



SWAP DEALER *DE MINIMIS* EXCEPTION PRELIMINARY REPORT

A REPORT BY STAFF
OF THE U.S. COMMODITY FUTURES TRADING COMMISSION
PURSUANT TO REGULATION 1.3(ggg)

November 18, 2015

DISCLAIMER

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Table of Contents

I. Introduction and Overview	1
A. Introduction.....	1
B. Overview.....	3
C. Comments.....	4
II. Background	6
A. Statutory Swap Dealer Definition.....	6
B. Regulatory Provisions.....	7
1. What Activity Constitutes Swap Dealing.....	7
2. <i>De Minimis</i> Exception	7
3. Calculation of Dealing Activity.....	8
4. Establishment of Notional Amount Threshold and Phase-in Period.....	9
III. Findings – Data, Methodology, and Analysis	10
A. Description of Available Data	11
1. Data Source and Review Period.....	11
2. Asset Classes Covered.....	11
B. Assumptions and Methodology	12
1. Legal Entity Identifier Assumptions.....	12
2. Unique Swap Identifier Assumptions.....	13
3. Entity-Based Assumptions	15
4. Activity-Based Assumptions	16
(i) Inter-Affiliate Exclusion	17
(ii) Cross-Border Considerations.....	17
5. Notional Value and Alternative Measures of Dealing Activity	18
C. Findings.....	21
1. IRS and CDS	21
(i) Application of Entity Filters	21
(ii) Application of Cross-Border Guidance	23
(iii) Aggregating Across Affiliated Entities.....	23
2. Equity Swaps	25
3. FX Derivatives.....	27

4.	Non-Financial Commodity Swaps.....	30
D.	Measuring Potential Swap Dealing Activity across Asset Classes.....	32
IV.	Policy Objectives and Considerations Relating to the <i>De Minimis</i> Exception	34
A.	General Policy Considerations.....	35
1.	Policies for Regulating Swap Dealers	35
(i)	Reduction in Systemic Risk	35
(ii)	Counterparty Protections	35
(iii)	Swap Market Transparency, Orderliness, and Efficiency	36
2.	Policies Advanced by a <i>De Minimis</i> Exception.....	36
(i)	Regulatory Certainty.....	37
(ii)	Allowing Limited Ancillary Dealing	37
(iii)	Encouraging New Participants.....	37
(iv)	Regulatory Efficiency	38
B.	Policy Considerations for Certain Sectors of the Swap Markets	38
1.	Non-Financial Commodity Swap Dealing	39
2.	Small to Mid-Sized Banking Enterprises	43
V.	<i>De Minimis</i> Exception Alternatives	47
A.	Higher or Lower Gross Notional <i>De Minimis</i> Threshold	48
B.	Alternative Approaches to the <i>De Minimis</i> Exception	51
1.	Different <i>De Minimis</i> Notional Thresholds by Asset Class Alternative	51
2.	Multi-Factor <i>De Minimis</i> Threshold Alternative.....	54
3.	Multi-Tiered Swap Dealer Regulation Alternative	57
4.	Swaps Executed on a SEF or DCM and/or Cleared	61
Appendix A		A-1

I. Introduction and Overview

A. Introduction

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (“**Dodd-Frank Act**”).¹ Title VII of the Dodd-Frank Act established a statutory framework to reduce risk, increase transparency, and promote market integrity within the financial system by regulating the over-the-counter swap market. Among other things, the Dodd-Frank Act amended the Commodity Exchange Act (“**CEA**”)² to provide for the registration and regulation of swap dealers. The Dodd-Frank Act directed the U.S. Commodity Futures Trading Commission (“**Commission**” or “**CFTC**”) and the U.S. Securities and Exchange Commission (“**SEC**” and together with the CFTC, “**Commissions**”) jointly to further define, among other terms, the term “swap dealer”³ and to exempt from designation as a swap dealer an entity that engages in a *de minimis* quantity of swap dealing.⁴

Pursuant to that statutory requirement, the Commissions jointly issued CFTC Regulation (“**Regulation**”) 1.3(ggg)⁵ defining the term “swap dealer” and providing for a *de minimis* exception therein, which states that a person shall not be deemed to be a swap dealer unless its swap dealing activity (as defined by the Commissions) exceeds an aggregate gross notional amount threshold of \$3 billion (measured over the prior 12-month period), subject to a phase-in

¹ Pub. L. 111-203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act can be accessed on the Commission’s website, at www.cftc.gov.

² The CEA is found at 7 U.S.C. 1, *et seq.* (2012). The CEA is accessible on the Commission’s website, at www.cftc.gov.

³ See the definitions of swap dealer in Section 1a(49) of the CEA and Commission regulation 1.3(ggg). 7 U.S.C. § 1a(49) and 17 C.F.R. § 1.3(ggg).

⁴ See Dodd-Frank Act § 721.

⁵ Commission regulations referred to herein are found at 17 C.F.R. Ch. 1 (2014). Commission regulations are accessible on the Commission’s website, at www.cftc.gov.

period during which the gross notional amount threshold is set at \$8 billion.⁶ Under the terms of Regulation 1.3(ggg)(4), the phase-in period will terminate on December 31, 2017, and the *de minimis* threshold will fall to \$3 billion, unless the CFTC takes prior action to set a different termination date or to modify the *de minimis* exception.

The Commissions acknowledged at the time they adopted the definition of the term “swap dealer” and the attendant *de minimis* exception that they were relying on the limited data available at that time regarding the swap market, as it then existed, to guide their determinations. Moreover, the Commissions were uncertain how the swap market would evolve following implementation of Title VII. In recognition of these limitations and in anticipation of additional swap market data becoming available to the CFTC through the reporting of transactions to swap data repositories (“**SDRs**”), the Commission adopted Regulation 1.3(ggg)(4)(ii)(B), which directs CFTC staff to complete and publish for public comment a report on topics relating to the definition of the term “swap dealer” and the *de minimis* threshold “as appropriate, based on the availability of data and information.”⁷

Regulation 1.3(ggg)(4) provides that nine months after the publication of a staff report and after giving due consideration to the report and any associated public comment, the CFTC may either set a termination date for the phase-in period or issue a notice of proposed rulemaking to modify the *de minimis* exception.

⁶ See 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). Staff notes that a joint rulemaking with the SEC is not necessary to amend the *de minimis* exception, pursuant to Commission regulation 1.3(ggg)(4). *Id.* at 30634 n.464.

⁷ Similarly, the SEC adopted Exchange Act Rule 240.3a71-2A, which directs SEC staff to prepare a report that addresses, among other things, the rule adopted by the Commissions further defining the term “‘security-based swap dealer’ (including the *de minimis* exception to that definition) and ‘major security-based swap participant.’” 17 C.F.R. § 240.3a71-2A.

In the interest of providing ample opportunity for inclusion of public input on the relevant policy considerations, as well as on staff's preliminary analysis of the SDR data, and to ensure that the Commission has as much information and data as practicable for purposes of its determinations with respect to the *de minimis* exception, staff is issuing and seeking public comment on this preliminary report concerning the *de minimis* exception to the swap dealer definition in Regulation 1.3(ggg)(4) ("**Preliminary Report**"). After considering the comments it receives on this Preliminary Report, staff will complete and publish for public comment a final report ("**Final Report**").

Throughout the Preliminary Report, staff poses questions and seeks comment from the public, with supporting data whenever available, in order to obtain as much relevant information as possible, and to ensure that the Commission can consider the perspectives of all market participants and members of the public as it evaluates this key component of swap market regulation. Any views expressed in this Preliminary Report are views of CFTC staff only and do not necessarily represent the positions or views of any Commissioner or the Commission.

B. Overview

Section II of this Preliminary Report provides a background discussion regarding the relevant statutory and regulatory provisions defining the term "swap dealer" and implementing the *de minimis* exception. Section II also discusses the scope of this Preliminary Report.

Section III discusses the data staff considered in preparing this Preliminary Report, including various reporting and data quality issues, methodology (including assumptions made) for analyzing the data, and a set of findings that serve as estimates for relevant measures of swap dealing activity considered in this Preliminary Report.

Section IV discusses the policies underlying swap dealer registration and regulation and the *de minimis* exception that form the basis for evaluating the swap market data for this Preliminary Report. Section IV also includes a discussion of considerations relating to the *de minimis* exception that are unique to particular segments of the swap market.

As contemplated by Regulation 1.3(ggg)(4)(ii)(B) and the preamble to the swap dealer definition, Section V discusses the data in light of alternative approaches to a *de minimis* exception, including some that have been previously suggested.⁸ Although it is beyond the scope of this Preliminary Report to evaluate the advantages and disadvantages of those alternatives, the Preliminary Report notes some of the general policy issues that may be relevant to further consideration of such alternatives.

C. Comments

Comments on this Preliminary Report must be received on or before January 19, 2016. You may submit comments, identified by “Comments on Swap Dealer *De Minimis* Exception Preliminary Report,” by any of the following methods:

- Agency Web Site: <http://www.cftc.gov>.
- Mail: Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.
- Hand Delivery/Courier: Same as mail above.

Please submit your comments using only one method. All comments must be submitted in English or accompanied by an English translation. Comments will be posted as received to www.cftc.gov. You should submit only information that you wish to make available publicly. If you would like to submit information that is exempt from disclosure under the Freedom of

⁸ 77 Fed. Reg. at 30365.

Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedure established in Regulation 145.9.

The CFTC reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse, or remove any or all of your submission from www.cftc.gov that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the Preliminary Report will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

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II. Background

A. Statutory Swap Dealer Definition

The Dodd-Frank Act amended the CEA to provide for the registration and regulation of swap dealers.⁹ Accordingly, the Commission has adopted regulations to implement the CEA's statutory provisions applicable to swap dealers. Under those regulations, swap dealers are subject to a broad range of requirements, including, *inter alia*, requirements applicable to registration, internal and external business conduct, reporting and recordkeeping, risk management, and chief compliance officer designation and responsibilities.¹⁰ In addition, swap dealers must become and remain members of a registered futures association.¹¹ Thus, determining who is a swap dealer, as defined by the CEA and Commission regulations, has significant implications for individual entities as well as for the oversight of the swap market.

CEA Section 1a(49) defines the term "swap dealer" to include any person who: (1) holds itself out as a dealer in swaps; (2) makes a market in swaps; (3) regularly enters into swaps with counterparties as an ordinary course of business for its own account; or (4) engages in any activity causing the person to be commonly known in the trade as a dealer or market maker in swaps.¹² CEA Section 1a(49) directs the Commission to "exempt from designation as a swap dealer an entity that engages in a *de minimis* quantity of swap dealing in connection with

⁹ See generally 7 U.S.C. § 6s.

¹⁰ See generally 17 C.F.R. §§ 3.3 and 23.

¹¹ See 17 C.F.R. § 170.16. Currently, the only such association is the National Futures Association ("NFA"). As a member of NFA, a swap dealer must comply with NFA rules and must pay annual dues, which may be as much as \$1 million, depending on the size of the swap dealer. See NFA Membership and Dues, available at: <http://www.nfa.futures.org/NFA-registration/NFA-membership-and-dues.HTML>.

¹² In general, a person that satisfies any one of the prongs in the swap dealer definition is engaged in swap dealing activity. The statutory swap dealer definition also provides an exclusion for an insured depository institution ("IDI") that enters into a swap in connection with a loan, as further discussed in Appendix A.

transactions with or on behalf of its customers” and to “promulgate regulations to establish factors with respect to the making of this determination to exempt.”¹³

The CFTC adopted Regulation 1.3(ggg), which further defines the term “swap dealer,” and includes an exception from that definition for a person who engages in a *de minimis* amount of swap dealing.¹⁴

B. Regulatory Provisions

Broadly stated, whether a particular person is a swap dealer will depend on the answer to two questions: (1) does the person engage in activity that constitutes “swap dealing”; and (2) is that swap dealing activity more than *de minimis*?

1. What Activity Constitutes Swap Dealing

Whether a person’s swap activity constitutes “dealing” is a key element in determining whether that person comes within the swap dealer definition and is based on the facts and circumstances of a person’s swaps activities.¹⁵ Regulation 1.3(ggg) provides that certain swaps are not considered in the determination of whether a person is a swap dealer, as discussed below.¹⁶

2. De Minimis Exception

If a person is engaged in swap dealing activity, there must be a determination of whether the person is engaged in more than a *de minimis* amount of swap dealing as established in the Commission’s regulations. If so, the person is a swap dealer and must register with the Commission.

¹³ 7 U.S.C. § 1a(49).

¹⁴ See 77 Fed. Reg. 30596.

¹⁵ See, e.g., *id.* at 30609.

¹⁶ See 17 C.F.R. §§ 1.3(ggg)(5) and 1.3(ggg)(6).

Regulation 1.3(ggg)(4) provides that a person “shall be deemed not to be a swap dealer” as long as the positions connected with the person’s dealing activities during the preceding 12-month period do not exceed an aggregate gross notional amount threshold of \$3 billion, subject to a phase-in level of \$8 billion that is currently in effect. The regulation provides a separate lower notional amount threshold of \$25 million that is not subject to a phase-in level for dealing swaps for which the counterparty is a “special entity.”¹⁷ The Commissions explained that this lower, \$25 million threshold was appropriate given the special protections that Title VII affords to special entities.¹⁸ The special entity *de minimis* threshold is not the focus of this Preliminary Report.

