaps ancillary to their primary utility or energy business in a particular geographic region. Regulatory certainty that increases the number of swap counterparties and promotes liquid markets is good for all commercial market participants, including the NFP Electric Association members.

The NFP Electric Associations respectfully submit the following comments:

- We support the Commission fixing $8 billion as the de minimis threshold for the level of swap dealing activity that would require an entity to register as a "swap dealer," measured by the aggregated gross notional amount ("AGNA") of swaps entered into over a 12-month period as part of a regular business of swap dealing activity.

- We recommend that the Commission provide further guidance, rather than establish or determine appropriate methodologies for calculating the AGNA of swap dealing activity for any group, category or type of nonfinancial commodity ("NFC") swap, and we do not agree that the Commission should delegate the authority to establish or determine methodologies for determining AGNA for a group, category or type of NFC swap to its Division of Swap Dealer and Intermediary Oversight ("DSIO").

- We strongly support the Commission's proposal to exclude from consideration as part of an entity's "swap dealing activity," for purposes of the SD De Minimis Threshold, swaps that are entered into for the primary purpose of hedging, as further clarified and limited in proposed Regulation 1.3(ggg)(4)(D).

I. BACKGROUND

The statutory definitions of "swap" and "swap dealer" were enacted as section 721 of the Dodd-Frank Act ("DFA Section 721")[6]– a cornerstone of the CFTC's new and expanded regulatory authority over the trading markets for "swaps." In the Dodd-Frank Act, Congress also

[6] The definitions are found in Section 1a(47) and 1a(49) of the Commodity Exchange Act (the "CEA") and are more fully defined in the definition of "swap" and "swap dealer" in CFTC Regulation 1.3.

directed the CFTC and the Securities and Exchange Commission (the "SEC") to engage in a joint rulemakings, in consultation with the Federal Reserve Board, to further define the terms "swap" and "swap dealer"[7] -- due to the potential overlap in jurisdiction over certain financial commodity derivatives, which were to be regulated by the CFTC, and "security-based swaps," which were to be regulated by the SEC.

In May 2012, the two Commissions issued an adopting release (the "Swap Dealer Release")[8] and the Commission published Regulation 1.3(ggg), further defining the term "swap dealer." The Commission also provided, in section (4) of Regulation 1.3(ggg), for the SD De Minimis Threshold whereby an entity is not required to register with the CFTC as a "swap dealer" unless it meets a certain level of swap dealing activity (the "2012 Swap Dealer Rule"). Regulation 1.3(ggg)(4), as initially adopted by the Commission, also contained a much lower sub-threshold of $25 million for dealing swaps entered into with a "special entity" counterparty (the "Special Entity Sub-Threshold').

In July 2012, certain of the NFP Electric Associations identified a significant issue in the 2012 Swap Dealer Rule, and in the Special Entity Sub-Threshold in particular. They submitted a petition jointly with the American Public Gas Association (collectively, the "USE Petitioners") to the Commission requesting an amendment to Regulation 1.3(ggg)(4) to exclude from the $25 million Special Entity Sub-Threshold "utility-operations related swaps" that a dealer enters into with "utility special entities"[9] A key concern of the USE Petitioners was that, due to the customized nature of such utility operations-related swaps, such swaps are typically available only from a relatively limited number of counterparties in each geographic region of the country (each such counterparty, an "Available USE Counterparty").[10] The USE Petitioners argued that the $25 million Special Entity Sub-Threshold was far too low and, as a result, drove counterparties out of the small regional markets for customized swaps due to the regulatory risk of having to register as a swap dealer, which constituted an unnecessary burden on the utility special entities by limiting their access to these commercial risk hedging swap transactions.

In response to the USE Petitioners concerns, the Commission adopted an amendment to Regulation 1.3(ggg)(4) (the "USE Rule Amendment"). In proposing the USE Rule Amendment, the Commission noted that the low Special Entity Sub-Threshold posed a significant regulatory burden on Available USE Counterparties, by deterring potential Available USE Counterparties

[7] See section 712(d) of the Dodd-Frank Act.

