

UNITED STATES OF AMERICA  
COMMODITY FUTURES TRADING COMMISSION

ENERGY AND ENVIRONMENTAL MARKETS ADVISORY  
COMMITTEE MEETING

Washington, D.C.  
Thursday, February 25, 2016

1 PARTICIPANTS:

2 Opening Remarks:

3 CHAIRMAN TIMOTHY G. MASSAD

4 COMMISSIONER SHARON BOWEN

5 COMMISSIONER CHRISTOPHER GIANCARLO

6 Panel I: Do Commission Exemptions for RTO/ISOs  
7 Transactions Strike the Right Balance?

8 COMMISSIONER KENNETH W. ANDERSON, JR.  
9 Public Utility Commission of Texas

10 KENNETH W. ANDERSON, JR.  
11 Senior Vice President & Chief Risk  
12 Officer, ACES

13 PAUL J. PANTANO, JR.  
14 ISO-RTO Commenters

15 Panel II: CFTC Staff Swap Dealer De Minimis  
16 Exception Preliminary Report

17 EILEEN FLAHERTY  
18 Director, Division of Swap Dealer &  
19 Intermediary Oversight

20 SAYEE SRINIVASAN  
21 Chief Economist, Office of the Chief  
22 Economist

LAEL E. CAMPBELL  
Commodity Markets Council

DAVID T. MCINDOE  
Commercial Energy Working Group

## 1 PARTICIPANTS (CONT'D):

## 2 Other Participants:

3 JOSEPH ALLEN  
4 Caterpillar Inc.

5 JAMES ALLISON  
6 ConocoPhillips

7 SUSAN BERGLES  
8 American Gas Association

9 SHARON BROWN-HRUSKA  
10 Tulane University, Energy Institute

11 BRYAN DURKIN  
12 CME Group

13 ARUSHI FRANK  
14 Electric Power Supply Association

15 MICHAEL GILL  
16 Independent Petroleum Association of  
17 America

18 PAUL HUGHES  
19 Southern Company

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Citigroup Energy Inc.12 TYSON SLOCUM  
Public Citizen13  
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National Rural Electric Cooperative  
Association15  
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Natural Gas Supply Association

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## P R O C E E D I N G S

(10:03 a.m.)

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3 COMMISSIONER GIANCARLO: Good morning,  
4 everyone. We'll get started. Welcome to the  
5 first 2016 meeting of the Energy and Environmental  
6 Markets Advisory Committee. I'd like to welcome  
7 new members to the committee and to today's  
8 meeting. Susan Bergles, Assistant General  
9 Counsel, American Gas Association; Ray Kahn, Board  
10 Member, FIA; Michael Padgett, Vice President,  
11 Energy and Carbon Strategy at Alcoa; and Arushi  
12 Sharma Frank, Director of Regulatory Affairs and  
13 Counsel at the Electric Power Supply Association.  
14 In addition, Professor Craig Pirrong, who was  
15 formerly an associate member, is now a full  
16 member. And I also want to welcome the Honorable  
17 Ken Anderson, Jr., Commissioner of the Texas  
18 Public Utility Commission, who has come up from  
19 Austin to participate in our first panel. And I  
20 also want to recognize and thank EEMAC member Dena  
21 Wiggins, who will serve as today's meeting chair.  
22 At our last meeting last year, I talked

1 about severe declines in the price of physical  
2 commodities. Those declines have since  
3 intensified. Indeed, according to data of the  
4 CFTC Office of the Chief Economist, the Bloomberg  
5 Investable Commodity Index is down 53 percent  
6 since December 2010. According to another measure  
7 commodity prices are at their weakest level in 43  
8 years. Falling commodity prices are acutely  
9 reflected in energy prices with oil hovering  
10 around \$30 a barrel. This is having a direct  
11 impact on American jobs, with U.S. energy  
12 producers, merchandisers, transporters, refiners,  
13 and processors now facing their second and third  
14 rounds of layoffs. The collapse in oil prices is  
15 also weighing heavily on U.S. and European banking  
16 sectors with ballooning loan losses and credit  
17 default spreads. It has adverse implications for  
18 commercial lending, the stock market, and overall  
19 U.S. and global economic growth.

20 Of course, the CFTC plays no role in  
21 setting the price of the commodities regardless of  
22 whether they are high or low. Still, the CFTC

1 must take care that it not inflict needless stress  
2 on our trading markets that are integral to the  
3 health of the American economy.

4           When farmers struggle to put food on  
5 their tables, energy producers face further  
6 layoffs, and energy sector firms teeter at the  
7 edge of bankruptcy, this agency must adopt  
8 policies that do not thwart the ability to hedge  
9 against plummeting prices. In this time of low  
10 growth economics, what we must do is provide  
11 market participants with regulations whose  
12 benefits unambiguously justify their costs.

13           On our first panel this morning we will  
14 examine the CFTC's proposed order exempting from  
15 provisions of the CEA and CFTC rules certain  
16 transactions in the market administered by  
17 Southwest Power Pool, a regional transmission  
18 organization, or RTO. As most of you know, FERC  
19 created RTOs and independent system operators to  
20 encourage competition by facilitating development  
21 of regional power markets and enhancing trading  
22 opportunities for our regional buyers and sellers.

1 RTOs and ISOs are public utilities that FERC  
2 nationally and state public utility commissioners  
3 interstate regulate more extensively than other  
4 public utilities or other commodity markets.  
5 Dodd-Frank recognized that FERC and state  
6 regulators maintain their authority to regulate  
7 transactions entered into pursuant to tariffs they  
8 approve. It instructed the CFTC and other  
9 electric power regulators to harmonize and  
10 streamline regulation of these vital markets. The  
11 CFTC, however, has proposed to retain authority to  
12 police fraud, manipulation, and similar violations  
13 of the CEA. Although the proposed regulatory text  
14 was silent on the matter, the preamble of the  
15 order suggests that the CFTC intends to permit  
16 third parties to bring private lawsuits pursuant  
17 to Section 22 of the CEA. It also appears that  
18 the CFTC intends the same result, that is,  
19 permitting private lawsuits, in a similar final  
20 order exempting certain transactions offered or  
21 entered into on six other RTOs or ISOs.