3. Calculation of Dealing Activity

Generally, an entity must count all swaps it enters into for dealing purposes towards its *de minimis* calculation. In addition, each entity that does not independently exceed the *de minimis* threshold must also include the notional amount of swaps of any other unregistered affiliate controlling, controlled by, or under common control with that entity in its *de minimis* calculation (often referred to as “aggregation”).¹⁹

As further explained in Appendix A, pursuant to various CFTC regulations, interpretive guidance, and staff letters, certain swaps, subject to specific conditions, need not be counted in an entity’s *de minimis* calculation, including: swaps related to loans made by insured depository institutions (“**IDI Exclusion**”); swaps between affiliates (“**Inter-Affiliate Exclusion**”); swaps by

¹⁷ The term “special entity” includes, among other persons, state governments, Federal and state agencies, certain government employee benefit plans under the Employee Retirement Income Security Act of 1974 and endowments. *See* 17 C.F.R. § 23.401(c).

¹⁸ *See* 77 Fed. Reg. at 30642. These heightened protections are reflected in CEA Section 4s(h), which sets forth additional requirements applicable to swap dealers when dealing with special entities.

¹⁹ 17 C.F.R. § 1.3(ggg)(4); Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 45292, 45323 (July 26, 2013).

cooperatives with members (“**Cooperative Exclusion**”); swaps hedging physical positions (“**Physical Hedging Exclusion**”); swaps by floor traders (“**Floor Trader Exclusion**”); cross-border swaps; FX swaps and FX forwards (“**FX Exemption**”); commodity trade options (“**Commodity Trade Option Exemption**”); and swaps resulting from portfolio compression (“**Portfolio Compression No-Action Relief**”). Further, certain inter-governmental or quasi-governmental international financial institutions are not included within the term “swap dealer” (“**International Financial Institution Treatment**”).

4. Establishment of Notional Amount Threshold and Phase-in Period

In adopting the *de minimis* exception, the Commissions explained that the information then available regarding certain portions of the swap market was limited, and that they expected more information to be available in the future, which would enable the Commission to assess the effectiveness of the exception and to revise it as appropriate.²⁰ The Commissions established the threshold for the *de minimis* exception in the swap dealer definition at an aggregate gross notional amount of \$3 billion. The Commissions stated:

[W]e believe an appropriate balance of the goal of promoting the benefits of regulation (while recognizing the unquantifiable nature of those benefits) against the competing goal of avoiding the imposition of burdens on those entities for which regulation as a dealer would not be associated with achieving those benefits in a significant way, would be reached by setting the notional standard for swaps at a level that is near . . . 0.001 percent of a reasonable estimate of the overall domestic market for all swaps between all counterparties. We believe a \$3 billion notional value standard is appropriate taking all these considerations into account.²¹

The Commissions provided, however, for a phase-in period during which the *de minimis* threshold is set at \$8 billion, explaining that it would: (1) permit market participants and the

²⁰ See 77 Fed. Reg. at 30634.

²¹ *Id.* at 30633.

Commissions to become familiar with the application of the swap dealer definition and regulatory requirements; (2) afford the Commissions time to study the swap market as it evolves and to consider new information about the swap market that becomes available (*e.g.*, through swap data reporting); (3) provide potential swap dealers that engage in smaller amounts of activity additional time to adjust their business practices, while at the same time preserving a focus on the regulation of the largest and most significant swap dealers; and (4) address comments suggesting that the *de minimis* threshold be set higher initially to provide for efficient use of regulatory resources and that implementation of swap dealer requirements overall be phased.²²

Registered swap dealers began reporting swap data on December 31, 2012 or February 28, 2013, depending on the type of swap. The analysis in this Preliminary Report draws on SDR data currently available to staff. In issuing this Preliminary Report, staff is mindful of the role the public and market participants can serve by addressing relevant policy considerations, as well as by providing any additional data and input on staff's methodology, analysis, and interpretation of the data. By soliciting public comment prior to completing and publishing a Final Report, staff seeks to better inform and assist the Commission as it considers the *de minimis* exception.

III. Findings – Data, Methodology, and Analysis

This section describes the data used for this Preliminary Report and also discusses staff's methodology to identify potential swap dealing activity for purposes of assessing the *de minimis* exception. The section also outlines some of the data-related issues staff faced in identifying potential swap dealing activity.

²² See *id.* at 30633-34.

A. Description of Available Data

1. Data Source and Review Period

The data used in this Preliminary Report was sourced primarily from data reported to the four registered SDRs: Chicago Mercantile Exchange Swap Data Repository, DTCC Data Repository, ICE Trade Vault, and BSDR, LLC. For the 12-month period reviewed, April 1, 2014 through March 31, 2015 (“**Review Period**”), the Commission received approximately 67 million transaction records with as many as 1,000 data fields per record from the SDRs.

The data now being collected by the SDRs is a tremendous advance since the Commissions set the *de minimis* exception in May 2012; it enables staff and the public to consider the policy issues related to the *de minimis* exception on the basis of much better information. At the same time, staff notes that the SDR data is still relatively new, and there is still significant ongoing work to improve it in various ways. This work includes standardizing reporting fields, harmonizing data among SDRs, and ensuring that market participants comply with their obligations to provide timely and accurate data. Therefore, there were some limitations on working with the data, as discussed below.

2. Asset Classes Covered

Staff analyzed data for the five asset classes of swaps that are within the Commission’s jurisdiction: credit default swaps (“**CDS**”); interest rate swaps (“**IRS**”); non-financial commodity (“**Non-Financial Commodity**”) swaps; foreign exchange derivatives (“**FX Derivatives**”);²³ and equity (“**Equity**”) swaps.²⁴

²³ Only certain FX transactions count towards an entity’s *de minimis* calculation. See Appendix A.

²⁴ See generally Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. 2136 (Jan. 13, 2012).

B. Assumptions and Methodology

This section discusses the methodology and assumptions used to identify potential swap dealing activity for this Preliminary Report. Under the definition of swap dealer, only an entity's dealing activities count towards its *de minimis* calculation. However, the SDR data does not include data fields to indicate whether a transaction is entered into for dealing purposes. Therefore, staff has used certain methods and made assumptions to identify entities engaged in potential swap dealing activity ("**Potential Swap Dealing Entities**"). This includes the development of methods to exclude some categories of participants that are not likely to be engaged in dealing, based on the nature of their business activities. Staff notes that the purpose of these "filters," as described below, is solely to generate estimates that help refine the analysis for purposes of this Preliminary Report; these methods are not a determinative basis for deciding whether any particular entity is engaged in swap dealing.

In addition, as discussed above, certain swaps, subject to specific conditions, need not be counted in an entity's *de minimis* calculation; however, such swaps are not always readily identifiable in the SDR data. As a result of the limited information available in the SDR data, and the assumptions necessary to conduct an analysis of dealing activity, the findings in this Preliminary Report should be viewed as estimates to assist the Commission, market participants, and the public in assessing the current *de minimis* exception. Furthermore, the data used for this Preliminary Report reflects past swap activity, and depending upon the changes, if any, made to the *de minimis* exception, market participants' behaviors may change.

1. Legal Entity Identifier Assumptions

A fundamental data issue is the need to accurately identify market participants. The recent establishment of the Legal Entity Identifier ("**LEI**") framework was intended to allow

financial regulators to effectively aggregate and analyze an entity’s market activity. However, this relatively new reporting requirement has not been universally implemented by all market participants. For example, with respect to IRS and CDS, staff found that over 14% of all transactions, or approximately 260,000 transactions, reported to SDRs during the Review Period lacked a valid LEI for one or both counterparties. The aggregate notional amount of these transactions was approximately \$30 trillion, comprising approximately 23% of the total notional amount of IRS and CDS. Accordingly, certain assumptions were made regarding swaps with LEI errors. For example, all generic identifiers that were not proper LEIs were grouped into a single “unknown” entity and collectively counted as one counterparty, because without further information, it was not possible to identify the actual counterparties. This assumption likely resulted in lower counterparty count statistics.

2. Unique Swap Identifier Assumptions

Another data issue for calculating a *de minimis* level for each entity is the need to have each SDR record pertain to a unique transaction. A unique swap identifier (“**USI**”) identifies each swap executed. Staff discovered many instances in which a single swap had multiple USIs assigned to it over its life cycle. The three most common reasons for one swap to be associated with multiple USIs – clearing, allocations, and compressions – are described in greater detail below. Additionally, staff observed many instances in which a single USI was used to identify multiple swaps. Staff removed duplicative swaps from the data when they could be identified. However, if they could not be identified and excluded, the findings related to aggregate notional activity and total transaction counts were likely overestimated.

Cleared Swaps. Cleared swaps are reported as three separate and distinct swaps: the original “alpha” swap, and the two equal and opposite resulting “beta” and “gamma” swaps with

the derivatives clearing organization (“**DCO**”) that are reported when the alpha swap is cleared.²⁵ The novation process involves termination of the alpha and replacement with the beta and gamma. If reporting counterparties do not identify these transactions as related, it may not be possible to link and reconcile the transactions, which may result in a single swap being counted more than once. The finalization and implementation of the recent proposed rulemaking for reporting of cleared swaps should help to mitigate this issue going forward.²⁶

Bunched Trades. Bunched trades occur when transactions for multiple accounts are grouped into a single transaction for execution. Duplication occurs when a reporting counterparty first reports the execution of the bunched transaction with the agent listed as its counterparty (typically an asset manager). Once the agent informs the reporting counterparty of the identities of the entities across which the trade is being allocated, the reporting counterparty should report each swap resulting from the allocation to the SDR. Each allocated swap should be assigned a new USI that is linked to the initial swap. However, in many instances, linking identifiers did not exist in the data, resulting in both the original bunched trade and the allocations being included in the analysis.

Compressions. Compressions involve the termination of an existing portfolio of swaps and replacement with a smaller number of swaps with a similar risk profile, but a smaller aggregate notional size.²⁷ In the SDR data used for staff’s analysis, it was not possible to identify, and therefore exclude from the analysis, swaps resulting from portfolio compressions.

²⁵ See Review of Swap Data Recordkeeping and Reporting Requirements, 79 Fed. Reg. 16689, 16694 (Mar. 26, 2014).

²⁶ See Amendments to Swap Data Recordkeeping and Reporting Requirements for Cleared Swaps, 80 Fed. Reg. 52544 (proposed Aug. 31, 2015).

²⁷ See generally 17 C.F.R. §§ 23.500(b) and (h).

3. Entity-Based Assumptions

Given that staff could not definitively identify all entities that engaged in swap dealing activity during the Review Period, staff employed certain assumptions to exclude those entities that were not likely engaged in dealing based on the nature of their business activities.

Specifically, market participants in the following categories were excluded from consideration as potential swap dealers for purposes of this analysis (“**Entity Filters**”). As previously noted, these methods are not a determinative means of assessing whether any particular entity is engaged in swap dealing.

a) *Collective investment vehicles (e.g., mutual funds, commodity pools, pension plans, hedge funds, etc.)*. Though these entities’ activities accounted for a significant portion of total notional activity during the Review Period, staff assumed that these entities entered into swaps primarily for investing or hedging purposes on behalf of their investors, rather than for purposes of accommodating counterparty demand, making markets, or otherwise engaging in swap dealing activity.

b) *Foreign central banks and other government related international financial institutions*. The Commission has previously determined that these entities were not intended to be designated as swap dealers.²⁸

c) *Cooperatives*. Given that financial cooperatives typically provide services to their members, staff assumed that all, or nearly all, of these entities’ dealing swaps were executed with their members and were therefore excluded from the *de minimis* calculation pursuant to the Cooperative Exclusion.²⁹ Furthermore, given the commercial nature of non-financial

²⁸ 77 Fed. Reg. at 30693.

²⁹ *Id.* at 30625.

cooperatives' businesses, staff assumed that the majority of these cooperatives' IRS transactions were entered into for hedging or other non-dealing purposes.

d) *Insurance companies and non-bank financing companies.* Staff assumed that these types of entities generally entered into swaps for the purposes of hedging or investing rather than dealing.³⁰

Staff attempted to assess the validity of the Entity Filters by reviewing the activity of those entities that were removed pursuant to each filter. As the Commission has previously noted, entities that are engaged in swap dealing activity tend to have more counterparties than non-dealing entities.³¹ In conducting its validity assessment, staff observed that of the thousands of entities that were removed using the Entity Filters, the vast majority had very few unique counterparties. In fact, very few of the excluded entities executed swaps with more than 50 unique counterparties during the Review Period.³² Therefore, staff believes that use of the Entity Filters appeared to exclude entities from this analysis that were not likely engaged in swap dealing activities.

4. Activity-Based Assumptions

While the Entity Filters served to remove entire categories of entities that were likely not engaged in swap dealing, staff sought to further refine its analysis by excluding certain types of

³⁰ Non-bank financing companies are those institutions who offer certain financial services, such as lending, but are not licensed banks (*e.g.*, some automotive loan and mortgage companies).

³¹ Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant", 75 Fed. Reg. 80174, 80177 (proposed Dec. 21, 2010).

³² Staff notes, however, that insofar as an individual entity's activity should be aggregated with affiliated entities, the combined group activity could be more significant.

transactions that do not count towards an entity's *de minimis* calculation. In particular, staff sought to account for the Inter-Affiliate Exclusion and cross-border swaps.³³

(i) Inter-Affiliate Exclusion

As discussed above, a person's swaps with certain of its affiliates are not considered in determining whether the person is a swap dealer. In the absence of a global reference database that identifies affiliated entities, staff developed a methodology to identify inter-affiliate transactions. For some aspects of the IRS and CDS analysis, a trade with any of the following characteristics was marked as an inter-affiliate trade and excluded from staff's analysis: (1) both counterparties had the same LEI; (2) the names of both counterparties referenced the same parent company; or (3) the counterparties had previously elected the Inter-Affiliate Clearing Exemption in DTCC Data Repository.³⁴ It should be noted that not every inter-affiliate transaction could be identified and excluded using this methodology and, as a result, an entity's notional amount and the number of swaps to which it is a party may be over-estimated.