[8] Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant," 77 Fed. Reg. 30596 (May. 23, 2012) (the "Swap Dealer Release")

[9] Petition for Rulemaking to Amend 1.33(ggg)(4) – Special Entity Sub-Threshold regarding the Entity Definitions Final Rule, 77 Fed. Reg. 30,596 (July 12, 2012). See item 5 on Attachment B for the link to the Commission's website.

[10] The USE petitioners presented documentation and testimony to support their concern, and to explain that there are typically a different, but limited, group of Available USE Counterparties in each geographic market for a particular type of utility-operations related swap. See item 6 on Attachment B for letters of support for the Petition, and more documentation presented supplemental to the April 3, 2014 Public Roundtable at item 7 on Attachment B, with links to the Commission's website.

from transacting with them, thus reducing competition and increasing transaction costs for utility special entities entering into commercial risk hedging swaps.[11] The USE Petitioners pointed out that, if an Available USE Counterparty assesses the regulatory burdens or risks of certain swap dealing transactions as comparatively higher than its other swap dealing activities or business activities, due to concerns over having to register as a swap dealer, the Available USE Counterparty will simply walk away (or limit the counterparties it deals with or the types of swaps it offers as part of swap dealing activity) – and pursue other business activities where the profits outweigh the costs and burdens, including the risk of regulatory uncertainty.[12]

II. COMMENTS

The 2012 Swap Dealer Rule contained an automatic drop from $8 billion to $3 billion in the SD De Minimis Threshold at Regulation 1.3(ggg)(4)(i)(A) after what the Regulation described as a phase-in period to allow the Commission time to collect and analyze data relative to swaps and swap dealing activity. Commercial energy trade associations and commercial market participants pointed out in prior comment letters and at Public Roundtables and the Energy and Environmental Markets Committee meetings that the $3 billion SD De Minimis Threshold was too low for nonfinancial energy commodity swap markets where commodity prices are volatile and notional amounts of longer tenured swaps may be considered comparatively high. Commenters also pointed out the regulatory uncertainty created by the automatic drop, the lack of clarity around how to calculate the amount of swap dealing activity (AGNA for certain nonfinancial energy commodity swaps) for purposes of monitoring compliance with the SD De Minimis Threshold, and whether particular NFC swaps are or are not considered part of an entity's regular business of swap dealing activity.[13] As a result of such regulatory uncertainty, other commercial energy companies (end-users), including the NFP Electric Associations' members, have seen available counterparties that previously offered such swaps stop offering such swaps.[14] By contrast, regulatory certainty will promote robust swaps markets and robust swaps markets benefit all market participants, particularly commercial end-users.[15]

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[11] Because the utility special entities are government-owned, there are no shareholders to bear these additional transaction costs. As a result, these regulatory costs pass through to the utility special entity's business and residential electric customers as dollar-for-dollar increases in utility rates. For more discussion of this point, see the comments submitted supplemental to the April 3, 2014 Public Roundtable on the Special Entity De Minimis Threshold issue, at item 7 on Attachment B with a link to the Commission's website.

[12] The NOPR confirms in the NOPR that the data indicates that some entities whose primary business activities are non-financial in nature and that trade in physical commodity markets, and that are likely engaged in dealing activity for such physical or non-financial commodity ("NFC") swaps but are not registered as swap dealers, may make the legitimate business decision to reduce NFC swap dealing activity to avoid registration and its related costs. See NOPR at 27457.

[13] See the comment letters cited in the NOPR at 27457, 27462 and 27464.

[14] Id.

[15] See NOPR at 27463. See also the Dodd-Lincoln Letter at fn 5.

A. WE SUPPORT FIXING $8 BILLION AS THE DE MINIMIS THRESHOLD FOR SWAP DEALING ACTIVITY THAT WOULD REQUIRE AN ENTITY TO REGISTER AS A "SWAP DEALER."