22 Now concerns have been raised that



1       permitting private lawsuits will undermine  
2       regulatory certainty. It could disrupt the finely  
3       calibrated electric market structure --  
4       electricity market structure that state and  
5       federal regulators have enacted over the last  
6       several decades. It may needlessly subject  
7       millions of American rate payers to higher utility  
8       bills as a result of a consequent increase in  
9       litigation, legal expense, and settlement costs.

10               So, appropriately, today's panel will  
11       examine these issues, consider the need for  
12       exemptive relief for RTO-ISO transactions, and  
13       review the Commission's exemptive orders in light  
14       of the congressional mandate for a streamlined,  
15       consistent regulatory approach to our nation's  
16       vital electricity markets.

17               On our second panel, we'll address the  
18       CFTC staff's preliminary report regarding the swap  
19       dealer de minimis exemption. As you know, the de  
20       minimis exemption permits a market participant to  
21       engage in a limited amount of swap dealing,  
22       currently \$8 billion, without having to register

1 as a swap dealer. Without further Commission  
2 action, that level will automatically drop to \$3  
3 billion at the end of next year. It is widely  
4 reported that many market participants are  
5 planning to reduce their market activity in  
6 anticipation of the automatic de minimis  
7 reduction. The Preliminary Staff Report candidly  
8 acknowledges that the data it examined was  
9 limited, not least because SDR data does not  
10 indicate whether a transaction was made for  
11 dealing purposes. The data was particularly  
12 spotty for non-financial commodity swaps, such as  
13 energy swaps, where total gross notional value of  
14 an entity's dealing activity was not available.  
15 As a result, it is impossible to assess the  
16 consequences of changing the de minimis threshold  
17 for energy swaps and similar products. Instead  
18 the staff suggested an alternative using some very  
19 broad assumptions to identify dealing activity  
20 particularly for non-financial commodity and  
21 energy swaps. Faced with this uncertainty,  
22 Congress recently expressed its preference that

1 the CFTC complete a rule-making raising the de  
2 minimis threshold to eight billion or higher and  
3 get it done by February 16, 2016, a deadline that  
4 has now passed. Today's panel will examine the  
5 CFTC staff's report, its underlying assumptions,  
6 the available data, and the range of policy  
7 responses available to the Commission.

8 Last year, for the first time since  
9 Dodd-Frank was enacted, the EEMAC satisfied its  
10 congressional mandate to hold meetings. In fact,  
11 it held two. Today, again for the first time  
12 under Dodd-Frank, the EEMAC submitted a report and  
13 recommendation to the Commission. Pursuant to the  
14 law, this report was voted on by EEMAC's nine  
15 statutory members and was not considered by its  
16 associate members. Adopted with an 8 to 1 vote,  
17 this report summarizes the EEMAC's work in 2015  
18 primarily focused on the CFTC's position limits  
19 proposal. The report also contains a pointed  
20 dissent, again, as authorized by Dodd-Frank.

21 The report concludes that the CFTC  
22 should not finalize the position limits rule as

1 proposed. It further provides recommendations to  
2 the Commission to improve the proposal.

3           During our third panel, Jim Allison, a  
4 member of EEMAC and chair of its first meeting in  
5 2015, will summarize the report and its  
6 recommendations. Next EEMAC member Tyson Slocum,  
7 of Public Citizen, will summarize the dissent.  
8 Thereafter, Dena Wiggins will moderate a  
9 discussion.

10           It must be noted that the U.S. District  
11 Court of the District of Columbia has concluded  
12 that the Commission is not under any unambiguous  
13 mandate to impose position limits. Based upon the  
14 recommendations of EEMAC before us today, I submit  
15 for the record that the CFTC should not and need  
16 not finalize its current position limits proposal.  
17 In light of the value destruction plaguing U.S.  
18 Energy and commodity markets it would be imprudent  
19 to move forward with the current proposal without  
20 lessening its adverse impact on orderly risk  
21 management by America's commodity and energy  
22 producers and the consumers they serve.

1                   Thank you to all the witnesses who have  
2                   prepared thoughtful presentations and thank you to  
3                   the CFTC staff who worked so hard to arrange this  
4                   meeting. I'm grateful to you the members and  
5                   associate members of EEMAC for volunteering your  
6                   time and expertise. And I would be remiss if I  
7                   did not note the characteristic grace and  
8                   fortitude of my two fellow commissioners in  
9                   participating in this second market advisory  
10                  committee in the past 72 hours. And we have a  
11                  roundtable coming up next week as well. We three  
12                  work hard to cover a lot of ground. I now  
13                  recognize the Chairman and Commissioner Bowen for  
14                  their opening remarks.

15                  CHAIRMAN MASSAD: Well, thank you,  
16                  Chris. And let me also thank all of you and  
17                  welcome all of you, particularly those of you who  
18                  have flown in. You know, we really appreciate you  
19                  being here. The EEMAC, like all of our  
20                  committees, is very important to us. We get a lot  
21                  of good input. The discussions are very helpful.  
22                  And I want to thank Commissioner Giancarlo for all

1 of his efforts with respect to the committee  
2 organizing this meeting. There's a lot of work  
3 that goes into this and developing the agenda. I  
4 also want to thank his staff and all of our staff  
5 who are involved in putting this together. I also  
6 want to thank Commissioner Bowen for being here,  
7 and she brings that same enthusiasm to her  
8 sponsorship of the Market Risk Advisory Committee.

9 Let me also just say that I think all of  
10 us have been very focused since we took office on  
11 looking at our rules and making sure that we are  
12 addressing the concerns of commercial end-users in  
13 these markets, and we've taken a lot of actions in  
14 that regard as all of you know. And meetings like  
15 this where we do have input from commercial  
16 end-users are very helpful to us in that regard.

17 Today's agenda covers a number of  
18 important issues. Commissioner Giancarlo has  
19 already described it. I'm not going to say much  
20 about any of those just because I'd rather get on  
21 with the discussion. I may have comments as we  
22 get into it. I will say just a couple of words on

1 one topic just because it is I think so important,  
2 and that is the de minimis threshold. And what I  
3 want to talk about in that regard is how this does  
4 reflect how far we've come since 2008 when we  
5 really had no information on the market. And, you  
6 know, I know the data is imperfect. I know there  
7 are gaps as I'm sure will be pointed out in the  
8 discussion. But we are a long way from 2008. We  
9 have much better insight into the market. We're  
10 working to improve that data constantly. And  
11 market participants now have greater price  
12 information, which contributes to competition and  
13 transparency. And we're taking a number of steps  
14 to improve the data. In fact, at this very moment  
15 our Chief Information Officer, John Rogers, is  
16 testifying on Capitol Hill along with a number of  
17 other people about the efforts we're making to  
18 improve data quality. There's a lot going on  
19 there.