(ii) Cross-Border Considerations

As a general matter, pursuant to the Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations issued by the Commission ("**Cross-Border Guidance**"),³⁵ entities that are not U.S. persons (as such term is defined in the Cross-Border Guidance) and that are not guaranteed affiliates and not affiliate conduits of a U.S. person count their dealing swaps with: (i) U.S. persons (other than a foreign branch of a U.S. registered

³³ Staff also sought to exclude swaps executed pursuant to the IDI Exclusion; however, the SDR data did not contain enough information to reliably identify those transactions.

³⁴ As discussed in further detail below, inter-affiliate trade identifiers were not readily available for FX Derivatives, Equity swaps, and Non-Financial Commodity swaps. Analysis of that swap data does not exclude any swaps between affiliates.

³⁵ See generally 78 Fed. Reg. 45292.

swap dealer); and (ii) certain non-U.S. person guaranteed affiliates.³⁶ In contrast, non-U.S. persons that are guaranteed affiliates or affiliate conduits of a U.S. person generally include all their dealing swaps with U.S. and non-U.S. persons in their *de minimis* count. However, because the SDR data does not contain identifiers for non-U.S. branches of U.S. registered swap dealers, guaranteed affiliates, or affiliate conduits, these categories of entities could not be identified.

Instead, for IRS and CDS, staff attempted to identify and exclude all swaps executed between two non-U.S. persons. This analysis was not completely accurate because the SDR data did not always indicate whether an entity was a non-U.S. person, and certain entities did not have valid LEIs that could be used to determine their status as a U.S. person. Further, as noted above, there are no SDR data fields indicating an entity's status as a branch, guaranteed affiliate, or affiliate conduit of a U.S. person. Given these limitations, certain swaps of non-U.S. persons were not accurately reflected in the analysis, which may overestimate or underestimate the number of Potential Swap Dealing Entities.

5. Notional Value and Alternative Measures of Dealing Activity

Although the total gross notional value of an entity's dealing activity determines its swap dealer registration status, reliable and complete notional data was not available for FX Derivatives, Equity swaps, and Non-Financial Commodity swaps during the Review Period. The most common reporting issues are listed below.

(a) In addition to the duplicative reporting described above, for Equity swaps and FX Derivatives, staff observed many instances in which a single USI between the same counterparty pair was reported multiple times, with different notional amounts reported in each instance.

³⁶ See Appendix A for additional information regarding cross-border considerations.

(b) For FX Derivatives, substantial variations in the reporting of USI-specific exchange rate information impaired the calculation of notional amounts.

(c) A substantial number of Non-Financial Commodity swaps were reported without the price and quantity data necessary to calculate notional amounts; and when reported, these data fields were not always consistently or thoroughly completed by reporting parties. For example, unit measurements for reported quantities (*e.g.*, barrels of oil, megawatt hours, and bushels of corn) were not universally applied by all reporting parties.

Without additional information, any attempt to calculate notional amounts would have resulted in potentially incorrect estimated notional values for FX Derivatives, Equity swaps, and Non-Financial Commodity swaps. Accordingly, in the absence of notional information for these swaps, staff explored alternate indicators of dealing activity for purposes of analyzing the *de minimis* exception. In this Preliminary Report, staff focused on the following two alternate indicators: (1) the number of unique counterparties an entity traded with (“**Counterparty Count**”); and (2) the total number of an entity’s swaps (“**Transaction Count**”).

Counterparty Count: As the Commission has previously observed, swap dealers tend to have more counterparties than non-dealers³⁷ because swap dealers often actively solicit business from potential counterparties and offer a range of products to suit various counterparties’ needs.³⁸ Accordingly, staff estimated the Counterparty Counts for Potential Swap Dealing Entities as a possible indicator of the relative likelihood that they may be engaged in dealing activity.

³⁷ 75 Fed. Reg. at 80177.

³⁸ 77 Fed. Reg. at 30608.

Transaction Count: Similarly, swap dealers tend to enter into a greater number of transactions than non-dealers. For example, market making activity is considered swap dealing activity,³⁹ and market makers tend to engage in a higher number of transactions than non-dealing entities. Accordingly, staff also estimated the Transaction Counts for Potential Swap Dealing Entities.

Staff acknowledges that these two metrics are not determinative in identifying dealing activity;⁴⁰ however, they are useful for observing potential patterns in the swaps activity of market participants, including relative levels of potential dealing activity. The Counterparty and Transaction Count information allowed staff to analyze swap activity and generally assess the effectiveness of the current *de minimis* exception as well as potential alternative approaches for the exception, which are discussed later in this Preliminary Report.

Given the above considerations, CFTC staff welcomes comments on the following:

- (1) Given the lack of a dealing field in the data, staff invites suggestions on how to best identify the dealing activity of market participants. Are the general approaches used in this Preliminary Report reasonable? If not, why not?
- (2) Staff seeks suggestions on techniques to identify transactions in the SDR data that may qualify for the IDI Exclusion.
- (3) Are Counterparty and Transaction Counts useful metrics for identifying potential swap dealing activity?
- (4) In addition to Counterparty and Transaction Counts, are there other metrics that could be useful in identifying potential swap dealing activity?

³⁹ 17 C.F.R. § 1.3(ggg)(4)(ii).

⁴⁰ For example, an entity with a high Transaction Count could be a central treasury unit of a large commercial enterprise that employs dynamic hedging strategies.

- (5) Are certain metrics for identifying potential swap dealing activity more useful for some asset classes than others? If so, please identify and describe those metrics.
- (6) Is the methodology used to identify inter-affiliate swaps appropriate?

C. Findings

1. IRS and CDS

As indicated above, notional amount data was available for IRS and CDS. Accordingly, for these two asset classes, staff sought to determine the approximate number of entities that may be engaged in swap dealing above various notional *de minimis* thresholds. As an initial matter, staff excluded from its analysis all entities whose gross notional amount for IRS and CDS combined did not exceed \$1 billion during the Review Period, based on the assumption that no appreciable dealing activity that would warrant swap dealer registration was likely occurring below this threshold.

(i) Application of Entity Filters

Table 1 applies the Entity Filters described above to remove entities that are not likely engaged in swap dealing activity. Columns (iii) and (iv) show the number of entities that were excluded as potential dealers at each notional level. Column (v) shows the number of entities remaining after applying all Entity Filters.

**Table 1 – Number of Potential Dealing Entities in IRS and CDS
After Excluding Presumed Non-Dealing Entities**

Notional Amount of IRS and CDS (USD Billions) Greater than (i)	No. of Entities above Notional Amount (ii)	Collective Investment Vehicles (iii)	Cooperatives, Government-Sponsored Banks, International Financial Institutions, Insurance Companies, & Non-Bank Financing Companies (iv)	Potential Swap Dealing Entities After Applying Entity Filters (v)
1	2,045	1,552	131	362
2	1,495	1,126	93	275
3	1,222	917	79	226
4	1,041	778	74	189
5	925	686	70	169
6	830	613	62	155
7	765	563	54	148
8	707	519	50	138
9	655	477	45	133
10	609	440	45	124
12	554	395	38	121
15	491	344	34	113
20	398	271	26	101
50	235	149	11	75
100	153	<90	*	62

Note: The asterisk indicates fewer than five entities. To preserve confidentiality, the exact number was not disclosed. The number of collective investment vehicles was also given an approximate value to preserve confidentiality.

Table 2 summarizes the exclusions resulting from the application of the Entity Filters for IRS and CDS combined.

Table 2 – IRS and CDS Entity Filter Exclusions

Exclusions	Number of LEIs	% of Total LEIs	% of Total Notional	% of Total Trades
Less than \$1 billion notional ⁴¹	16,248	87.6%	0.5%	5.1%
Funds and Other Collective Investment Vehicles	1,552	8.4%	26.0%	30.8%
Government-sponsored Banks, International Financial Institutions, and Cooperatives	47	0.3%	0.7%	0.5%
Insurance Companies and Non-Bank Financing Companies	84	0.5%	0.3%	0.7%
Invalid LEIs	263	1.4%	9.1%	6.1%

⁴¹ Entities that entered into less than \$1 billion notional combined IRS/CDS activity were not reviewed for the Entity Filters or for invalid LEIs.

(ii) Application of Cross-Border Guidance

Table 3 addresses cross-border considerations, to the extent practicable, by excluding swaps between two non-U.S. persons. Specifically, column (v) shows the number of non-U.S. persons engaged in potential swap dealing above each gross notional amount after excluding transactions between two non-U.S. persons.

Table 3 – Exclusion of Non-U.S. Person to Non-U.S. Person Transactions in IRS and CDS

Notional Amount of IRS and CDS (USD Billions) Greater than (i)	Potential Swap Dealing Entities After Applying Entity Filters ⁴² (ii)	U.S. Persons (iii)	Non-U.S. Persons (iv)	Non-U.S. Persons After Excluding Trades With Other Non-U.S. Persons (v)	Total U.S. and Non-U.S. Potential Swap Dealing Entities After Exclusion of Non-U.S. Person Swaps (vi)
1	362	202	160	130	332
2	275	143	132	112	255
3	226	111	115	96	207
4	189	92	97	81	173
5	169	85	84	70	155
6	155	74	81	65	139
7	148	70	78	62	132
8	138	64	74	59	123
9	133	61	72	56	117
10	124	57	67	55	112
12	121	57	64	52	109
15	113	51	62	50	101
20	101	43	58	47	90
50	75	31	44	34	65
100+	62	25	37	28	53

(iii) Aggregating Across Affiliated Entities

As reflected in **Table 4** below, staff aggregated the notional activity of affiliated entities. For example, consider an affiliated group comprised of four entities with the following gross notional amounts: Entity A with \$2 billion; Entity B with \$3 billion; Entity C with \$7 billion;

⁴² Column (ii) shows the number of entities remaining after the Entity Filters shown in **Table 1** (see column (v) of **Table 1**).

and Entity D with \$10 billion. At the current \$8 billion *de minimis* threshold, only Entity D would be required to register before aggregation is applied. However, after taking aggregation into account, Entity C would also be required to register to reduce the aggregated notional activity of the remaining unregistered entities in the affiliated group to below \$8 billion. Entities C and D would therefore be included in the last column of **Table 4** for that level. Staff performed this exercise on the Potential Swap Dealing Entities identified in column (vi) of **Table 3** at the notional thresholds shown in the first column of **Table 4**.

Table 4 – Aggregation of IRS and CDS Dealing Activity

Gross Notional Amount of IRS and CDS (USD Billions) Greater than	Potential Swap Dealing Entities After All Exclusions ⁴³	Affiliated Groups	Potential Swap Dealing Entities after Applying Aggregation
1	332	232	332
2	255	173	259
3	207	137	212
4	173	115	181
5	155	105	164
6	139	91	147
7	132	85	138
8	123	82	129
9	117	78	124
10	112	74	120
12	109	71	114
15	101	68	107
20	90	63	99
50	65	48	70
100+	53	41	56

Although the estimates of Potential Swap Dealing Entities in **Table 4** are based on a series of assumptions as reflected in **Tables 1** through **3**, staff believes that, given the data challenges discussed above, the estimates in **Table 4** reflect a reasonable approach for estimating a baseline of the number of entities that could potentially be swap dealers at various notional

⁴³ See column (vi) of **Table 3**.

thresholds based on combined IRS and CDS notional amounts.⁴⁴

2. Equity Swaps

To assess potential dealing activity in the Equity swap market, staff first sought to remove those transactions that are not subject to the Commission’s jurisdiction. In particular, staff removed transactions in single name Equity swaps and Equity swap baskets. Although Equity swap baskets containing more than nine underlying securities are generally within the Commission’s jurisdiction, the SDR data did not contain sufficient information to determine the number of swaps in each basket. Accordingly, staff excluded from its analysis all transactions referencing baskets of Equity instruments.⁴⁵ Next, staff applied the Entity Filters described above in Section III.B.3, with some adjustments. The Entity Filters excluded: (1) entities that had already been identified in the excluded categories for the IRS and CDS data analysis; (2) commodity pools whose operators were registered with the Commission as commodity pool operators; (3) entities listed on the SEC’s Investment Company Series and Class Report; and (4) entities whose names matched any of a set of keywords that likely indicated the entity was in one of the categories to be excluded (*e.g.*, “fund” or “insurance”). Due to certain limitations, staff did not manually review the underlying business activities of each entity in the Equity swap market, as it did for IRS and CDS, and did not apply the activity-based assumptions described above in Section III.B.4.

Tables 5 and **6** below show the Counterparty and Transaction Counts of Potential Swap Dealing Entities that remained after the application of the Entity Filters in the Equity swap

⁴⁴ Staff notes that the Potential Swap Dealing Entities in **Table 4** may have affiliated entities that were excluded in this analysis due to the application of the Entity Filters prior to aggregation. Therefore, if these entities had been included, the number of entities and aggregate gross notional activity of affiliated groups may have been higher.