The Commission describes the regulatory policy reasons behind the de minimis threshold in the NOPR.[16] When the Commission first published the 2012 Swap Dealer Rule, an automatic drop from $8 billion to $3 billion was included because the Commission did not have data on swaps or swap dealing activity that would enable it to fix the de minimis threshold with the necessary certainty that it would not be too high or too low. The 2012 Swap Dealer Rule allowed the Commission time to collect and analyze the necessary swap data.[17] In the NOPR, the Commission analyzes the swap data now available to it,[18] and provides its rationale for fixing the $8 billion level (eliminating the $3 billion from consideration, as well as declining at this time requests to increase the threshold above $8 billion or make other adjustments by asset class, category or other risk metric associated with swap dealing activity). The Commission provides a reasoned analysis of available swap data, the regulatory burdens and benefits of the $8 billion SD De Minimis Threshold and the risks of lowering that threshold.[19] The Commission states its conclusion that "decreasing the SD De Minimis Threshold would negatively affect swap market access and liquidity for commercial end-user counterparties of currently unregistered entities that are active in NFC swaps."[20]

The NFP Electric Associations support fixing the $8 billion level, rather than a higher or lower threshold, and commend the Commission for its analysis. In particular and based on the utility special entities' experience with the Special Entity Sub-Threshold, the NFP Electric Associations agree that a threshold lower than the currently applicable $8 billion would likely eliminate available counterparties in regional markets for the customized operations-related swaps that the members need to cost-effectively hedge or mitigate commercial risks arising from their ongoing electric operations. If the $8 billion were to be reduced, the result would be reduced swap dealing activity by entities that have chosen to maintain their swap dealing

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[16] NOPR at 27450.

[17] The Commission twice extended the date for the automatic drop from $8 billion to $3 billion (81 Fed. Reg. 71605 and 82 Fed. Reg. 50309) to enable Commission staff to complete its data analysis, and give market participants sufficient time to begin preparing for a change, if any, to the SD De Minimis Threshold. The NFP Electric Associations encourage the Commission to finalize this rulemaking promptly to avoid the continuing regulatory uncertainty.

[18] It is important to note that the NOPR acknowledges that reliable AGNA data was not available to the Commission for NFC swaps, given the limitations on swap reporting data elements discussed in the NOPR at 27449.

[19] The Commission is acting under its authority in CEA Section 1a(49)(D) (the definition of swap dealer) to promulgate regulations to establish factors with respect to the making of this determination. This clause in the definition of "swap dealer" is identical to section 3(a)(71)(D) of the Securities Exchange Act, which were themselves added by the Dodd-Frank Act. Each allows "the Commission," not "the Commissions" to establish factors with respect to making the determination to exempt a de minimis quantity of swap dealing. See 77 Fed. Reg. 30634 fn. 464.

[20] See NOPR at 27457.

business without the cost of registering as swap dealers, and commercial end-users would face fewer counterparties, incur higher costs and be offered less customized swap terms and shorter tenors.[21] As the NOPR states: "much of the swap dealing activity by these smaller entities, whose operations represent less risk to the global financial system, serves small or mid-sized end-users in their localized markets. Often, the end-users served by these entities do not have trading relationships with larger financial entity [swap dealers], and then end-users rely on these small to mid-sized and/or non-financial entities to access liquidity provided by larger dealers."[22]

B. WE RECOMMEND THAT THE COMMISSION PROVIDE FURTHER GUIDANCE, RATHER THAN ESTABLISH OR DETERMINE APPROPRIATE METHODOLOGIES FOR A DEALER CALCULATING THE AGGREGATED GROSS NOTIONAL AMOUNT ("AGNA") OF ITS SWAP DEALING ACTIVITY IN A PARTICULAR GROUP, CATEGORY OR TYPE OF NFC SWAPS, AND WE DO NOT AGREE THAT THE COMMISSION SHOULD DELEGATE THE AUTHORITY TO DETERMINE METHODOLOGIES FOR CALCULATING AGNA FOR A GROUP, CATEGORY OR TYPE OF NFC SWAP TO ITS DIVISION OF SWAP DEALER AND INTERMEDIARY OVERSIGHT ("DSIO").