20 And so we'll get into a discussion of  
21 the report. It is a preliminary report. As you  
22 know, it doesn't make recommendations. It just

1 sets forth the data we have and a lot of issues.  
2 And obviously this meeting and the other ways in  
3 which we're getting input on this are very helpful  
4 to us as the staff looks to finalize that report,  
5 which will put us in a position to decide what  
6 action, if any, we need to take.

7 So with that let me stop so that we can  
8 get on to the discussion. But first, of course,  
9 I'll turn it over to Commissioner Bowen.

10 COMMISSIONER BOWEN: Thank you and good  
11 morning. It's good to be here today for another  
12 meeting of the Energy and Environmental Markets  
13 Advisory Committee. I want to express my  
14 appreciation to the committee and our Commission  
15 staff for the time that you've devoted to today's  
16 meeting. This meeting is particularly timely  
17 given the numerous challenges that energy  
18 end-users face today, including volatile fuel  
19 prices, global pressures, and the reduced capacity  
20 of their traditional counterparties, the banks, to  
21 enter into transactions because of their own  
22 capital pressures. Thus, as a general matter, I



1 am very interested in hearing from our  
2 participants about how they are coping in the  
3 current environment.

4           The specific topics today are also very  
5 important. I look forward to feedback from this  
6 committee about the proposed -- sorry, I --  
7 Southwest Power Pool Order. Regional transmission  
8 organizations, RTOs, and independent system  
9 operators, ISOs, play a crucial role in providing  
10 a reliable power grid for our nation. Thus, a  
11 4(c) exemption for Southwest Power makes sense  
12 because we've extended that exemption for other  
13 RTOs and ISOs. I'm also interested in hearing  
14 from participants today about any issues or  
15 concerns you may have about aspects of this  
16 relief, including allowing private rights of  
17 action. I also look forward to the discussion  
18 about the preliminary study on the de minimis  
19 exception to the swap dealer definition. After  
20 the 2008 crisis it became clear that we needed  
21 robust, specialized regulation of firms that acted  
22 as swap dealers so that no one could be a massive

1 player in the swaps market without being subject  
2 to appropriate oversight. At the same time, we  
3 did not cast the net so wide that the swap dealer  
4 definition would encompass small market players  
5 who continue to play a crucial role in our markets  
6 and pose little systemic risk.

7 Thus was born the de minimis threshold.  
8 Firms that engage in swap dealing under certain  
9 thresholds would not be subject to swap dealer  
10 regulation. We set that threshold at \$3 billion  
11 with an \$8 billion phase-in that would terminate  
12 at the end of 2017. Now that we've had a half-  
13 decade of post-crisis swap activity reported, it  
14 is time to assess whether there is any data-based  
15 rationale for deviating from the path laid out in  
16 these rules, namely, ending the phase-in in 2017  
17 and then dropping the threshold to \$3 billion. I  
18 will be following the discussion closely today to  
19 discern if there is strong evidence that such a  
20 rationale exists.

21 I would also like to renew my call to  
22 finalize the position limits rule. We've

1 discussed the same issues in multiple forums and  
2 for far too long while end-users clearly have  
3 waited for clarity and certainty. It's time to  
4 make a decision on outstanding issues like  
5 delegation and aggregation. Let's finalize this  
6 rule and close the book on this chapter of the  
7 position limit saga.

8 Thank you again to the committee and the  
9 sponsorship of Commissioner Giancarlo for  
10 providing the opportunity for us to hear from you  
11 today.

12 COMMISSIONER GIANCARLO: Thank you. And  
13 now, Ajay you will -- have a statement to make.

14 MR. SUTARIA: Good morning, all. I've  
15 been asked to remind you that these microphones  
16 are push to talk. Please keep the microphone a  
17 few inches away when you wish to speak. Press the  
18 white button on the base. When your indicator  
19 light appears red your microphone is on. When  
20 you've finished talking please press the  
21 microphone again to turn it off. Only a limited  
22 number of microphones can be active at one time.

1 Please turn your microphone off after speaking to  
2 allow others to speak without issue and please  
3 refrain from putting any mobile cell device on the  
4 table as it may cause radio interference. Please  
5 be advised that this meeting is being recorded and  
6 we will have some EEMAC members participating by  
7 phone. With that, as the federal officer for this  
8 meeting, I declare it open. Thank you very much  
9 and I'll turn things over to Dena.

10 MS. WIGGINS: Thank you very much.  
11 Commissioner Giancarlo, thank you very much for  
12 your sponsorship of this group. We very much  
13 appreciate what you and your staff have done to  
14 facilitate our discussions and our interactions.  
15 Mr. Chairman and Commissioner Bowen, thank you  
16 very much also for your attention and  
17 participation. We look forward to an interesting  
18 conversation today. I think as has been our  
19 tradition in the past, when it comes to the  
20 discussion part of this meeting, if people who  
21 wish to speak will put their tent cards up on end  
22 and then I will try to do my best to keep the

1 trains running on time and recognize people in the  
2 order in which they have requested to speak. As  
3 Ajay mentioned, we do have a few people  
4 participating by phone. I've got my cell phone on  
5 the table here because they're supposed to text  
6 me. So lest you think I am texting with my kids,  
7 the people who want to are -- to -- who are on the  
8 phone who want to have something to say will be  
9 texting me and then I will recognize them for  
10 participation in this meeting. We're going to  
11 turn it over to our first panel and the  
12 Commissioner. And after the panel has finished  
13 speaking we will open it up to the floor for  
14 comments and questions from our EEMAC members.  
15 Commissioner?