⁴⁵ Baskets accounted for approximately 6% of the Equity swap data.

market.⁴⁶ These tables demonstrate that the vast majority of Potential Swap Dealing Entities in the Equity swap market had very low Counterparty and Transaction Counts. As discussed above, swap dealers generally tend to have higher Counterparty and Transaction Counts than non-dealers. The Counterparty and Transaction Counts of Potential Swap Dealing Entities in the Equity swap market appear to indicate that dealing in that asset class may be concentrated among a small number of dealers.

**Table 5 – Equity Swaps
Counterparty Counts**

Number of Counterparties	No. Entities by Unique Identifiers	No. of Entities after Excluding Invalid LEIs and Applying Entity Filters
1-5	3,682	905
6-15	186	46
16-25	5	*
26-50	*	*
51-75	*	*
76-100	*	*
101-250	6	6
251-500	6	6
501-1000	*	*
Over 1000	*	*

Note: Each asterisk indicates fewer than five entities.

⁴⁶ In the Equity swap market, approximately 76% of all entities were excluded from the universe of Potential Swap Dealing Entities – approximately 36% were excluded due to the absence of a valid LEI, and approximately 40% were excluded due to the application of the Entity Filters.

**Table 6 – Equity Swaps
Transaction Counts**

Number of Transactions	No. of Entities by Unique Identifiers	No. of Entities after Excluding Invalid LEIs and Applying Entity Filters
1-10	2,641	622
11-25	590	159
26-50	282	79
51-100	171	50
101-250	147	35
251-500	30	11
501-1000	11	*
1,001-5,000	13	8
5,001-10,000	5	5
10,001-100,000	*	*
Over 100,000	0	0

Note: Each asterisk indicates fewer than five entities.

Table 7 summarizes the exclusions resulting from the application of the Entity Filters on the Equity swap data.

Table 7 – Equity Swaps Entity Filter Exclusions

Exclusions	Equity Swaps			
	LEIs	% LEI	USIs	% USI
Funds	1,450	37.2%	40,925	19.9%
Financial Cooperatives	0	0.0%	0	0.0%
International Financial Institutions	9	0.2%	202	0.1%
Non-Financial Cooperatives	0	0.0%	0	0.0%
Insurance Companies	62	1.6%	1,330	0.6%
Non-Bank Financing	*	0.0%	105	0.1%
Invalid LEI	1,397	35.9%	32,386	15.7%

Note: The asterisk indicates fewer than five entities.

3. FX Derivatives

To assess potential dealing in the FX Derivatives market, staff first sought to exclude FX transactions that, while required to be reported by statute, do not count towards an entity's *de minimis* calculation. In particular, staff removed FX swaps and FX forwards, pursuant to the FX

Exemption.⁴⁷ Staff also removed certain spot transactions that do not count towards an entity’s *de minimis* calculation. As indicated in **Table 8** below, FX Derivatives (*i.e.*, those not covered by the FX Exemption) only comprised approximately 14% of the FX transactions reported to the SDRs during the Review Period.⁴⁸

Table 8 – Identification of FX Transactions Counted for the *De Minimis* Threshold

All FX Product Transactions⁴⁹	86,246,528
Excluded FX Transactions by Product:⁵⁰	
Forward	(53,957,796)
Spot	(20,308,517)
Total Excluded	(74,266,313)
Included Swap Transactions by Product (<i>i.e.</i>, “FX Derivatives”):	
Non-deliverable Forwards	7,583,018
Non-deliverable Options	302,373
Options	4,083,444
Total Included	11,968,835
Percent of All FX Products	14%

Next, staff applied the same Entity Filters used for Equity swaps. In addition, consistent with the Equity swaps analysis, the activity-based assumptions described above in Section III.B.4 were not applied. **Tables 9** and **10** below show the Counterparty and Transaction Counts

⁴⁷ See Determination of Foreign Exchange Swaps and Foreign Exchange Forwards Under the Commodity Exchange Act, 77 Fed. Reg. 69694, 69705 (Nov. 20, 2012).

⁴⁸ Although FX swaps and FX forwards are not included in an entity’s *de minimis* calculation, they are still subject to SDR reporting requirements. Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 Fed Reg. 48208, 48253 (Aug. 13, 2012); 77 Fed. Reg. at 69705.

⁴⁹ Approximately 11,000 FX transactions were excluded from this analysis because no product type was identified in the SDR data.

⁵⁰ Currently there is no universal field for reporting “FX swaps,” which are excluded from an entity’s *de minimis* calculation. Staff found that the majority of market participants reported the near leg of an FX swap as an FX spot or FX forward, and the far leg of the swap as an FX forward. Therefore, FX swaps are not separately delineated in this table.

of the Potential Swap Dealing Entities that remained after the application of the Entity Filters.⁵¹

These tables demonstrate that the vast majority of Potential Swap Dealing Entities in FX Derivatives had very low Counterparty and Transaction Counts. Similar to the Equity swap market, it appears that dealing in the FX Derivatives market may be concentrated among a small number of entities.

**Table 9 – FX Derivatives
Counterparty Counts**

Number of Counterparties	No. of Entities by Unique Identifiers	No. of Entities after Excluding Invalid LEIs and Applying Entity Filters
1-5	25,474	4,977
6-15	1,580	445
16-25	109	37
26-50	20	17
51-75	18	16
76-250	16	15
251-500	5	5
501-1000	12	10
Over 1000	14	14

⁵¹ In the FX Derivatives market, approximately 80% of all entities were excluded from the universe of Potential Swap Dealing Entities – approximately 61% were excluded due to the absence of valid LEIs, and approximately 19% were excluded due to the application of the Entity Filters. Of the 61% of entities that were excluded due to invalid LEIs, almost all had unique identifiers of some kind. Accordingly, although it was not possible to definitively determine who many of those entities were, the availability of the unique identifiers enabled staff to aggregate their Counterparty and Transaction Counts. Staff found that most of the excluded entities engaged in very few transactions during the Review Period, and therefore staff assumed that they were not likely engaged in dealing.

**Table 10 – FX Derivatives
Transaction Counts**

Number of Transactions	No. of Entities by Unique Identifiers	No. of Entities after Excluding Invalid LEIs and Applying Entity Filters
1-10	15,501	2,575
11-25	3,720	879
26-50	2,408	613
51-100	1,880	482
101-250	1,851	449
251-500	787	200
501-1000	496	122
1,001-5,000	462	129
5,001-10,000	63	27
10,001-100,000	58	39
Over 100,000	22	21

Table 11 summarizes the exclusions resulting from the application of the Entity Filters on the FX Derivatives data.

Table 11 – FX Derivatives Entity Filter Exclusions

Exclusions	FX Derivatives			
	LEIs	% LEI	USIs	% USI
Funds	4,972	18.3%	1,083,264	9.1%
Financial Cooperatives	*	0.00%	*	0.0%
International Financial Institutions	15	0.1%	4926	0.0%
Non-Financial Cooperatives	0	0.00%	0	0.0%
Insurance Companies	162	0.6%	15,894	0.1%
Non-Bank Financing	*	0.00%	62	0.0%
Invalid LEI	>16,500	60.8%	1,423,380	11.9%

Note: Each asterisk indicates fewer than five entities.

4. Non-Financial Commodity Swaps

To assess potential dealing activity in Non-Financial Commodity swaps, staff applied the same Entity Filters used for the Equity swaps and FX Derivatives data analysis; the activity-based assumptions described above in Section III.B.4 were also not applied.⁵² In addition, staff

⁵² Although commodity trade options are exempted from an entity's *de minimis* calculation, it was not possible to exclude these transactions from the analysis because there is no SDR data field to identify commodity trade options. Accordingly, the estimates in **Tables 12** and **13** may overstate potential dealing activity to the extent commodity

manually identified remaining entities to: (1) confirm that they did not fall under one of the Entity Filters; and (2) categorize the entities as either financial or non-financial. This extra step was undertaken to facilitate certain analyses specific to Non-Financial Commodity swaps as described in Sections IV and V of this Preliminary Report. **Tables 12** and **13** below show the Counterparty and Transaction Counts of Potential Swap Dealing Entities in Non-Financial Commodity swaps.⁵³ **Table 12** shows that most of these entities had low Counterparty Counts, suggesting that many of these entities may not be dealing. A similar pattern is reflected in **Table 13**, which shows that most Potential Swap Dealing Entities executed a small number of Non-Financial Commodity swaps during the Review Period.

**Table 12 – Non-Financial Commodity Swaps
Counterparty Counts**

Number of Counterparties	No. of Entities by Unique Identifiers	No. of Entities after Excluding Invalid LEIs and Applying Entity Filters
1-5	5,184	3,361
6-15	226	197
16-25	26	23
26-50	27	24
51-75	7	7
76-100	9	9
101-250	14	14
251-500	6	6
501-1000	*	*
Over 1000	0	0

Note: Each asterisk indicates fewer than five entities.

trade options were reported in the SDR data. Staff notes that the Commission has proposed to eliminate the requirement to report commodity trade options by end-users. Trade Options, 80 Fed. Reg. 26200 (proposed May 7, 2015).

⁵³ In the Non-Financial Commodity swap market, approximately 34% of all entities were excluded from the universe of Potential Swap Dealing Entities – approximately 21% were excluded due to the absence of a valid LEI, and approximately 13% were excluded due to the application of the Entity Filters.

**Table 13 – Non-Financial Commodity Swaps
Transaction Counts**

Number of Transactions	No. of Entities by Unique Identifiers	No. of Entities after Excluding Invalid LEIs and Applying Entity Filters
1-10	2,673	1,553
11-25	962	676
26-50	614	452
51-100	446	318
101-250	404	311
251-500	173	145
501-1000	97	76
1,001-5,000	92	77
5,001-10,000	19	17
10,001-100,000	21	18
Over 100,000	*	*

Note: Each asterisk indicates fewer than five entities.

Table 14 summarizes the exclusions resulting from the application of the Entity Filters on the Non-Financial Commodity swaps data.

Table 14 – Non-Financial Commodity Swaps Dealing Filter Exclusions

Exclusions	Non-Financial Commodity Swaps			
	LEIs	% LEI	USIs	% USI
Funds	634	11.5%	47,423	3.5%
Financial Cooperatives	0	0.0%	0	0.0%
International Financial Institutions	*	0.0%	11	0.0%
Non-Financial Cooperatives	61	1.1%	4015	0.3%
Insurance Companies	29	0.5%	490	0.0%
Non-Bank Financing	0	0.0%	0	0.0%
Invalid LEI	1,132	20.6%	203,787	15.0%

Note: The asterisk indicates fewer than five entities.

D. Measuring Potential Swap Dealing Activity across Asset Classes

In the absence of gross notional information for all asset classes, Counterparty and Transaction Counts were used to compare swap activity, including potential dealing, across asset classes. To develop baseline levels at which dealing is more likely, staff compared the number of Potential Swap Dealing Entities to the number of registered swap dealers among those entities in numerous ranges of Counterparty Counts and Transaction Counts in each asset class. Staff's

analysis indicated that the 51 to 75 Counterparty Count range is the lowest level at which the majority of Potential Swap Dealing Entities in each asset class were registered swap dealers. Similarly, the 10,001 to 100,000 Transaction Count range was the lowest level at which the majority of Potential Swap Dealing Entities in each asset class were registered. These estimated ranges are used in Sections IV and V, in the absence of complete notional data for all asset classes, for comparative analysis of potential swap dealing activity across all asset classes.

Staff welcomes comments on the following aspects of the data, methodology, and analysis:

- (1) Is it reasonable to assume that entities with less than \$1 billion of aggregate notional amount in IRS and CDS over a 12-month period are not likely engaged in appreciable swap dealing activity?
- (2) Is it reasonable to assume that the following types of entities are not likely engaged in swap dealing?
 - a. Investment funds and other collective investment vehicles.
 - b. Financial and non-financial cooperatives.
 - c. Insurance companies (including their subsidiaries).
 - d. Non-bank financing companies.
- (3) Is the methodology used to identify affiliated entities and to aggregate notional swap trading activity appropriate?
- (4) Are there affiliated entities where each entity has less than \$1 billion of aggregate notional swap trading activity, but when aggregated across affiliated entities, the total gross notional activity would exceed \$1 billion?

- (5) Are there additional filters that should be considered in general and for any particular asset class?
- (6) Is focusing on the Counterparty and Transaction Count ranges at which the majority of Potential Swap Dealing Entities were registered as swap dealers an appropriate strategy to identify potentially significant swap dealing activity? Should another approach for using Counterparty and/or Transaction Counts be considered?
- (7) The analysis for this Preliminary Report did not assess the range of products executed by an entity as another alternative indicator of potential dealing activity. Staff invites comments on the value of analyzing this metric, potentially in conjunction with other metrics.
- (8) Is there other data that staff should consider?

IV. Policy Objectives and Considerations Relating to the *De Minimis* Exception

In adopting the swap dealer definition, the Commissions identified the policy goals underlying swap dealer registration and regulation generally to include the reduction of systemic risk, counterparty protections, and market efficiency, orderliness, and transparency.⁵⁴ The Commissions explained that “implementing the *de minimis* exception requires a careful balancing that considers the regulatory interests that could be undermined by an unduly broad exception as well as those regulatory interests that may be promoted by an appropriately limited exception.”⁵⁵ A narrow *de minimis* exception would likely mean that a greater number of counterparties would be required to register as swap dealers and become subject to the regulatory framework. However, a *de minimis* exception that is too limited could, for example, discourage

⁵⁴ 77 Fed. Reg. at 30628-29, 30707.