Fixing the $8 billion threshold is just one aspect of regulatory certainty that would benefit the markets for customized nonfinancial energy commodity swaps, including commercial end-users like the NFP Electric Association members. For commercial entities that engage in some level of swap dealing activity in one or more categories or types of NFC swaps, another aspect of the uncertainty is how to calculate the dollar or dollar-equivalent quantity or amount of a swap, when measuring "swap dealing activity" against the $8 billion threshold – to determine if the swap dealing activity is at $2 billion or $5 billion or $7.99 billion during a rolling 12-month measurement period.[23] The NFP Electric Association can appreciate the need for those engaged in such dealing activities to understand such quantitative methodologies, when the regulatory consequences for exceeding the SD De Minimis Threshold are so significant.[24]

The NFP Electric Associations agree that the Commission should be guided by standard practice among dealing entities for a particular NFC swaps as to the methodologies for calculating AGNA for that specific group, category or type of NFC swap.[25] Various industry

[21] The NOPR cites comments from market participants that some entities would reduce or stop dealing activity if the SD De Minimis Threshold is reduced below $8 billion. See the NOPR at 27457, fn. 104.

[22] Id.

[23] The NFP Electric Associations are not providing comments on particular methodologies or whether they are or are not "standard industry practice" for dealers of any specific group, category or type of NFC swap. The NFP Electric Association members, and most commercial end-users, quantify the value and measure the costs of a particular swap only in relation to how well the swap hedges or mitigates the specific commercial risks of the end-user's operations.

[24] Registration as a swap dealer is not a regulatory result that any entity would want to risk by inadvertently tripping over the SD De Minimis Threshold.

[25] See NOPR at 27464-27465. Standard practice among those dealing in financial swaps, agricultural commodity swaps or metals swaps may not be appropriate methodologies for calculating AGNA for crude oil or natural gas swaps or, potentially, for electricity swaps.

groups' letters and statements, as well as the DSIO FAQ Guidance[26] and the Technical Guidance[27] are useful for the Commission and its staff, and to dealers or those considering swap dealing activity in certain NFC swap markets, to understand commonly-held views on calculating certain aspects of AGNA for a particular industry or type of NFC swaps.[28] NFC swaps are more complex and customized than financial commodity swaps,[29] and certain characteristics may be measured or quantified differently for AGNA purposes, depending on the commercial industry and a swap dealer's business model and risk management policies.

However, the NFP Electric Associations respectfully do not agree that it is the Commission's role to establish, or to approve, a standard practice for a commercial industry, or to determine appropriate AGNA methodologies that an entity engaged in or considering swap dealing activity must use for a particular group, category or type of NFC swaps. We recommend, instead, that the word "determine" in the proposed new paragraph (4) (vii) of the "swap dealer" definition be changed to "provide guidance with respect to".

Moreover, the NFP Electric Associations also disagree with the Commission's proposal to delegate authority to establish or determine methodologies for determining AGNA for a group, category or type of NFC swap to DSIO. Quantifying an entity's swap dealing activity is an integral part of monitoring and measuring its ongoing swap dealing activity against the SD De Minimis Threshold. The methodologies applicable to a particular group, category or type of NFC swap should be developed by dealers in the industry and markets where such NFC swaps are transacted. Such methodologies should not be established or determined by regulators or staff, without notice, an opportunity for public comment and a careful consideration of any potential negative impacts on either entities that conduct dealing activities in such NFC swap categories or the end-users of that particular group, category or type of NFC swap.[30]

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[26] See NOPR at 27464.

[27] Id.

[28] The Commission acknowledges in the NOPR that there is variation on some aspects of the AGNA methodology that is appropriate, even among dealers with respect to a particular group, category or type of NFC swap. NOPR at 27465. Standard practice may not be universal practice, even within the same industry. Standard industry practice may also be an evolving standard, particularly with respect to new categories and types of swap products in the future. See NOPR at 27465.

[29] NOPR at 27449.