16 COMMISSIONER ANDERSON: Thank you. And  
17 on behalf of the PUCT of Texas I'd like to thank  
18 you all for the opportunity to be here. The  
19 Public Utility Commission of Texas -- with one  
20 important exception, obviously -- you know,  
21 obviously supports the CFTC's proposed order  
22 exempting SPP. The proposed exemption is

1 consistent with the exemptions -- it would've been  
2 previously granted. However, our concern really  
3 is in the preamble language, and it's a deep  
4 concern. Retaining private causes of action in  
5 both, with respect to SPP as well as opening up  
6 the orders, the previous orders, would be very,  
7 very difficult and also unnecessary.

8           And let me give a little background  
9 because I think that -- I'm sorry. Oh, there.  
10 Okay, let me give a little background because the  
11 Commission may not be aware of our unique status.  
12 You know, we are unlike the other 49 states in the  
13 U.S., because PUCs are really limited or primarily  
14 limited to retail, retail rates, and that sort of  
15 thing. We've been regulating -- we designed and  
16 have been regulating in a wholesale market now for  
17 20 years. And I believe that generally it's  
18 considered the most competitive market in the  
19 country. Both on the real -- it's an integrated  
20 market. There is -- the distinction between  
21 wholesale and retail is -- really does not exist,  
22 unlike the other markets. It's a market that has

1 over 1,400 participants, and it's an energy-only  
2 market, which means that the generation -- and I  
3 -- we're the only energy-only market, at least in  
4 the U.S., which means the generators really have  
5 to look to the energy market for all their  
6 revenue. The importance of that I'll discuss in a  
7 minute when we get down to our specific concerns.

8           The CFTC's -- in the preamble -- the  
9 CFTC's stated intent -- in there to preserve  
10 private claims really raises a number of troubling  
11 issues. Currently, the process both at FERC and  
12 the PUC is designed, you know, to arbitrate those  
13 disputes that arise within the energy markets.  
14 But generally it's more efficient, at least at the  
15 PUC, than private legal proceedings. We generally  
16 can resolve -- we resolve cases in well under a  
17 year. Allowing private claims will allow  
18 collateral attacks both on the FERC and  
19 PUC-authorized, valid market rules, which in turn  
20 will undermine the efficient operation and  
21 regulation of the energy markets.

22           And then finally, allowing private

1 claims, which will necessarily, I think, over time  
2 involve the RTOs, ISOs, and CELs will -- those  
3 RTOs and ISOs will incur costs that'll be directly  
4 passed down to the customers. To remind you,  
5 these RTOs are all -- I believe all of them are  
6 non-profits. And certainly ERCOT and SPP are  
7 non-profits. And so their expenses are routinely  
8 passed on to consumers. So whether it's  
9 attorneys' fees or whether it's damages imposed,  
10 that flows right down. And if I were an  
11 enterprising retail regulator, you know, I'd make  
12 sure the customer knows on the bill insert exactly  
13 what that charge is for and whom they can call  
14 with their complaints.

15 Both FERC and PUC, the design of the  
16 markets at the very beginning, as I mentioned,  
17 were designed in part to arbitrate these disputes.  
18 First, of course, we have enforcement -- at PUCT  
19 we have enforcement divisions. We have  
20 independent market monitors. In the case of  
21 Texas, it's actually a contract employee of the  
22 Commission. They review all transactions. They



1 work very closely with our market participants.  
2 And most importantly, in the context of the issue  
3 before us, those market participants who are  
4 aggrieved and other third parties with standing,  
5 you know, can bring their disputes either before  
6 the Commission or FERC. In Texas our PUC staff  
7 has the option to participate in those proceedings  
8 if they believe the public interest is implicated.  
9 And in that way the issues are, you know, are  
10 guided. The Commission is guided, you know, by  
11 previous -- first off by our expertise and also by  
12 our previous -- you know, by our previous  
13 decisions.

14 We also have -- by the other rules that  
15 bring inconsistent outcomes, you know, before us  
16 before -- in order to resolve these matters. I  
17 would also think it's important to mention that  
18 neither the Federal Power Act, you know, or PURA  
19 even provides for private causes of action. And I  
20 believe Congress, you know, intended -- well,  
21 going back, I actually participated early on on  
22 the Senate side of the Dodd-Frank -- when

1       Dodd-Frank was going through the Senate. And I  
2       worked specifically on an amendment that was  
3       introduced by John Cornyn and by Senator Bingman  
4       which would have resolved this issue. It went  
5       over to the House and in conference the current  
6       language, which contemplated an exemption, was  
7       adopted. But it was relayed to me because we were  
8       deeply concerned about the final solution in  
9       Dodd-Frank, we were told at the time that, don't  
10      worry. This exemption is designed to get in the  
11      same place, you know, while making it clear that  
12      the CFTC still has its enforcement jurisdiction.  
13      With that assurance we got comfortable. And in  
14      the meetings, at least early on with CFTC, this  
15      issue of private rights of action was never --  
16      were never raised. And when the orders were  
17      actually issued we all assumed that the orders did  
18      not include the private cause of action because,  
19      again, what was represented at the time was that  
20      the RTOs would be put, with the exemptions, would  
21      be put functionally, be put back into the position  
22      they were in before Dodd-Frank.

1           These private causes of action -- sorry,  
2           will allow collateral attacks on the rules and the  
3           processes of both the RTOs and frankly of FERC and  
4           the Commission. Now I'm not here defending FERC's  
5           jurisdiction, but I am concerned obviously about  
6           ERCOT. Transactions that are lawful under our  
7           rules will be able to be challenged under the CEA  
8           by third parties without the participation of the  
9           regulator in the proceedings. That actually --  
10          should concern the CFTC as well. Federal courts  
11          will be interpreting both FERC and PUC rules and  
12          regulations and the RTO-ISO market rules, you  
13          know, instead of the regulatory authority. That's  
14          likely to lead to inconsistent determinations by  
15          different federal courts. This in turn will  
16          weaken the market and regulatory structure and  
17          cause market uncertainty regarding what conduct is  
18          permitted under the rules. And again I would just  
19          point out that CFTC ought to be concerned about  
20          that as well because a district court in some  
21          court of appeals district may well decide that  
22          this means X and that's not what the CFTC has

1 interpreted.