⁵⁵ *Id.* at 30628. See also 75 Fed. Reg. at 80179 (The *de minimis* exception “should apply only when an entity’s dealing activity is so minimal that applying dealer regulations to the entity would not be warranted.”).

market participants in Non-Financial Commodity swaps or small and mid-sized banks from engaging in swap dealing activity in order to avoid the burdens associated with swap dealer regulation.

A. General Policy Considerations

1. Policies for Regulating Swap Dealers

(i) Reduction in Systemic Risk

The Dodd-Frank Act was enacted in the wake of the financial crisis of 2008, in significant part, to reduce systemic risk, including the risk to the broader U.S. financial system created by interconnections in the swap market.⁵⁶ Pursuant to the Dodd-Frank Act, the Commission has proposed or adopted regulations designed to mitigate the potential systemic risk inherent in the previously unregulated swap market, including the registration and regulation of swap dealers.

(ii) Counterparty Protections

Providing regulatory protections for swap counterparties who may be less experienced or knowledgeable about the swap products offered by swap dealers (particularly end-users who use swaps for hedging or investment purposes) is a fundamental policy goal advanced by the regulation of swap dealers. The Commissions recognized that the narrower or smaller the *de minimis* exception, the greater the number of counterparties that would benefit from those regulatory protections.⁵⁷

⁵⁶ Dodd-Frank Act, Preamble (stating that the purpose of the Dodd-Frank Act was “[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end ‘too big to fail’, to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes.”).

⁵⁷ 77 Fed. Reg. at 30628 (“On the one hand, a *de minimis* exception, by its nature, will eliminate key counterparty protections provided by Title VII for particular users of swaps and security-based swaps.”).

(iii) Swap Market Transparency, Orderliness, and Efficiency

Another goal of swap dealer regulation is swap market transparency, orderliness, and efficiency.⁵⁸ These market benefits are achieved through regulations requiring, for example, swap dealers to keep detailed daily trading records, report trade information, and engage in portfolio reconciliation and compression exercises.⁵⁹

2. Policies Advanced by a *De Minimis* Exception

The Commissions also recognized that, consistent with Congressional intent, “an appropriately calibrated *de minimis* exception has the potential to advance other interests.”⁶⁰ The Commissions explained that these interests include providing regulatory certainty, allowing limited swap dealing in connection with other client services, encouraging new participants to enter the market, and providing greater regulatory efficiency. The policy objectives underlying the *de minimis* exception are designed to encourage participation and competition by allowing market participants to engage in a *de minimis* amount of dealing without incurring the costs of registration and regulation.

⁵⁸ *Id.* at 30629 (“The statutory requirements that apply to swap dealers and security-based swap dealers . . . include requirements . . . aimed at helping to promote effective operation and transparency of the swap and security-based swap markets.”); *see also id.* at 30703 (“Those who engage in swaps with entities that elude swap dealer or major swap participant status and the attendant regulations could be exposed to increased counterparty risk; customer protection and market orderliness benefits that the regulations are intended to provide could be muted or sacrificed, resulting in increased costs through reduced market integrity and efficiency . . .”).

⁵⁹ Relevant statutory and regulatory provisions aimed at providing these market benefits include, but are not limited to, the following: daily trading records requirements (CEA Section 4s(g); 17 C.F.R. §§ 23.201-23.203); swap data reporting and recordkeeping requirements (CEA Section 4s(f); 17 C.F.R. §§ 23.204-23.205, 17 C.F.R. Parts 43 and 45); requirements related to disclosure of information to regulators (CEA Section 4s(j)(3); 17 C.F.R. § 23.606); and requirements related to post-trade processing and valuation of swaps (CEA Section 4s(i); 17 C.F.R. §§ 23.500-23.506).

⁶⁰ 77 Fed. Reg. at 30628.

(i) Regulatory Certainty

A *de minimis* exception based on an objective test with a limited degree of complexity enables entities to engage in a small amount of swap dealing with limited concerns about whether their activities would require registration.⁶¹ The existing single gross notional *de minimis* threshold provides regulatory certainty by establishing a single threshold test for all swap dealing in the aggregate. Conversely, the more variables included in the *de minimis* calculation, the more complex the determination of whether a market participant must register, potentially resulting in less certainty for market participants.

(ii) Allowing Limited Ancillary Dealing

A *de minimis* exception may allow market participants to accommodate existing clients that have a need for swaps along with other services on a limited basis.⁶² This interest enables end-users to continue transacting within existing business relationships.

(iii) Encouraging New Participants

A *de minimis* exception also may promote competition by allowing an entity to initiate some swap dealing activities without immediately incurring the regulatory costs associated with swap dealer registration and regulation.⁶³ Without a *de minimis* exception, regulation of swap dealers could become a barrier to entry that could stifle competition. An appropriately calibrated *de minimis* exception could lower the barrier to entry in the swap dealer space by allowing smaller participants to gradually expand their business until the scope and scale of their activity warrants regulation and the costs involved with compliance.

⁶¹ *Id.* at 30629, 30708.

⁶² *Id.*

⁶³ *Id.*

(iv) Regulatory Efficiency

Finally, the exception may also increase regulatory efficiency by enabling the Commission to focus its finite resources on entities whose swap dealing activity is sufficient in size and scope to warrant oversight.⁶⁴

Given these considerations, CFTC staff welcomes comments on the following:

- (1) Are there additional policy considerations underlying swap dealer regulation or the *de minimis* exception that the Commission should consider?
- (2) Are any of the policy considerations discussed above more or less important than the others?
- (3) Have there been any structural changes to the swap market such that the policy considerations have evolved?
- (4) Are entities curtailing their swap dealing activity to avoid swap dealer registration, and if so, what impact does that have on the swap market?
- (5) What are the specific costs of swap dealer registration?
- (6) Do these costs vary depending on the size and nature of an entity's swap dealing activities?
- (7) Are there particular regulatory requirements that are more burdensome than others?

B. Policy Considerations for Certain Sectors of the Swap Markets

Staff assessed the implications of any changes in the *de minimis* threshold for Non-Financial Commodity swap market participants and small and mid-sized banking enterprises; comments received during the swap dealer definition rulemaking process and staff observations

⁶⁴ *Id.* at 30628-29.

from the data reviewed indicate that these sectors may have characteristics that make them more sensitive to variations in the *de minimis* exception.

1. Non-Financial Commodity Swap Dealing

During the rulemaking process to define the term “swap dealer,” commenters stated that, while swaps entered into by non-financial entities may be viewed as accommodating a counterparty’s demand for a swap, and thus considered dealing activity, the swaps are driven by, and incidental to, other related transactions with the counterparty.⁶⁵ For example, these commenters noted that in physical transactions with commodity suppliers and purchasers, the counterparties often seek related financial risk management products.⁶⁶ Accordingly, the commenters requested that this swap activity be viewed as incidental to an entity’s non-swap business.⁶⁷

Ultimately, it was determined that a *per se* exclusion of all swaps entered into in connection with a physical commodity business would be inappropriate given that “in some circumstances a person might enter into swaps that are connected to a physical commodity business but also serve market functions characteristic of the functions served by swap dealers.”⁶⁸ Specifically, the preamble to the swap dealer definition states that focusing on the *dealing* activity of the market participant “ensure[s] that all participants in the swap markets are

⁶⁵ See generally Joint letter from Shell Trading (US) Company and Shell Energy North America (US), L.P., dated Feb. 22, 2011; Joint letter from Natural Gas Supply Association and National Corn Growers Association, dated Nov. 16, 2010; Letter from Gavilon Group, LLC, dated Feb. 21, 2011 (“**Gavilon Letter**”); Presentation from Working Group of Commercial Energy Firms (“**WGCEF**”), dated Nov. 2, 2011; Letter from WGCEF, dated June 3, 2011; Letter from Edison Electric Institute, dated Sep. 20, 2010; Presentation from BG Group, dated June 22, 2011; Letter from Vitol Inc., dated Feb. 22, 2011; and Letter from EDF Trading North America, LLC, dated Feb. 22, 2011.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ 77 Fed. Reg. at 30611.

regulated in a fair and consistent manner, regardless of whether their underlying business is primarily physical or financial in nature.”⁶⁹

Staff analyzed the Non-Financial Commodity swaps activity of financial and non-financial entities to assess possible differences in swaps activity; both registered and unregistered entities were compared. To perform this analysis, each Potential Swap Dealing Entity identified in **Tables 12 and 13** above was categorized as “financial” or “non-financial” based on the apparent nature of its business.⁷⁰ **Tables 15 and 16** below compare the Counterparty and Transaction Counts of registered and unregistered financial and non-financial entities.⁷¹

**Table 15 – Non-Financial Commodity Swaps
Analysis of Counterparty Counts**

Counterparty Count	Unregistered Entities		Registered Swap Dealers	
	Financial	Non-Financial	Financial	Non-Financial
1-5	174	3,187	0	0
6-15	18	179	0	0
16-25	*	18	*	0
26-50	*	17	*	0
51-75	*	*	*	0
76-1,000	0	7	21	*
Over 1,000	0	0	0	0

Note: Each asterisk indicates fewer than five entities.

⁶⁹ *Id.*

⁷⁰ An entity was deemed to be “financial” if it was a bank, bank affiliate, bank subsidiary, futures commission merchant, foreign exchange broker, or broker-dealer. An entity was deemed to be “non-financial” if it did not fall under any of those categories.

⁷¹ An entity was excluded from the registered swap dealer columns and included in the unregistered columns if it entered into only a small amount of Non-Financial Commodity swaps and appeared to be registered as a swap dealer because of its volume of swap activity in types of swaps other than Non-Financial Commodity swaps.

**Table 16 – Non-Financial Commodity Swaps
Analysis of Transaction Counts**

Transaction Count	Unregistered Entities		Registered Swap Dealers	
	Financial	Non-Financial	Financial	Non-Financial
1-10	74	1,479	0	0
11-25	39	637	0	0
26-50	24	428	0	0
51-100	11	307	0	0
101-250	19	292	0	0
251-1,000	18	198	5	0
1,001-5,000	10	57	10	0
5,001-10,000	*	7	7	*
Over 10,000	*	5	10	*

Note: Each asterisk indicates fewer than five entities.

Tables 15 and **16** indicate that the majority of entities with Counterparty and Transaction Counts above 50 and 10,000, respectively, in the Non-Financial Commodity swaps market were financial entities. Most of these financial entities were registered swap dealers. With respect to the Non-Financial Commodity swap activity of non-financial entities, a large majority of such entities had relatively low Counterparty and Transaction Counts, potentially indicating that many of these entities may be end-users.⁷² However, at least some non-financial entities had Counterparty and Transaction Counts that were comparable to financial entities and may be indicative of dealing. For example, **Table 15** shows that more than seven non-financial entities had greater than 50 counterparties during the Review Period, and **Table 16** shows that more than five non-financial entities had Transaction Counts over 10,000.⁷³ In summary, the data indicates that, while financial entities that transact in Non-Financial Commodity swaps were more likely to have Counterparty and Transaction Counts that may be indicative of dealing, and were more

⁷² More than 90% of non-financial entities had a Counterparty Count of five or less, and more than 80% of non-financial entities had a Transaction Count of 100 or less.

⁷³ A minority of the non-financial entities with Counterparty and Transaction Counts above 50 and 10,000, respectively, were registered swap dealers.

likely to be registered dealers, there were some non-financial entities that had Counterparty and Transaction Counts that may be indicative of dealing, with a subset of that group having registered with the Commission as swap dealers.

The SDR data also indicates that non-financial entities in the Non-Financial Commodity swap market represented approximately 65% of the most active participants in that market during the Review Period, as measured by number of transactions. Staff considered all entities with more than 1,000 swaps during the Review Period to be the most active participants in the Non-Financial Commodity swap market. This data shows that non-financial entities play a significant part in the Non-Financial Commodity swap market and, accordingly, a decision to exclude such firms from swap dealer registration may require further analysis to assess whether such an exclusion could result in a greater than *de minimis* amount of unregistered dealing activity.

Given these considerations, CFTC staff welcomes comments on the following:

- (1) What has been the impact of the current *de minimis* threshold on the Non-Financial Commodity swap market, including, but not limited to, the ability of end-users to hedge their risk? Staff requests quantitative analysis of the impact, including various measures of transaction costs and liquidity.
- (2) Have participants in the Non-Financial Commodity swap market limited their swap dealing activity to remain below the *de minimis* threshold?
- (3) Does the dealing activity of financial entities in the Non-Financial Commodity swap market differ from the dealing activity of non-financial entities?

2. Small to Mid-Sized Banking Enterprises

Commenters on the proposed swap dealer definition stated that the limited nature of small and mid-sized banks' swaps activity supports a reduced regulatory burden for those entities.⁷⁴ In analyzing the Review Period data, staff observed that there was a wide range in the size of banks that routinely engaged in IRS and CDS activity. The commenters noted that small and mid-sized banks were primarily swap dealers in the IRS market because of their focus on lending activities.⁷⁵ This section considers the *de minimis* exception in the context of small and mid-sized banking entities.