[30] NFC energy commodities and utility operations-related swaps entail significant price volatility and constraints on availability/deliverability (and storage) of the underlying commodity (resulting in periodic, regional scarcity pricing). For these reasons, each utility operations-related swap may have a significant and fluctuating "notional amount." One or two such swaps with one or two commercial end-user counterparties could easily create the potential for entity engaged in swap dealing activity to exceed the SD De Minimis Threshold. Consequently, that swap counterparty would be reasonably expected to maintain the AGNA of its swap dealing activities comfortably below the rolling 12-month threshold.

C. WE SUPPORT THE COMMISSION'S PROPOSAL TO EXCLUDE FROM CONSIDERATION OF AN ENTITY'S "SWAP DEALING ACTIVITY" THOSE SWAPS THAT ARE ENTERED INTO FOR THE PRIMARY PURPOSE OF HEDGING, AS FURTHER DESCRIBED IN PROPOSED REGULATION 1.3(ggg)(4)(D).

The NFP Electric Associations support the Commission's proposal to add a new section (4)(D) to Regulation 1.3(ggg) to exclude from an entity's swap dealing activity, solely for purposes of the SD De Minimis Threshold calculation, swaps that are entered into for the primary purpose of hedging. Subsections (4)(D)(1) through (5) of the exclusion identifies several important limitations on the "hedging" concept that underlies the exclusion. Those limitations are sufficiently clear that an entity engaged in swap dealing activity should be able to operationalize the exclusion and determine, at the time it enters into a swap as part of a regular business of swap dealing activity, whether the AGNA of that swap must be counted against the rolling 12-month SD De Minimis Threshold (as a "dealing swap"), or not counted because it is a commercial risk "hedging" swap. This regulatory clarity will enhance the ability of an entity to accurately measure its swap dealing activity on an ongoing basis against the SD De Minimis Threshold.

First, in subsection (4)(D)(1), the primary purpose for entering into the swap must be to reduce or otherwise mitigate (in the vernacular of commercial entities, to "hedge") one or more specific risks. Subsection (4)(D)(1) provides a non-exclusive litany of some of the types of commercial risks that might arise in the ordinary course of a nonfinancial (or commercial) business operation. The litany of risks is consistent with the types of commercial risks discussed by commercial energy industry groups, including the NFP Electric Associations, in comment letters and at the EEMAC meetings. This list includes many of the commercial risks that an end-user of a swap (not a financial entity) might be hedging or mitigating by entering into a swap for which that end-user would utilize the exception to clearing under Regulation 50.50(c).[31]

Second, subsection (4)(D)(2) provides that the person (that wants to exclude a swap from its swap dealing activity for purposes of the SD De Minimis Threshold calculation) is not a price maker and does not receive a bid-ask spread, fee, commission or other compensation for entering into the swap. To the extent that acting as a price maker, or receiving these types of compensation, when entering into a swap would be characteristic of swap dealing activity, and accommodating the need of another for the swap rather than hedging commercial risks arising from the entity's own ongoing operations, the NFP Electric Associations concur with this limitation. But it would provide clarity if the Commission would confirm in its adopting release that this is the reasoning behind this subsection.

Subsection (4)(D)(3) and (4)(D)(4) are also consistent with the Commission's Regulation 50.50(c), and describe the characteristics of an end-user "hedging or mitigating commercial risks" of its ongoing operations by entering into a swap. Such commercial risk hedging swaps

[31] See the end-user exception to mandatory clearing of swaps, included in CEA 2(h)(7) by the Dodd-Frank Act. Concurrently with providing the Commission with the authority to construct a regulatory regime for swaps, Congress instructed the Commission to preserve end-users ability to hedge or mitigate commercial risks. CFTC Regulation 50.50(c) implemented that statutory provision.

should be excluded from swap dealing activity for purposes of the SD De Minimis Threshold calculation.