2 I think the potential for courts and  
3 these inconsistent results rather than an expert  
4 regulator could provide any number of problems.  
5 An example, the CFTC has exempted explicitly from  
6 the CEA transactions that exist under the  
7 Day-Ahead Markets and the Real-Time Markets. But  
8 what happens if somebody who participates in the  
9 DAM, you know, makes a claim against another  
10 Day-Ahead Market participant, you know, claiming  
11 that there's been price -- that there's price  
12 manipulation because it's a futures, because the  
13 DAM is a futures market or because the financial  
14 transmission right is a swap. You know, what's --  
15 then you get into, again, the problem of what the  
16 federal court decides in effect could eliminate or  
17 cause uncertainty regarding the exemption. And  
18 depending on how they rule, it might also be  
19 against the position or against the viewpoint of  
20 the CFTC.

21 And then finally to wrap this up,  
22 private causes of action will increase the cost to

1 consumers. It can, particularly, if the RTO or  
2 ISO, you know, is forced to become a party or  
3 because, as could happen, they're sued themselves,  
4 you know, claiming that somehow their action, you  
5 know, violated, you know, constituted a swap or  
6 violated some other provision of the CEA or  
7 constituted market manipulation. And an example,  
8 we have a complaint. I won't get into the merits  
9 because it's currently pending before us. But we  
10 have a market participant who has complained about  
11 an ERCOT decision. Well if they could bring that  
12 in federal court, all those costs, not to mention  
13 the resettlement costs, you know, if they  
14 prevailed, would be bypassing the regulatory  
15 expertise of the Commission, and all those costs  
16 would flow right through to consumers on a load-  
17 share ratio basis.

18 With that, I'll end and look forward to  
19 answering any of your questions. And again, thank  
20 you for having me.

21 MR. WALKER: ACES acts as legal agent  
22 for more than 20 electorate cooperatives and other

1 electric utilities. ACES members participate as  
2 load-serving entities in five of the seven RTOs  
3 and ISOs in the United States where their  
4 generation and transmission assets operate or  
5 where their electric customers are located.  
6 Sometimes an ACES member also participates in a  
7 second adjacent RTO as well. RTOs are only used  
8 regionally by physical location of load,  
9 generation, and/or transmission. ACES has members  
10 that participate regionally in some but certainly  
11 not all of the six original RTOs in the 2013  
12 exemption order. In addition, ACES has some  
13 members that participate in SPP. And most  
14 importantly, ACES has members that participate  
15 regionally away from SPP, say, only in MISO or  
16 only in PJM, but do not participate in SPP. There  
17 are electric cooperative ACES members and  
18 municipally-owned electric utility ACES customers  
19 located in the Midwest or in the Mid-Atlantic.  
20 And since transactions on MISO are exempt from the  
21 CEA, say, for the 15 enforcement provisions in the  
22 exemption order, a MISO-only electric utility has

1 no reason to read CFTC releases about SPP, and,  
2 for that matter, about ICE or CME, for its MISO  
3 compliance.

4 As consumer-owned commercial entities,  
5 ACES members most reflect the public interests.  
6 ACES members are not-for-profit electric entities  
7 and engage in ISO transactions as part of the  
8 ordinary course of their electric operations to  
9 purchase electricity, transmission services,  
10 capacity, and to hedge commercial risk arising  
11 from their ongoing utility operations, which are  
12 to provide reliable and affordable electric  
13 service to electric consumers. Each ACES member  
14 or any other electric cooperative or municipal  
15 electric utility hedges its unique commercial risk  
16 to serve end-use American businesses and consumers  
17 in each RTO market. So we believe these types of  
18 consumer-owned commercial entities most reflect  
19 the public interest.

20 Stepping back from the focus down in the  
21 weeds, let's take a look at some RTO facts. RTO  
22 transactions have nothing to do with systemic risk

1 to the global financial markets or the global  
2 banks or insurance companies or swap dealers.  
3 Each RTO is designed to maintain the reliable flow  
4 of electricity in their region and between the  
5 regions. Nothing indicates the RTO markets were  
6 or are opaque pools of interconnected financial  
7 entity transactions or instruments.

8 Six of the seven RTOs are  
9 comprehensively regulated by FERC, the federal  
10 agency under whose tariff the RTO was created, and  
11 also by the National Electric Reliability  
12 Organization, namely NERC. Market participation  
13 in an RTO is not open to all comers. The public,  
14 consumers -- or consumers cannot buy high-voltage  
15 wholesale electricity, energy, capacity, or FTR  
16 products at retail in the RTO.

17 RTOs do not geographically cover the  
18 entire U.S. No RTO is a national, much less  
19 global, market. RTO market participants are  
20 diverse and include both large and small electric  
21 utilities, transmission owners, and state public  
22 utility commissions from their geographic region.



1           Pivoting to the 2013 exemption order, it  
2           plainly states that the exemption is from all  
3           provisions of the CEA except for 15 enforcement  
4           provisions. There's no ambiguity in the language  
5           in 2013. We understood that all presumably means  
6           all, save the 15. So ACES members have transacted  
7           in four of the original six RTO markets for over  
8           two years now relying on the plain language of the  
9           2013 exemption order. The Commission has also  
10          granted other exemption orders and ACES' 21  
11          members and other commercial end-users continually  
12          rely upon the plain language of those commission  
13          exemption orders as well.

14                 Above all, RTO market participants, risk  
15          managers, and compliance officers really need to  
16          be able to rely upon the plain language of CFTC  
17          exemption orders applicable to their businesses  
18          unless an amendment rule-making process is  
19          announced and public comments are considered.  
20          This is critical to commercial end-users.

21                 Now to SPP. SPP has developed its RTO  
22          marketplace and the relevant provisions of the SPP

1 tariff. SPP requested a parallel exemption order  
2 neither more expansive nor more narrowly focused  
3 than the 2013 exemption order. SPP did not raise  
4 a question about whether its exemption order would  
5 allow private rights of action. In the text of  
6 the proposed SPP exemption order by the  
7 Commission, it says all the 15 enforcement  
8 provisions. The Commission did not request public  
9 comments on whether the SPP exemption order should  
10 contain another CEA section, Section 22, with the  
11 15 reserved sections. There was no consideration  
12 of how such a provision would affect the carefully  
13 balanced public interest analysis.