Banking enterprises⁷⁶ are often differentiated in regulatory contexts based on total assets.⁷⁷ **Table 17** illustrates that during the Review Period, the volume of potential swap dealing activity, measured by average Counterparty Count, Transaction Count, and notional amount, was considerably higher for banking enterprises with total assets exceeding \$750 billion. Furthermore, approximately 86% of banking enterprises with at least \$750 billion in assets that

⁷⁴ See generally Letter from Securities Industry and Financial Markets Association, dated Nov. 10, 2010 (“**SIFMA Letter**”); Letter from the Mid-Size Bank Coalition of America, dated Feb. 15, 2011; Letter from Capital One Financial Corporation, dated Feb. 22, 2011 (“**Capital One Letter**”); Notes from staff meeting with Regions Bank, M&T Bank, and Fifth Third Bank, Aug. 8, 2011 (“**Regions/M&T/Fifth Third Meeting Notes**”); Notes from staff conference call with community and regional banks, Oct. 4, 2011 (“**Community and Regional Bank Call Notes**”); and Notes from staff meeting with Capital One, N.A., B&F Capital Markets, and Branch Banking & Trust Co., Feb. 4, 2011 (“**Capital One/B&F/BB&T Meeting Notes**”).

⁷⁵ See Regions/M&T/Fifth Third Meeting Notes; Community and Regional Bank Call Notes; and SIFMA Letter.

⁷⁶ As used in this Preliminary Report, the term “banking enterprises” refers to affiliated groups that contain at least one depository institution, parents of depository institutions, and bank holding companies for purpose of Section 8 of the International Banking Act of 1978. The banking enterprises were identified from the Potential Swap Dealing Entities identified in **Table 4** using Global Industry Classification Standard codes found in Bloomberg Finance, L.P. data. If a bank was not a member of a banking enterprise, its swaps activity was assessed individually.

⁷⁷ See, e.g., Dodd-Frank Act; Bank Holding Company Act, Pub. L. 84-511, 70 Stat. 133 (1956).

entered into IRS or CDS transactions during the Review Period had at least one registered swap dealer in the corporate family.⁷⁸

Table 17 – Potential IRS and CDS Dealing Activity of Banking Enterprises by Total Asset Size⁷⁹

Total Global Assets (USD Billions)	Banking Enterprises Entering into IRS or CDS	Banking Enterprises with Registered SDs	Counterparty Count		Transaction Count		Gross Notional Amount (USD Billions)					
			Mean	Max	Mean	Max	IRS		CDS		IRS and CDS	
							Mean	Max	Mean	Max	Mean	Max
0-25	8	0	31	92	149	289	4	7	0.0	0.0	4	7
25-50	10	0	53	166	178	402	2	4	0.0	0.0	2	4
50-100	8	*	112	345	314	819	8	18	0.1	0.6	8	19
100-200	16	*	55	449	266	1,016	16	72	0.5	4.8	17	75
200-300	10	0	11	20	92	557	9	42	0.7	6.0	9	48
300-500	13	6	155	1,192	4,053	35,565	543	3,998	6.3	57.8	550	4,056
500-750	12	11	249	596	2,196	4,432	264	646	1.7	4.4	265	649
750-1,000	9	6	1,738	5,726	31,146	142,192	3,275	15,456	249.6	1,483.2	3,524	16,939
1,000+	19	18	2,248	7,729	48,078	225,808	4,115	18,148	444.2	3,079.9	4,559	21,170

Note: Each asterisk indicates fewer than five entities.

Table 17 also indicates that for small and mid-sized banking enterprises, the volume of a banking enterprise’s swap activities is not directly correlated to its asset size. For example, banking enterprises with total assets ranging from \$300 billion to \$500 billion had an average Transaction Count of 4,053 in IRS and CDS during the Review Period. However, one bank executed over 35,000 swap transactions during the Review Period, more than eight times the average. Banking enterprises with total assets ranging from \$50 billion to \$100 billion had an average Counterparty Count of 112 during the Review Period, whereas banking enterprises with

⁷⁸ While many of the banking entities included in the data set had gross notional amounts exceeding \$8 billion during the Review Period, to the extent they enter into dealing swaps in connection with loans provided to the swap counterparty, such swaps would not be counted toward the banking entity’s gross notional amount because of the IDI Exclusion. Accordingly, such entities may remain under the current *de minimis* exception threshold.

⁷⁹ If multiple subsidiaries of a banking enterprise engaged in IRS and CDS activity, their potential swap dealing metrics (Counterparty Count, Transaction Count, and notional amounts) were aggregated.

total assets ranging from \$200 billion to \$300 billion had an average Counterparty Count of only 11. This data suggests that a blanket exclusion for certain banking entities based on asset size could exclude banks that engage in significant levels of dealing activity.

Table 18 illustrates that the majority of the IRS and CDS activity within the banking sector, as measured by notional amount, appears to be concentrated in large banking enterprises. Specifically, it shows that banking enterprises with over \$750 billion in total assets accounted for approximately 91% of the total IRS and CDS notional activity reported for banking enterprises during the Review Period.⁸⁰ Further, banking enterprises with over \$300 billion in total assets accounted for approximately 99% of the total IRS and CDS notional activity reported for banking enterprises.

Table 18 – Concentration of Potential IRS and CDS Dealing Activity of Banking Enterprises by Total Asset Size

Total Bank Global Assets (USD Billions)	Banking Enterprises within the Asset Range	Banking Enterprises with Registered SDs	Gross Notional Amount of IRS and CDS (USD Billions)	Percentage of IRS and CDS Bank Activity During the Review Period
0-25	8	0	30	0.0%
25-50	10	0	24	0.0%
50-100	8	*	62	0.0%
100-200	16	*	271	0.2%
200-300	10	0	93	0.1%
300-500	13	6	7,144	5.5%
500-750	12	11	3,184	2.5%
750-1,000	9	6	31,721	24.6%
1,000+	19	18	86,620	67.1%
Total	105	46	129,149	100.0%

Note: Each asterisk indicates fewer than five entities.

⁸⁰ Total assets may be reported differently from bank to bank based on differences in global accounting standards. For example, according to the International Swaps and Derivatives Association (“ISDA”), U.S. Generally Accepted Accounting Principles (“U.S. GAAP”) allow derivatives to be reported on a net basis, while International Financial Reporting Standards (“IFRS”) requires reporting on a gross basis. See “Netting and Offsetting: Reporting derivatives under U.S. GAAP and under IFRS,” ISDA (May 23, 2012), available at: <https://www2.isda.org/attachment/NDQxOQ==/Offsetting%20under%20US%20GAAP%20and%20IFRS%20-%20May%202012.pdf>.

Regulation 1.3(ggg)(4)(ii)(B) directs staff to address the impact of certain exclusions from the *de minimis* exception calculation and potential alternatives to these exclusions, including the IDI Exclusion. Some commenters stated that the IDI Exclusion is too narrow and does not accurately reflect the nature of the swaps entered into by IDIs in connection with loans.⁸¹ Although many of the comments centered on requests for a broad interpretation of the IDI Exclusion, the Commission noted in the swap dealer definition final rule that it was constrained by the specific statutory limitations of the exclusion within the swap dealer definition.⁸²

Given these previously stated constraints, staff explored whether changes could come in the form of relief for a particular class of market participants or a particular level of swap dealing activity. Despite the limited scope of swap activities in which small and mid-sized banking enterprises appear to be engaged, **Tables 17** and **18** indicate that some of them nonetheless have high Counterparty and Transaction Counts. Accordingly, excluding small and mid-sized banking enterprises from regulation based solely on asset size might be inconsistent with the Commission's interest in promoting counterparty protections and swap market transparency, orderliness, and efficiency.

Given these considerations, CFTC staff welcomes comments on the following:

- (1) What has been the impact of the current *de minimis* threshold on the swap activity of small and mid-sized banking enterprises?
- (2) Have small and mid-sized banking enterprises limited swap dealing activity to remain below the *de minimis* threshold?

⁸¹ See Capital One Letter; Regions/M&T/Fifth Third Meeting Notes; and Capital One/B&F/BB&T Meeting Notes.

⁸² 77 Fed. Reg. at 30621-22.

- (3) Would an expansion of the IDI Exclusion address small to mid-sized banking enterprises' concerns? If so, what sort of expansion would be appropriate given the relevant statutory constraints and competing policy goals?

V. *De Minimis* Exception Alternatives

This Preliminary Report draws on the analysis previously discussed to consider, among other things, “whether the *de minimis* threshold should be increased or decreased.”⁸³ The available data was analyzed for indications of the impact of changing the threshold in light of the policy considerations underlying swap dealer regulation and the *de minimis* exception.

Further, this Preliminary Report also considers whether “alternative approaches [to the single gross notional *de minimis* exception] would more effectively promote the regulatory goals that may be associated with a *de minimis* exception.”⁸⁴ Specifically, based on alternative approaches considered during the swap dealer definition rulemaking process, comments from market participants, and staff’s observations from the data analysis, the following alternatives are discussed: (1) a notional *de minimis* threshold specific to each asset class; (2) a multi-factor approach that would potentially include Counterparty Count and/or Transaction Count metrics in the *de minimis* exception, in addition to a gross notional dealing threshold; (3) a multi-tiered approach where the regulatory requirements associated with swap dealer registration are commensurate with an entity’s level of dealing activity; and (4) the exclusion of swaps that are traded on a registered or exempted swap execution facility (“SEF”) or designated contract market (“DCM”), and/or cleared from an entity’s *de minimis* calculation.

⁸³ 17 C.F.R. § 1.3(ggg)(4)(ii)(B).

⁸⁴ 77 Fed. Reg. at 30635.

A. Higher or Lower Gross Notional *De Minimis* Threshold

In light of the scheduled decrease of the *de minimis* notional threshold to \$3 billion at the end of the phase-in period, staff analyzed the data to assess the impact of a gross notional *de minimis* threshold that is higher or lower than the current \$8 billion threshold. This section focuses on IRS and CDS because notional data was not available for the other asset classes. Therefore, the discussion is only an illustration to help inform the consideration of any potential changes to the notional threshold. Additional information for the other asset classes would be necessary for a comprehensive analysis.

Building on **Table 4**, **Table 19** shows the estimated amount of IRS and CDS notional activity, transactions, and counterparties that would be covered by regulation depending on the notional level used for the registration threshold and assuming all Potential Swap Dealing Entities were registered at those thresholds. The \$3 and \$8 billion notional levels are shown because they are used in the current *de minimis* exception. The \$1 billion, \$15 billion, and \$100+ billion levels are shown to provide a sense of the possible change in coverage as the notional threshold moves significantly higher or lower.

Table 19 – IRS and CDS Potential Dealing Activity Covered by Notional Amount

Gross Notional Amount of IRS/CDS (USD Billions) Greater than (i)	Potential Swap Dealing Entities (ii)	Total Notional Amount (USD Billions)		Transactions		Unique Counterparties	
		Total Amount (iii)	Change from \$8 Billion Level (iv)	Total Number (v)	Change from \$8 Billion Level (vi)	Total Number (vii)	Change from \$8 Billion Level (viii)
1	332	132,737	597	1,325,106	21,992	27,894	986
3	212	132,519	379	1,318,351	15,237	27,429	521
8	129	132,140	N/A	1,303,114	N/A	26,908	N/A
15	107	131,945	-195	1,298,250	-4,864	25,849	-1,059
100+	56	130,223	-1,917	1,274,194	-28,920	24,089	-2,819

Columns (iii) and (v) of **Table 19** estimate the total notional amount and the total number of swaps that would be covered at the thresholds listed in Column (i) if all Potential Swap Dealing Entities were required to register. Column (vii) similarly shows the estimated number of unique counterparties that would be covered if all Potential Swap Dealing Entities at each level were required to register. Columns (iv), (vi), and (viii) show the difference in each metric that might be subject to swap dealer regulation as compared to the current \$8 billion threshold.

Table 19 shows that up to an incremental 83 additional Potential Swap Dealing Entities in IRS and CDS might be subject to registration if the *de minimis* threshold falls to \$3 billion. Up to an estimated \$379 billion in notional activity (approximately less than a 1% increase of the total during the Review Period), 15,237 swaps (approximately a 1% increase), and 521 unique counterparties (approximately a 2% increase) might be covered by swap dealer regulations at the \$3 billion level. However, it is likely that the incremental changes would be smaller than the amounts estimated, given that hedging and proprietary trading activity could not be excluded from the gross notional amounts of Potential Swap Dealing Entities.

Table 19 appears to indicate that only a substantial increase or decrease in the *de minimis* threshold would have an appreciable impact on regulatory coverage as measured by notional amount, transactions, or unique counterparties. As noted above, a decrease to a \$3 billion *de minimis* threshold would only result in one to two percent more activity, as measured by the different metrics, being covered by swap dealer regulation. Similarly, at the \$15 billion level, approximately \$195 billion less notional activity, 4,864 fewer swaps, and 1,059 fewer unique counterparties would be covered by swap dealer regulation, representing a decrease in coverage of less than 1% for notional activity and swap transactions and less than 4% for unique counterparties.

Some policy objectives may be furthered by a more limited *de minimis* exception, including reducing systemic risk, providing counterparty protections, and enhancing swap market transparency, orderliness, and efficiency. On the other hand, some policy objectives may be advanced by a broader *de minimis* exception, including, encouraging new participants, allowing limited ancillary dealing, providing greater regulatory certainty, and providing for greater regulatory efficiency. **Table 19** provides estimates for the Commission and the public that should be informative for the assessment of the potential impact that changes in the threshold may have on these policy objectives. Since this analysis measures the impact of a modified notional threshold for the IRS and CDS asset classes only, it has limited value for setting a more effective single *de minimis* threshold for the entire swap market.