There are several "hedging" concepts used in different contexts in the CFTC's regulations and guidance relative to futures contracts (its pre-Dodd-Frank Act regulations and guidance).[32] But in the Dodd-Frank Act amendments to the CEA, Congress recognized that swaps trade bilaterally as commercial contracts, and that commercial entities that are end-users of swaps engage in a very specific type of "hedging" – commercial risk hedging. Congress directed the Commission to preserve the end-user's ability to cost-effectively enter into swap transactions "to hedge or mitigate commercial risks." When doing so, the end-user can elect not to clear the swap it enters into, even if the Commission has put in place a clearing mandate for the asset class or category of swaps. When doing so, the [non-financial, or commercial] end-user does not need to post or hold collateral or margin with respect to such swap.

Commercial risks are unique to the particular business industry and enterprise of the end-user, as well as the end-user's assets, liabilities, processes (inputs and outputs), suppliers, customers and financial circumstances. A commercial end-user exercises its business judgment when it enters into a swap,[33] and if the swap does not appropriately hedge or mitigate commercial risks to which the end-user's operations are subject, the end-user's managers or owners bear the consequences. By contrast, a swap dealer (which is acting as a financial entity that offers to buy or sell swaps, and seeks profit from the bid-ask spread in conducting its regular business of swap dealing activity), and if the dealing activity is above a de minimis threshold, may represent interconnected systemic risk to the global financial markets. In measuring swap dealing activity, and in distinguishing dealing swaps from commercial risk hedging swaps (which are not to be considered swap dealing activity for the purpose of the SD De Minimis Threshold), the subsections (4)(D)(1) to (4)(D)(5) are appropriately consistent with Regulation

[32] For a useful table presenting some of the differences between the "hedging" concepts in the CEA before and after the Dodd-Frank Act amendments adding Commission authority over "swaps," see Duke Energy's comment letter, dated February 10, 2014, in response to the Commission's NOPR regarding Position Limits for Derivatives (RIN 3038-AD99). To understand the differences, it is useful to consider the separate questions of who(?) is hedging what(?), and when(?) and why(?) is the hedging purpose being tested. The concepts involved when *a financial trader* hedges its *positions in commodity interests or investment contracts against other positions*, tested *on an ongoing basis* to reduce *systemic risk of excessive speculation or concentration*, are different from the concepts involved when a *commercial business* entity *enters into a bilateral swap* to hedge *commercial risks* that arise in the ordinary course of its business operations, in order *to reduce or mitigate such commercial risks*. Congress, in the Dodd-Lincoln Letter cited in fn. 5 clearly recognized the difference. In the CFTC's speculative position limits rules, the rules are designed to measure (and then limit) excessive "positions" in certain nonfinancial commodities and related commodity interests that are held on an ongoing basis by a trader for speculative purposes. In that context, the rules exclude from the applicable calculation "bona fide hedging" positions or transactions of specific enumerated types. Testing against the limits is ongoing, and the risks that a speculator hedges are financial market risks. If the hedging is "bona fide," there is a commercial or other risk acceptable or approved by the regulator being hedged. Excessive speculative trading positions in nonfinancial commodities can harm both businesses that need such commodities and hedging products, and to the global financial system. Consequently, the Commission analyzes, measures and limits speculative positions by regulation, on an ongoing basis.

[33] There is not an ongoing test or measurement of "positions" for the end-user hedging exception relative to swaps, as there is with the accounting concept of hedging or "hedge effectiveness." Nor is the statutory concept of "commercial risks" confined to an enumerated list.

50.50, focusing on the purpose of the swap at the time the parties enter into the swap, relative to commercial risks of the counterparty's non-dealing business operations.

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Many of the 2500 members of the NFP Electric Association are "small entities," as such term is defined and described (for utility entities) for purposes of the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act (collectively, "SBREFA"). SBREFA requires Federal agencies to take steps to collect input from small entities on regulations, and to determine whether a rule is expected to have a significant economic impact on a substantial number of small entities.[34] Moreover, Federal agencies are required to identify alternative regulatory approaches to reduce regulatory burdens on small entities such as businesses, small governmental jurisdictions and non-profit organizations.[35] The NFP Electric Associations appreciate the Commission's consideration, in the NOPR and in its ongoing rulemaking, of the ways in which its regulation of swap dealers can be streamlined and clarified to the benefit of small entities, including commercial end-users such as the NFP Electric Association members, that enter into customized swaps in illiquid regional markets solely to hedge or mitigate commercial risks arising from ongoing operations.