14 So the preamble paragraph in the  
15 proposed SPP order was unsolicited and surprised a  
16 lot of electric companies. When disinterested  
17 parties in the electric industry learned about the  
18 paragraph through the grapevine, the reaction was  
19 pretty consistent: the unsolicited paragraph  
20 should be deleted. The CFTC has not re-proposed  
21 or requested comment on another version of the SPP  
22 order. So there's a lack of evidence to base

1 making a public interest determination to have the  
2 SPP order include Section 22 as a 16th reserved  
3 CEA section. Furthermore, adding conditions and  
4 limitations now to either the 2013 exemption order  
5 or to the proposed SPP order will add legal and  
6 regulatory uncertainty for commercial end-users  
7 such as ACES members and other electric utilities,  
8 especially without a careful analysis of whether  
9 and how such additional restrictions are in the  
10 public interest. FERC should weigh in. SPP  
11 itself should weigh in and the market participants  
12 who face the additional legal and regulatory  
13 uncertainty should also be consulted.

14           So what are some examples of this cloud  
15 of uncertainty for regulatory and legal lack of  
16 clarity? Well, let's say that a generation owner  
17 has experienced tube leaks in its boiler. So its  
18 generating unit is de-rated below full capacity.  
19 The generation owner can decide to either limp  
20 along and postpone the repair outage for a week or  
21 two, or it can take the outage now and proceed  
22 with the repairs. And so the -- today the

1 generation owner decides it's going to start the  
2 repair outage tomorrow. So what does it do? It  
3 goes out to hedge its shorts position today for  
4 the outage duration coming up starting tomorrow.  
5 And they do that in either forward contracts or  
6 swaps or futures or trade options. So they get  
7 their hedges in place and tomorrow the unit begins  
8 a repair outage and coincidentally, local RTO  
9 prices spike.

10 There's another market participant who  
11 incurs losses on its short physical position in an  
12 RTO, whether for its load or otherwise, since it  
13 didn't anticipate the price spikes. And what does  
14 it do? It files a Section 22 action against the  
15 generation owner from market manipulation in one  
16 of the 100 or so federal district courts.  
17 Furthermore, Section 22 does not require the  
18 plaintiff to prove that the generation owner was  
19 not acting in a prudent utility practice manner  
20 when scheduling the repair outage. That is legal  
21 uncertainty.

22 Next, let's say that a NERC designated

1 transmission operator calls a generation owner and  
2 requests voltage support to stabilize the  
3 reliability of the transmission grid. So the  
4 generation owner is required by NERC to drop its  
5 output of megawatts so that it can produce  
6 reactive power. It's a similar situation that  
7 could occur where another market participant sees  
8 that it's hurt because prices spike as a result of  
9 the generator having to back down its generator --  
10 to the generation owner having to back down its  
11 generator to balance the system and support the  
12 voltage support.

13 Or let's say that a NERC designated  
14 reliability coordinator, which is oftentimes an  
15 RTO, calls the generation owner and requests a low  
16 re-dispatch of the generation owner's unit due to  
17 congestion it's causing in the RTO.  
18 Coincidentally, local prices spike and in real  
19 time no one has time to forward hedge in this  
20 scenario, but you can still have the same scenario  
21 with another market participant alleging damages  
22 in court because they were short when the price

1 spikes occurred. Furthermore, Section 22 does not  
2 require the plaintiff to prove that the generation  
3 owner was acting for its own economic best  
4 interest instead of responding to federal  
5 reliability standards for the electric grid.  
6 That's legal uncertainty.

7           And lastly, let's say a pair of buy-sell  
8 parties engage in private bilateral forward  
9 contracts within SPP and accordingly they follow  
10 SPP's protocol to inform SPP of the point of  
11 delivery and receipt for the schedule for the  
12 bilateral forward so that SPP knows that when it's  
13 doing its settlements of charges and credits,  
14 which locational price in the SPP market the  
15 buyer/seller parties are to be credited and  
16 charged respectively for energy delivered, SPP  
17 transmission congestion, and SPP energy losses.  
18 SPP refers to this information schedule as either  
19 a bilateral settlement schedule or a financial  
20 schedule. And this term, financial schedule, is  
21 common because the RTO does not take any  
22 responsibility for the physical obligation of the

1 private bilateral buy-sell parties in their  
2 performance of the bilateral schedule.

3 Now let's say that a third party  
4 believes it has suffered damages in SPP somehow  
5 resulting from this buy-sell transaction. And it  
6 seeks to establish that this so-called financial  
7 schedule in SPP is a Dodd-Frank swap in one of the  
8 100 or so federal district courts. That's legal  
9 and regulatory uncertainty.

10 Overall these are the kinds of examples  
11 CFTC would want to consider in reevaluating the  
12 public interest determination as a whole if  
13 Section 22 is added to the litany of reserved  
14 enforcement provisions. But I would expect that  
15 FERC and SPP would have much more to say about  
16 potential conflict and confusion created for their  
17 market.

18 If you look back at the evolution of the  
19 regulation of RTOs, 10 years ago we had FERC. In  
20 2007 NERC was added for reliability standards. In  
21 2010 Dodd-Frank came along. In 2013 we had a  
22 limitation in the CEA that applies to the RTOs as

1 a result of the 2013 exemption. But now in 2013  
2 we're looking at adding in 100 or so federal  
3 district courts. And that is a quantum leap in  
4 uncertainty both legally and regulatory-wise.  
5 Thank you.

6 MR. PANTANO: Good morning. My name is  
7 Paul Pantano and I'm here on behalf of three RTOs  
8 and ISOs that filed comments on the proposed SPP  
9 exemption. That's PJM, ERCOT, and CAL ISO. We  
10 also represented PJM and ERCOT when they obtained  
11 their exemption from the CEA in 2013. And we  
12 filed an amicus brief on behalf of the same three  
13 RTOs and ISOs that commented on the SPP exemption  
14 in the Aspire case, which Commissioner Anderson  
15 mentioned a few minutes ago. I'm going to address  
16 three topics briefly this morning. The first is  
17 the benefits of a public interest exemption for  
18 the RTOs and just as importantly for the  
19 Commission and members of the public. The history  
20 of the CFTC's public interest exemptions, that's  
21 very important because the CFTC has been granting  
22 these exemptions for the past 24 years and so far



1 has no experience with what will happen if it  
2 permits private rights of action based on  
3 transactions for which it has granted an  
4 exemption. And finally, the adverse consequences  
5 of allowing private claims based solely on  
6 transactions that have been -- that take place in  
7 RTO and ISO markets.