Given these considerations, CFTC staff welcomes comments on the following:

- (1) What would be the impact of lowering the *de minimis* threshold to \$3 billion or raising it above \$8 billion on each of the Commission's policy objectives?
- (2) If the *de minimis* threshold is lowered to \$3 billion or raised above \$8 billion, would there be a disparate impact on different asset classes or types of participants in those asset classes?
- (3) If the *de minimis* threshold is lowered to \$3 billion or raised above \$8 billion, what would be the effect on market participants' behavior?
- (4) Has the analysis and subsequent discussion of the potential impact of a change in the notional threshold focused on the appropriate metrics or are there other metrics that should be considered?
- (5) Are there any unique costs or benefits associated with the *de minimis* threshold being reduced to \$3 billion or being raised above \$8 billion?

B. Alternative Approaches to the *De Minimis* Exception

In addition to a single gross notional threshold approach to the *de minimis* exception, this Preliminary Report also considers the data in light of the following alternatives: (1) a notional *de minimis* threshold specific to each asset class; (2) a multi-factor approach; (3) a multi-tiered regulatory approach; and (4) the exclusion of swaps executed on a SEF or DCM and/or cleared swaps from an entity's *de minimis* calculation.

1. Different *De Minimis* Notional Thresholds by Asset Class Alternative

Staff examined the extent to which swaps executed during the Review Period involved at least one swap dealer. These levels would indicate the extent to which swap activity for each asset class was subject to swap dealer regulation at the current *de minimis* exception threshold. The percentage of swaps with at least one registered swap dealer as one of the counterparties was greater than 95% for IRS and CDS and approximately 90% and 93% for FX Derivatives and Equity swaps, respectively. Non-Financial Commodity swaps were noticeably lower at 78%.

Staff notes, however, that this data reflects the amount of swaps that were subject to swap dealer regulation and does not identify the amount of swap *dealing* transactions that were subject to regulation. **Table 20** measures the percentage of Potential Swap Dealing Entities with relatively high Counterparty and Transaction Counts that were registered as swap dealers.

Table 20 – Percentage of Potential Swap Dealing Entities that were Registered

	IRS	CDS	FX	Equity	Non-Financial Commodity
Percent Registered With Greater Than 50 Counterparties	75% ⁸⁵	100%	97%	100%	74%
Percent Registered With Greater Than 10,000 Transactions	89%	100%	73%	100%	68%

Table 20 indicates that Potential Swap Dealing Entities with high Counterparty and Transaction Counts in the Non-Financial Commodity swap asset class had comparatively lower registration rates for both measures. The discussion below examines specific characteristics of this asset class that may explain this lower regulatory coverage.

The commenters on the proposed swap dealer definition stated that some asset classes may have higher average notional amounts per swap than others.⁸⁶ Consequently, a market participant that executes a small number of dealing transactions with only a few counterparties in an asset class for which the notional size of each transaction is comparatively large could exceed the *de minimis* threshold with relatively few transactions and be required to register. Conversely, a market participant that executes a large number of dealing transactions with many counterparties in an asset class for which the notional size per swap is comparatively small could be more likely to stay under the *de minimis* threshold and not be required to register.

⁸⁵ Staff reviewed the unregistered entities with over 50 counterparties in the IRS asset class and found that a large majority were IDIs that may not be required to register because of the IDI Exclusion. This data point exceeds 90% if these entities are excluded.

⁸⁶ The Commission received comment letters suggesting that the *de minimis* notional amount threshold should vary by asset class in proportion to the notional size of each asset class. See Letter from ISDA, dated Feb. 22, 2011 (“In certain markets (*e.g.*, foreign exchange) it would be relatively easy for the activities of a small trader that enters into few Covered Swaps to exceed a \$100m notional amount (or \$25m for Covered Swaps with special entities).”); and Gavilon Letter.

Another possible explanation for the lower regulatory coverage is that entities in the Non-Financial Commodity swap asset class may be more likely to be engaged in hedging or proprietary trading activity with other non-dealers than entities in other asset classes.

When the Commission adopted Regulation 1.3(ggg), it stated that establishing multiple thresholds by asset class would increase the costs to market participants of determining if they fell within the *de minimis* exception by requiring participants to consider multiple variables, thereby decreasing regulatory certainty.⁸⁷ Staff also notes that a complex *de minimis* calculation could decrease regulatory efficiency by increasing the amount of time and resources needed at the CFTC to monitor and enforce the exception.

Given these considerations, CFTC staff welcomes comments on the following:

- (1) Is it correct to conclude that an asset class that has a substantially lower average notional swap size could result in more entities staying under the \$8 billion *de minimis* level?
- (2) If the average notional size of a swap asset class is materially smaller than the average notional size of other types of swaps, should the Commission establish a lower notional *de minimis* threshold for that asset class?
- (3) What characteristics of asset classes should the Commission consider in determining whether establishing different notional thresholds for different asset classes may be appropriate?
- (4) Are there any unique costs or benefits associated with this alternative to the *de minimis* exception?

⁸⁷ 77 Fed. Reg. at 30708.

2. Multi-Factor *De Minimis* Threshold Alternative

Insofar as Counterparty and Transaction Counts may be indicators of dealing activity, staff also considered the establishment of a *de minimis* exception based upon some combination of (1) gross notional swap dealing activity, (2) Counterparty Count, and/or (3) Transaction Count. For example, a multi-factor *de minimis* exception could potentially distinguish entities below a gross notional swap dealing threshold that nonetheless have high Counterparty and/or Transaction Counts, and therefore are more likely to be engaging in a level of swap dealing activity that is not *de minimis*.

When the swap dealer definition was first proposed, the Commissions stated that an entity with a large number of dealing counterparties or a large number of dealing transactions should be required to register “to help achieve Title VII’s orderly market goals.”⁸⁸ Under the proposal, the *de minimis* exception covered only entities that entered into 20 or fewer dealing transactions and had 15 or fewer counterparties.⁸⁹ Ultimately, these other metrics were not included in the *de minimis* exception. In reaching this conclusion, the Commissions considered concerns expressed by commenters in reaction to the proposed levels that “a standard based on the number of swaps . . . or counterparties can produce arbitrary results by giving disproportionate weight to a series of smaller transactions or counterparties.”⁹⁰

⁸⁸ 75 Fed. Reg. at 80180.

⁸⁹ *Id.*

⁹⁰ 77 Fed. Reg. at 30630. *See, e.g.*, Letter from Coalition of Physical Energy Companies, dated Feb. 22, 2011 (“It is possible that a person may enter into multiple swaps and have multiple counterparties but still engage in activities that do not ‘amount to a hill of beans’ in the market. If the gross notional value of the total swaps position is insignificant, then the Regular Business is *de minimis*. If the gross notional value of the total swaps position is above an insignificant amount, it is not *de minimis*. Accordingly, COPE proposes to delete the number of counterparties and number or swaps criteria and measure a *de minimis* level by gross notional value alone.”).

As discussed in Section III, there may be meaningful distinctions in levels of activity, as measured by Counterparty Counts, among the asset classes. For example, the majority of Potential Swap Dealing Entities with a Counterparty Count above 50 were registered as swap dealers, ranging from approximately 74% in Non-Financial Commodity swaps to 100% in CDS and Equity swaps. Two possible uses of Counterparty Counts as part of the *de minimis* exception are outlined below.

One approach could be to use a Counterparty Count threshold as an alternative to a gross notional threshold. In this approach, an entity would be required to register if it exceeds *either* (i) a gross notional threshold, *or* (ii) a dealing counterparty threshold. This approach could be particularly useful with a relatively higher gross notional threshold that would likely exclude potential dealers that fall below that threshold, but which have high numbers of unique counterparties.

Another approach could be to use a Counterparty Count threshold together with a gross notional threshold. In this approach, an entity would be required to register if the entity exceeds *both* (i) a gross notional threshold, *and* (ii) a dealing counterparty threshold. This approach could be used with a relatively lower gross notional threshold that, if used alone, may capture too many smaller dealers with *de minimis* activity (as evidenced by a small number of dealing counterparties). In effect, with the registration requirement applying only if two thresholds are exceeded, those smaller dealers with relatively low notional amounts and low Counterparty Counts would be excluded from registration as swap dealers. Under either approach, to address concerns regarding regulatory certainty, the Counterparty Count threshold would need to be high enough to permit entities to engage in a certain amount of swaps activity without concern about monitoring and remaining below the Counterparty Count threshold.

Regarding the Transaction Count metric, while the data may indicate a loose correlation with dealing activity, Transaction Count appears to be less indicative of dealing activity as compared to Counterparty Count, and therefore, may be less effective as an alternative or additional metric for the *de minimis* exception. In reviewing the SDR data, staff notes that there are a number of entities that entered into thousands (in a few cases over 10,000) transactions, but had fewer than 20 unique counterparties, indicating that many of these entities may not be dealing. These high transaction counts by non-dealers could be for any number of reasons, such as the nature of their hedging or trading strategies.

Staff also notes that a number of other factors should be considered with respect to using Counterparty and/or Transaction Count as metrics for the *de minimis* exception, such as their impact on regulatory efficiency and certainty, and whether the use of such metrics would create incentives to structure transactions so as to avoid regulation.

Given these considerations, CFTC staff welcomes comments on the following:

- (1) Should Counterparty and/or Transaction Count be considered as possible metrics for the *de minimis* exception?
- (2) Are there other metrics that should be used instead?
- (3) Under what circumstances might entities have high Counterparty Counts and not be dealers in swaps?
- (4) If a multi-factor approach is used, what approach should be used and what should the thresholds be for the various metrics, taking into account the Commission's policy objectives?
- (5) Should the metrics used in a multi-factor approach be the same for each asset class?

- (6) Are there any unique costs or benefits associated with this alternative to the *de minimis* exception?

3. Multi-Tiered Swap Dealer Regulation Alternative

As described below, the SDR data indicates that there appear to be a small number of large dealers with high levels of swap dealing activity and a second tier of entities, many of which may be engaged in swap dealing activity, but at substantially lower levels. In light of the various policy objectives served by swap dealer regulation and the *de minimis* exception, staff considered whether multiple tiers of regulation should be established for registered swap dealers. For example, less rigorous swap dealer regulation may be appropriate for: (1) small and mid-sized banking enterprises; and (2) entities that appear to be actively dealing, but for the reasons discussed above (*e.g.*, low notional sizes), do not exceed the current \$8 billion *de minimis* threshold.

A multi-tiered approach could establish different levels of swap dealer regulation based on two gross notional thresholds: (1) one threshold would differentiate dealers with the largest amounts of gross notional dealing activity (“**Tier 1 Dealers**”); and (2) a second, lower threshold, would differentiate dealers with lower, but still significant, amounts of gross notional dealing activity (“**Tier 2 Dealers**”) from those with *de minimis* levels of activity. Entities that do not exceed the Tier 2 Dealer threshold would not be required to register. It is beyond the scope of this Preliminary Report to determine the specific constructs of such a multi-tiered framework, or to evaluate the advantages and disadvantages of this approach. Generally though, Tier 1 Dealers could, for example, be subject to the full scope of current swap dealer regulations, whereas Tier 2 Dealers could be subject to a lesser set of regulations that still meet the requirements for regulating swap dealers enumerated under CEA Section 4s.

Staff reviewed the SDR data for indicators to differentiate dealing activity among Potential Swap Dealing Entities. In **Table 21** below, Potential Swap Dealing Entities in each asset class are grouped based on their Counterparty Counts. The first group is the top 20 entities in each asset class as measured by Counterparty Count (“**Group A**”); the second group represents the next 20 entities as measured by Counterparty Count (“**Group B**”); and the third group includes all remaining entities (“**Group C**”). These levels were selected for comparative purposes only for this Preliminary Report. A more detailed analysis of the data and swap markets would need to be conducted to determine the levels at which the different registration thresholds should be established.

Table 21 – Comparison of Swap Activity by Dealer Groupings

Potential Swap Dealing Entities by Counterparty Count (i)	Transactions		Unique Counterparties		Registered Swap Dealers (vi)	Total Notional (USD Billions) (vii)
	Total (ii)	Median (iii)	Total (iv)	Median (v)		
IRS						
Top 20 LEIs	1,140,468	20,230	18,326	1,803	18	129,344
21-40 LEIs	235,851	2,578	5,992	456	19	27,078
Remaining LEIs	160,795	51	3,034	10	31	17,897
CDS						
Top 20 LEIs	536,097	2,178	7,644	690	20	22,210
21-40 LEIs	21,204	114	156	17	17	1,006
Remaining LEIs	8,469	19	49	7	17	331
FX Derivatives						
Top 20 LEIs	6,776,221	257,644	13,087	1,494	20	N/A
21-40 LEIs	1,145,292	27,753	2,102	234	20	N/A
Remaining LEIs	1,527,114	12	4,787	1	51	N/A
Equity						
Top 20 LEIs	115,820	3,967	3,653	191	20	N/A
21-40 LEIs	3,819	106	100	12	13	N/A
Remaining LEIs	18,377	5	81	2	27	N/A
Non-Financial Commodity						
Top 20 LEIs	485,085	9,987	4,230	216	17	N/A
21-40 LEIs	102,361	1,783	1,126	85	12	N/A
Remaining LEIs	516,271	15	1,041	2	38	N/A

Table 21 demonstrates that Group A entities had significantly higher median and total Counterparty and Transaction Counts compared to Group B entities in every swap asset class.