The NFP Electric Associations appreciate the opportunity to submit these comments on the NOPR, and look forward to continuing to work with the Commission to streamline and clarify application of its swap rules.

[Signature page to follow]

[34] SBREFA incorporates by reference the definition of "small entity" adopted by the Small Business Administration (the "SBA"). Using the SBREFA criteria for small business size regulations, the vast majority of NRECA's 900 members meet the definition of "small entity" (13 C.F.R. §121.201, as modified effective January 22, 2014. See 78 Fed. Reg. 77343 (December 23, 2013)). Only three generation and transmission cooperatives would be expected not to meet the definition. In addition, most of APPA's more than 2,000 members also meet the definition of "small entity."

[35] As part of the Commission's overview of its post-Dodd-Frank Act rulemakings implementing its regulatory jurisdiction over NFC swaps, the NFP Electric Associations' respectfully request that the Commission conduct the required SBREFA analysis for the benefit of "small entities," including the NFP Electric Associations' members.

SIGNATURE PAGE

DE MINIMIS EXCEPTION TO THE SWAP DEALER DEFINITION - RIN 3038-AE68

The NFP Electric Associations appreciate the opportunity to submit recommendations to be considered in connection with the Notice of Proposed Rulemaking with respect to the De Minimis Exception to the Swap Dealer Definition (RIN 3038-AE68).

Respectfully submitted,

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cc: Honorable J. Christopher Giancarlo, Chairman
Honorable Brian Quintenz
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ATTACHMENT A

DESCRIPTION OF THE NFP ELECTRIC ASSOCIATIONS

The National Rural Electric Cooperative Association (NRECA) is the national service organization for America's electric cooperatives. The nation's member-owned, not-for-profit electric cooperatives constitute a unique sector of the electric utility industry – and face a unique set of challenges. NRECA represents the interests of the nation's more than 900 rural electric utilities responsible for keeping the lights on for more than 42 million people across 47 states. Electric cooperatives are driven by their public service purpose to power communities and empower their members to improve their quality of life. Affordable electricity is the lifeblood of the American economy, and for 75 years electric cooperatives have been proud to keep the lights on. Because of their critical role in providing affordable, reliable, and universally accessible electric service, electric cooperatives are vital to the economic health of the communities they serve.

America's electric cooperatives serve 56 percent of the nation, 88 percent of all counties, and 12 percent of the nation's electric customers, while accounting for approximately 11 percent of all electric energy sold in the United States. NRECA's member cooperatives include 63 generation and transmission (G&T) cooperatives and 834 distribution cooperatives. The G&Ts are owned by the distribution cooperatives they serve. The G&Ts generate and transmit power to nearly 80 percent of the distribution cooperatives, those cooperatives that provide power directly to the end-of-the-line consumer-owners. Remaining distribution cooperatives receive power directly from other generation sources within the electric utility sector. NRECA members account for about five percent of national generation and, on net, generate approximately 50 percent of the electric energy they sell and purchase the remaining 50 percent from non-NRECA members. Both distribution and G&T cooperatives share an obligation to serve their members by providing safe, reliable, and affordable electric service.

APPA is the national service organization representing the interests of government-owned electric utilities in the United States. More than two thousand public power systems provide over fifteen percent of all kilowatt-hour sales to ultimate electric customers. APPA's member utilities are not-for-profit utility systems that were created by state or local governments to serve the public interest. Some government-owned electric utilities generate, transmit, and sell power at wholesale and retail, while others purchase power and distribute it to retail customers, and still others perform all or a combination of these functions. Government-owned utilities are accountable to elected and/or appointed officials and, ultimately, the American public. The focus of a government-owned electric utility is to provide reliable and safe electricity service, keeping costs low and predictable for its customers, while practicing good environmental stewardship.