8 We've been facing regulatory uncertainty  
9 about these types of transactions for almost two  
10 decades. In 1998 PJM filed the first of several  
11 no-action requests seeking confirmation from the  
12 Commission that it would not regulate transactions  
13 in PJM as futures contracts. Twelve years later  
14 as part of the Dodd-Frank Act, Congress sought to  
15 eliminate some of the uncertainty about which  
16 agency has jurisdiction over these types of  
17 transactions by directing the Commission to grant  
18 exemptions if, as it did in the 2013 exemption, it  
19 finds that those exemptions are in the public  
20 interest.

21 There are many benefits of public  
22 interest exemptions for -- as I mentioned the RTOs

1 and ISOs, the Commission, and members of the  
2 public. First, with respect to the RTOs and the  
3 ISOs, an exemption provides them with regulatory  
4 certainty about which regulatory regime they need  
5 to operate under and it provides certainty for  
6 their members and the enforceability of  
7 transactions that occur in their markets. It also  
8 provides benefits for the CFTC in a number of  
9 different ways. It avoids disputes between the  
10 CFTC and other regulators, in this case, either  
11 the FERC or the PUCT, about who has jurisdiction  
12 over a particular type of transaction or conduct.  
13 It helps the Commission conserve its limited  
14 resources because it doesn't have to divert them  
15 to regulating these transactions. It can rely  
16 instead on the pervasive regulation of these  
17 markets and the transactions that take place in  
18 them by the FERC and the Public Utility Commission  
19 of Texas. And importantly, it preserves the  
20 ability of the Commission to take enforcement  
21 action against wrongdoers even in these markets in  
22 a controlled way. And I'm going to come back and

1 talk about that, but you know, under the current  
2 regime and at least in the 2013 order, which does  
3 not permit private rights of action, it's the  
4 Commission that would bring an enforcement case if  
5 for some reason it felt that was necessary and  
6 didn't want to rely on the FERC to do that  
7 exclusively. And it's also important to remember  
8 that both the FERC and the CFTC, if they bring a  
9 manipulation enforcement action against the  
10 wrongdoer, can seek restitution of damages for any  
11 party that's injured as a result of alleged  
12 manipulative conduct.

13 And the advantage to members of the  
14 public of these exemptions is, you know, assurance  
15 that these transactions in these markets are going  
16 to be regulated by expert regulators and that they  
17 are going to do so in a way that just -- that  
18 produces just and reasonable rates for the  
19 different products, including electricity.

20 Turning to the history of these  
21 exemptions. The Section 4(c) was added to the  
22 Commodity Exchange Act in 1992. And shortly after

1 that, the Commission issued exemptions related to  
2 swaps. It issued an exemption for energy --  
3 bilateral energy transactions. And in those  
4 exemptions it reserved its authority to bring  
5 anti-manipulation and anti-fraud enforcement  
6 matters -- claims, but it did not preserve private  
7 rights of action. As far as we've been able to  
8 determine, in the last 24 years there's only been  
9 two occasions when the CFTC expressly preserved  
10 private rights of action in exemptions. And that  
11 -- those two exemptions were superseded eight days  
12 after they were issued by Congress when it passed  
13 the Commodity Futures Modernization Act. And it  
14 included exemptions in the statute that covered  
15 the same transactions that were previously covered  
16 by those two regulatory exemptions. And it did so  
17 by preserving the Commission's enforcement  
18 authority, but not preserving private rights of  
19 action for, you know, claims based on those exempt  
20 transactions. So as I mentioned a minute ago, as  
21 we sit here today, the Commission does not have  
22 experience with what will happen in these markets

1 if it allows private rights of action to go  
2 forward.

3 In light of that history, the  
4 Commission's statement in the preamble to the SPP  
5 exemption is curious because the Commission  
6 describes it -- well, the Commission said it would  
7 be highly unusual for it to preserve its  
8 enforcement authority while not at the same time  
9 preserving private rights of action. But in fact,  
10 over the 24-year period that I just described,  
11 that's exactly what it has done and we think for  
12 good reason.

13 There are many adverse consequences that  
14 we think will flow from allowing private rights of  
15 action for transactions that occur in RTO markets.  
16 You know, one of the benefits of Section 4(c) is  
17 that it allows the Commission to grant exemptions  
18 for transactions without determining whether they  
19 are futures contracts, swaps, or options. And  
20 that is a way that enables a mechanism that  
21 enables the Commission to grant exemptions without  
22 raising jurisdictional disputes within -- in this

1 case with other regulators. We think that if the  
2 Commission allows private rights of action for RTO  
3 transactions it's going to undermine the  
4 regulatory certainty that's provided by the  
5 exemptions. And it has the potential, even in a  
6 worst-case scenario, to divest the FERC and the  
7 PUCT of jurisdiction over some transactions that  
8 occur in those markets.

9           And let me give you an example of a way  
10 that that could happen. And in this example I'm  
11 going to focus just on claims based on  
12 transactions that occur exclusively within an RTO  
13 market, not on a claim that involves, you know,  
14 alleged related position manipulation where  
15 somebody claims that a market participant is  
16 manipulating prices in one market to benefit  
17 positions in another market, either one of those  
18 being subject to the CFTC's jurisdiction. I want  
19 to just focus on transactions that are either  
20 regulated by the FERC or the Public Utility  
21 Commission of Texas.

22           So assume for our hypothetical that

1 private party A sues private party B for  
2 manipulating the price of an FTR. To prevail on  
3 that private claim under Section 22 of the  
4 Commodity Exchange Act, that private party has to  
5 prove that an FTR is either a swap or a futures  
6 contract. That's the first element that they have  
7 to show to move forward with that claim. Let's  
8 assume that a federal district court agrees that  
9 the plaintiff established that an FTR is a swap  
10 and ultimately that a court of appeals agrees with  
11 that determination. Now let's assume that the  
12 FERC brings an enforcement case against that same  
13 defendant for manipulating prices of those same  
14 FTRs. That defendant is going to claim in that  
15 case that FERC can't bring that action because  
16 this FTR is a swap and consequently it's subject  
17 to the exclusive jurisdiction of the CFTC as the  
18 court held in a -- in the Amaranth case, obviously  
19 involving different transactions.