Column (ii) indicates that Group A entities, in the aggregate, executed more than four times as many swaps in each asset class than Group B entities. Further, column (iii) indicates that the median number of swaps executed by Group A entities ranged from approximately five to over ten times higher than Group B entities. Moreover, columns (iv) and (v) indicate that in each asset class, Group A entities transacted with a significantly greater number of unique counterparties. The large differences in the median and total Counterparty and Transaction Counts between the two groups in every asset class suggest that there is substantial differentiation in the swap trading levels of the most active swap market participants.

The data also indicates that there may be a significant decrease in potential swap dealing activity for Group C entities. Staff notes that although the number of entities in Group C is much larger than the 20 entities in Group B, Group C entities have lower total Counterparty Counts across asset classes as compared to Group B, with the exception of FX Derivatives. More significantly, the median number of swaps executed by Group B entities was markedly higher, ranging from approximately six to as much as 2,000 times greater than the median number of transactions for Group C entities.

As noted above, an assessment of the advantages and disadvantages of a multi-tiered *de minimis* exception is beyond the scope of this Preliminary Report. However, staff has set forth some of the issues that would need to be examined if such an alternative is to be considered. This is not, however, a complete list of such factors. Depending on where the Tier 2 Dealer threshold is set, a multi-tiered approach could result in an increase in the number of entities subject to Commission regulations, although at a reduced level of regulation. For example, entities may find that the reduced costs associated with registering and operating as a Tier 2 Dealer may justify continued or expanded swap dealing, as well as potentially encourage new

swap dealers to enter the market. In turn, this could increase the number of swaps covered by the swap dealer regulations applicable to Tier 2 Dealers.

On the other hand, this approach could also result in currently registered swap dealers becoming Tier 2 Dealers subject to a reduced level of regulatory oversight. Generally, given that Tier 1 Dealers would have substantially higher levels of swap activity as compared to Tier 2 Dealers, the benefits achieved from applying full swap dealer regulation to Tier 1 Dealers could be greater than the benefits achieved by applying those same regulations to Tier 2 Dealers, while reducing the costs of compliance for Tier 2 Dealers who would otherwise have been Tier 1 Dealers. In this regard, it would be important to set the thresholds at appropriate levels such that the reduction in regulation of Tier 2 Dealers is consistent with the reduced involvement and impact they have individually, and in the aggregate, on the swap markets.

A multi-tiered regulatory approach may also advance the policy objective of regulatory efficiency by allowing the Commission to focus more of its resources on the smaller number of Tier 1 Dealers. However, a multi-tiered approach could potentially reduce regulatory certainty.

A tiered regulatory approach might also address, at least partially, some of the unique considerations discussed above in Section IV.B. For example, the issues regarding regulating smaller Non-Financial Commodity swap dealers and small and mid-sized banking enterprises might be addressed through a multi-tiered approach.

Given these considerations, CFTC staff welcomes comments on the following:

- (1) How would a multi-tiered regulatory structure impact the policy considerations underlying swap dealer regulation and the *de minimis* exception?

- (2) Given the apparent stratification of swap dealing activity in each asset class, should the Commission establish differing levels of regulation based on an entity's relative amount of swap dealing activity?
- (3) Would a reduced level of regulation encourage entities to enter the swap markets or expand their swap dealing activities because the costs associated with registration and compliance would be reduced?
- (4) Would a tiered regulatory structure address issues concerning the regulation of non-financial entities in the Non-Financial Commodity swap market or small and mid-sized banking enterprises?
- (5) If the Commission developed a multi-tiered approach, what factors and methodologies should it use to establish the appropriate thresholds for each tier?
- (6) Are there any unique costs or benefits associated with this alternative to the *de minimis* exception?

4. Swaps Executed on a SEF or DCM and/or Cleared

Staff also considered whether swaps that are executed on a SEF or DCM and/or cleared should be excluded from counting toward an entity's *de minimis* calculation. Under CEA Section 2(h)(8), swaps subject to a clearing requirement pursuant to CEA Section 2(h) must be executed on a SEF or DCM, unless no SEF or DCM makes the swap available to trade or a clearing exception under CEA Section 2(h)(7) applies ("**Trade-Execution Mandate**"). Subsequent to the adoption of the swap dealer definition, certain categories of swaps have become subject to mandatory clearing and some types of swaps have become subject to the Trade-Execution Mandate.

Through the execution of swaps on SEFs and DCMs, market participants benefit from viewing the prices of available bids and offers and from having access to transparent and competitive trading systems or platforms.⁹¹ In addition, one of the fundamental goals of Title VII of the Dodd-Frank Act, to reduce systemic risk, may be achieved by requiring central clearing of more swaps. Once a swap is cleared, the swap between the counterparties is extinguished and the risk mitigation is performed by the clearing organization. Accordingly, swap dealer regulation may be of limited value with regard to swaps that are executed on a SEF or DCM and/or cleared.

Given these considerations, CFTC staff welcomes comments on the following:

- (1) How would the exclusion of SEF or DCM-traded and/or cleared swaps from an entity's *de minimis* calculation impact the policy considerations underlying swap dealer regulation and the *de minimis* exception?
- (2) Should anonymity be a factor in determining whether exchange-traded and/or cleared swaps are treated differently under the *de minimis* exception?
- (3) If exchange-traded and/or cleared swaps are excluded from an entity's *de minimis* calculation, what other requirements, if any, should apply to the exclusion?
- (4) Would an exclusion for exchange-traded and/or cleared swaps increase the volume of swaps executed on SEFs or DCMs?
- (5) Are there any unique costs or benefits associated with this alternative to the *de minimis* exception?
- (6) Has the Floor Trader Exclusion (*see* Appendix A) encouraged additional trading on SEFs?

⁹¹ See Core Principles and Other Requirements for Swap Execution Facilities, 78 Fed. Reg. 33476 (June 4, 2013).

Appendix A

The following table provides an overview of the CFTC regulations, guidance, and staff letters that staff considered in order to identify relevant data for conducting an analysis of the *de minimis* exception. More specifically, the table identifies when certain swaps may not count towards an entity’s *de minimis* calculation. Staff cautions that this discussion is a high level overview of the relevant law, regulation, guidance, and staff letters that were used to develop the methodology for the analysis of data for this Preliminary Report and should not be used as a definitive guide for how to calculate swap dealing activity under the swap dealer definition. Interested persons should refer to the text of the provisions cited below for specific details regarding the calculation of swap dealing activity for purposes of the *de minimis* exception.

Summary of Relevant CFTC Regulations, Guidance, and Staff Letters

Topic	Description
Regulation 1.3(ggg): Exclusion of Certain Swaps	
IDI Exclusion	Subject to certain requirements, swaps entered into by an IDI with a customer in connection with originating a loan with that customer are not considered in determining whether the IDI is a swap dealer. ⁹²
Inter-Affiliate Exclusion	Subject to certain requirements, a person’s swaps with its majority-owned affiliates are not considered in determining whether the person is a swap dealer. Counterparties to a swap are majority-owned if: (1) one counterparty directly or indirectly owns a majority ownership interest in the other; or (2) a third party directly or indirectly holds a majority interest in both counterparties. ⁹³
Cooperative Exclusion	Subject to certain requirements, any swap that is entered into by a cooperative (<i>e.g.</i> , cooperative associations of producers or a cooperative of financial entities) with a member of such cooperative is not considered in determining whether the cooperative is a swap dealer. ⁹⁴

⁹² See 17 C.F.R. § 1.3(ggg)(5); 77 Fed. Reg. at 30620-24.

⁹³ See 17 C.F.R. § 1.3(ggg)(6)(i); 77 Fed. Reg. at 30624-25.

⁹⁴ See 17 C.F.R. § 1.3(ggg)(6)(ii); 77 Fed. Reg. at 30625-26.

Topic	Description
Physical Hedging Exclusion	Subject to certain requirements, swaps entered into by a person for purposes of hedging physical positions are not considered in determining whether the person is a swap dealer. ⁹⁵
Floor Trader Exclusion	Subject to certain requirements, swaps entered into by a person in its capacity as a floor trader on or subject to the rules of a SEF or DCM are not considered for the purpose of determining whether the person is a swap dealer if the swaps are submitted for clearing to a DCO. ⁹⁶
Additional <i>De Minimis</i> Calculation Considerations	
Cross-Border Transactions	<p>Regarding swap dealing transactions involving one or more non-U.S. persons, the general considerations for including such transactions in the <i>de minimis</i> calculation are as follows:</p> <ol style="list-style-type: none"> (1) U.S. persons (as defined in the Cross-Border Guidance) include all dealing swaps with U.S. and non-U.S. persons.⁹⁷ (2) Non-U.S. persons that are not “guaranteed affiliates” and not “affiliate conduits” (as described in the Cross-Border Guidance⁹⁸) count dealing swaps with: <ol style="list-style-type: none"> a. U.S. persons other than a foreign branch of a registered U.S. swap dealer;⁹⁹ or b. Non-U.S. persons that are guaranteed affiliates of U.S. persons unless the non-U.S. guaranteed affiliate is: (1) a registered swap dealer; (2) not a registered swap dealer but engages in <i>de minimis</i> swap dealing activity and is affiliated with a swap dealer; or (3) guaranteed by a non-financial entity. In such instances, the swap may be excluded from the <i>de minimis</i> calculation.¹⁰⁰ <p>In addition, when non-U.S. persons that are not guaranteed affiliates and not affiliate conduits enter into swaps anonymously on a registered DCM, SEF, or foreign board of trade and such swaps are cleared, the non-U.S. persons generally need not include such swaps in their <i>de minimis</i> calculation.¹⁰¹</p>

⁹⁵ 17 C.F.R. § 1.3(ggg)(6)(iii); 77 Fed. Reg. at 30611-14.

⁹⁶ 17 C.F.R. § 1.3(ggg)(6)(iv); 77 Fed. Reg. at 30614. Staff notes that the Floor Trader Exclusion was addressed in no-action relief as well. See CFTC Staff Letter No. 13-80 (Dec. 23, 2013).

⁹⁷ 78 Fed. Reg. at 45316-18.

⁹⁸ *Id.* at 45318.

⁹⁹ *Id.* at 45324.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 45325.

Topic	Description
	<p>(1) Non-U.S. persons that are guaranteed affiliates – Such persons include all dealing swaps with U.S. and non-U.S. persons.¹⁰²</p> <p>(2) Non-U.S. persons that are affiliate conduits – Such persons include all dealing swaps with U.S. and non-U.S. persons.¹⁰³</p> <p>Additionally, subject to several restrictions, U.S. banks that are wholly owned by a foreign entity may calculate the <i>de minimis</i> threshold without including activity from their foreign affiliates.¹⁰⁴</p>
FX Derivatives	<p>Pursuant to the FX Exemption, a person need not count certain foreign exchange products – namely FX swaps and FX forwards – towards its <i>de minimis</i> calculation. “Foreign exchange forwards” and “foreign exchange swaps,” as defined in the CEA, are considered swaps under the swap definition unless the Secretary of the Treasury issues a written determination that either foreign exchange swaps, foreign exchange forwards, or both: (1) should not be regulated as swaps; and (2) are not structured to evade the Dodd-Frank Act in violation of any rule promulgated by the CFTC pursuant to Section 721(c) of the Dodd-Frank Act.¹⁰⁵ The Secretary of the Treasury issued such a determination with respect to both FX swaps and FX forwards on November 20, 2012.¹⁰⁶</p> <p>Notwithstanding the determination, certain provisions of the CEA continue to apply to such transactions. Specifically, those transactions are subject to certain reporting requirements, and swap dealers engaging in such transactions are subject to certain business conduct standards.¹⁰⁷</p> <p>However, the FX Exemption is not applicable for certain categories of foreign exchange products, including foreign exchange options and non-deliverable forwards.¹⁰⁸ Foreign exchange options and non-deliverable forwards are therefore FX Derivatives. It is also noted that currency and cross-currency swaps are categorized as IRS.</p> <p>As discussed in the Swap Definition Adopting Release, in general, the Commission does not have regulatory jurisdiction over foreign exchange spot transactions, and as such, foreign exchange spot transactions are not</p>

¹⁰² *Id.* at 45318-19.

¹⁰³ *Id.*

¹⁰⁴ CFTC Staff Letters No. 12-61 (Dec. 20, 2012) and 12-71 (Dec. 31, 2012).

¹⁰⁵ 77 Fed. Reg. at 48253.

¹⁰⁶ 77 Fed. Reg. at 69704-05.

¹⁰⁷ 77 Fed. Reg. at 48253; 77 Fed. Reg. at 69704-05.

¹⁰⁸ 77 Fed. Reg. at 48254-56; 77 Fed. Reg. at 69695, 69703-04.

Topic	Description
	included in the definition of a “swap” and are not included in the <i>de minimis</i> calculation. ¹⁰⁹
Commodity Trade Option Exemption	Subject to certain requirements, commodity trade options entered into by certain persons are not considered for purposes of determining whether the person is a swap dealer. ¹¹⁰
Portfolio Compression No-Action Relief	Staff provided no-action relief from the requirement to include the gross notional amount of “compression exercise swaps” in determining whether a person has exceeded the <i>de minimis</i> threshold. ¹¹¹
International Financial Institution Treatment	The Commission has stated that foreign governments, foreign central banks, and international financial institutions should not be required to register as swap dealers. ¹¹²

¹⁰⁹ 77 Fed. Reg. at 48257.

¹¹⁰ 17 C.F.R. § 32.3; Commodity Options, 77 Fed. Reg. 25320, 25326 n.39 (Apr. 27, 2012).

¹¹¹ CFTC Staff Letter No. 12-62 (Dec. 21, 2012).

¹¹² 77 Fed. Reg. at 30693.