ATTACHMENT B
NFP ELECTRIC ASSOCIATIONS – LIST OF CFTC FILINGS REGARDING THE DEFINITION OF "SWAP DEALER" AND THE "SD DE MINIMIS THRESHOLD"[36]

	CFTC RULE-MAKING	DATE ISSUED BY CFTC	FEDERAL REGISTER NUMBER	ELECTRIC TRADE ASSOCIATION FILING
1	Definitions ANOPR: "swap" and "swap dealer," "major swap participant," "eligible contract participant"	Aug. 20, 2010	75 Fed. Reg. 51,429	Sept. 20, 2010 (NFP Energy End Users) Link to Comment Sept. 20, 2010 (EEI) Link to Comment
2	Further Definition of SD, MSP and ECP	Dec. 21, 2010	75 Fed. Reg. 80,174	Feb. 22, 2011 (NFP Electrics) Link to Comment Feb. 22, 2011 (EEI/EPSA) Link to Comment
3	Roundtable on Schedule for Final Rules and Implementation of Final Rules under Dodd Frank	April 12, 2011	-----	May 4, 2011 (NFP Electrics/EEI/EPSA) Link to Comment

[36] The NFP Electric Associations are typically NRECA and APPA (and in some cases the Large Public Power Council, a group of the largest municipal electric utilities), with support from ACES (and in some cases The Energy Authority). The list does not identify comments filed in response to requests from individual Commissioners, and it may not include all filings made by EEI or EPSA on matters on which the NFP Electric Associations did not join with those trade associations, provide substantive input to those entities' comments, or cross-reference in our comments. We have provided hyperlinks, as well as information to cut and paste into a browser should the links not work. The list also includes the Special Entity Sub-Threshold Petition, in addition to comments on the NOPR to exclude Utility Operations-Related Swaps from the SD De Minimis Threshold. The list does not include numerous requests for clarification, no-action or other relief, as most are not available as links to the CFTC website. The links were last spot checked in August of 2018. If a link does not work, please inform Patty Dondanville, Reed Smith LLP at pdondanville@reedsmith.com.

	CFTC RULE-MAKING	DATE ISSUED BY CFTC	FEDERAL REGISTER NUMBER	ELECTRIC TRADE ASSOCIATION FILING
4	Reopening and Extension of Comment Periods for Rulemakings Implementing the Dodd-Frank Act	May 4, 2011	76 Fed. Reg. 25,274	June 3, 2011 (NFP Electrics/EEI/EPSA) Link to Comment
5	Petition for Rulemaking to Amend 1.33(ggg)(4) – Special Entity Sub-Threshold regarding the Entity Definitions Final Rule[37]	May 23, 2012	77 Fed. Reg. 30,596	July 12, 2012 (APPA, LPPC, APGA, TAPS, BPA) Link to Petition (PDF)
6	Letters in Support of Special Entity Sub-threshold	-----	-----	August and September, 2012 (NRECA, EEI, EPSA) Link to Support Letters
7	Comments Supplemental to the April 3, 2014 Public Roundtable on the Special Entity De Minimis Threshold Issue	April 3, 2014 Roundtable	Announced by Press Release PR 6872-14 on March 5, 2014	April 17, 2014 (APPA, LPPC, BPA) Link to Comment
8	Exclusion of Utility Operations – Related Swaps with Utility Special Entities from DeMinimis for Swaps	June 2, 2014	79 Fed. Reg. 31,238	July 2, 2014 (NRECA, APPA, LPPC and BPA) Link to Comment
9	Comments on Commission Staff's Draft Technical Specifications for Certain Swap Data Elements	December 22, 2015		March 7, 2016 (NRECA, APPA) Link to Comment

[37] Petition for relief, rather than a response to a Commission filing and request for comments.

	CFTC RULE-MAKING	DATE ISSUED BY CFTC	FEDERAL REGISTER NUMBER	ELECTRIC TRADE ASSOCIATION FILING
107	Division of Market Oversight Review of Swap Data Reporting Rules in Parts 43, 45 and 49 (CFTC Letter 17-33) and Requests for No-Action Relief	July 10, 2017	CFTC Letter 17-33	August 18, 2017 (NRECA, APPA) Link to Comment