20 Let's repeat this scenario in multiple  
21 -- different courts. As Jeff mentioned, there's  
22 almost 100 federal district courts. There's over

1 400 federal district court judges. We have a  
2 number of courts that rule that FTRs are swaps.  
3 That means that they're subject to the CFTC's  
4 exclusive jurisdiction. And it also means that no  
5 other regulator, either federal or state, can  
6 regulate those transactions. If the FERC and the  
7 PUCT are precluded from regulating those  
8 transactions, who's going to regulate them? You  
9 know, presumably the CFTC does not want to step  
10 into that void because it has limited resources  
11 and would be -- it would be -- make more sense for  
12 the CFTC to then defer to the expertise of the two  
13 agencies that have been regulating these  
14 transactions for decades.

15           And if you contrast a private claim with  
16 a CFTC enforcement claim, a CFTC enforcement claim  
17 does not raise the same jurisdictional issues  
18 because the CFTC, unlike a private party, can  
19 prosecute a manipulation of the price of a  
20 commodity in interstate commerce. So it does not  
21 have to prove, for example, that whatever  
22 transactions are involved in the alleged



1 manipulation are futures contracts or swaps; it  
2 has much broader jurisdiction. So it doesn't have  
3 to raise the question that has the potential to  
4 divest these other agencies of jurisdiction. And  
5 there are other adverse consequences of these  
6 kinds of private actions. As Commissioner  
7 Anderson mentioned, it would allow private parties  
8 to collaterally attack the transactions and prices  
9 that are set based on rules that have been  
10 approved by FERC and the public utility Texas of  
11 -- I'm sorry, the Public Utility Commission of  
12 Texas. It will allow private parties to challenge  
13 filed rates, which is something that the courts  
14 historically in the antitrust area have not  
15 permitted and have deferred to the Federal Energy  
16 Regulatory Commission and the PUCT for those kinds  
17 of claims. And it will also, you know, have  
18 adverse consequences on the MOU between FERC and  
19 the CFTC, which they've used to cooperate in terms  
20 of conducting enforcement investigations and  
21 bringing enforcement proceedings.

22 So to us it seems that the many

1       disadvantages of allowing private rights of action  
2       greatly outweigh any advantages of permitting  
3       those kinds of actions. And for that reason, we  
4       think that the CFTC should not permit private  
5       claims for exempt RTO and ISO transactions. And  
6       that instead it should continue to work closely  
7       with the Federal Energy Regulatory Commission and  
8       the Public Utility Commission of Texas to regulate  
9       those transactions and to prevent manipulation and  
10      fraud in those markets. Thank you.

11                 MS. WIGGINS: Thank you all for the  
12      presentations. Do we have anyone who wishes to  
13      comment? Jim?

14                 MR. ALLISON: Thank you. We heard the  
15      assertion that private right of action will add  
16      costs to the system. Do we have any way to think  
17      about the magnitude of the costs that would be  
18      added, and do we have any way to think about how  
19      those costs will ultimately be borne? So  
20      Commissioner Anderson talked about at least some  
21      of the costs being borne by retail consumers,  
22      which I guess includes all of us around this

1 table. So I suppose, Ajay, you should note that  
2 we all have a direct interest in this question.  
3 What tools do we have to think about the magnitude  
4 of the extra costs? What tools do we have to  
5 think about who bears those costs ultimately?

6 COMMISSIONER ANDERSON: Well it would  
7 depend on the claim, but there's currently, as I  
8 mentioned there's a -- I won't get to the merits  
9 because it's a contested case before us. But  
10 there's a claim that ERCOT needs to resettle  
11 involving transactions in the Day-Ahead Market as  
12 well as Real-Time. The initial allegation is that  
13 the claimant would involve -- well it's millions  
14 of dollars. And if they could bring that claim in  
15 federal court and if they prevailed -- or even if  
16 ERCOT was forced to settle, for example, that cost  
17 would go right down, in addition to the attorneys'  
18 fees, that cost would go right down to consumers  
19 and it would be done on a load share basis. And  
20 so, you know, consumers -- the Commission I  
21 suppose would have to decide exactly how to  
22 allocate that cost, but generally it would go in

1 the administrative expenses that are passed on to  
2 consumers through the wholesale market on a, you  
3 know, a megawatt-hour basis. And incidentally if  
4 the claim was large enough, that means ERCOT would  
5 have to draw on its line of credit and there would  
6 be interest expenses. Although in the current  
7 interest rate -- you know, environment that's  
8 probably not a big expense. But I remember the  
9 days when prime was 18 or 19 percent, so.

10 MR. PANTANO: One thing to add to  
11 Commissioner Anderson's remarks. If you just look  
12 at the pending FERC manipulation enforcement  
13 actions against parties for allegedly manipulating  
14 transactions in RTOs and ISOs it's probably about  
15 eight proceedings at this point. And I think you  
16 could assume that there would be at least eight  
17 private claims that were brought on the heels of  
18 those claims by the FERC. So there would be, I  
19 think -- you know, I think it's fair to say there  
20 will be a lot of private litigation that results  
21 from permitting private claims under these  
22 exemptions and that they will generate huge

1 expense for RTOs and their members.

2 MS. WIGGINS: Jeff, did you have  
3 anything to add on that?

4 MR. WALKER: FERC does have data on  
5 enforcement, numbers of investigations, but also  
6 settlements, since about 2008, and that would --  
7 might be another way of looking at this in terms  
8 of what kind of a financial impact it could have.

9 MS. WIGGINS: Lopa?

10 MS. PARIKH: Thank you, Dena. Thank  
11 you, Commissioners, for discussing this very  
12 important topic today. This is a very important  
13 issue for EEI members, who are all of the  
14 investor-owned utilities in the United States.  
15 EEI members serve approximately 70 percent of all  
16 end-use customers. About two-thirds of all  
17 electric customers in the United States are served  
18 by markets that are operated by RTOs and ISOs.  
19 And so this is a very important issue for us. EEI  
20 members take very seriously their responsibility  
21 to provide just -- provide electricity at just and  
22 reasonable rates and to maintain reliability. And

1       because of that they have invested significant  
2       amounts of capital in the long-term infrastructure  
3       of the markets.

4                 So just for illustrative purposes,  
5       between 2010 and 2015 they've invested every  
6       single year 70 billion or more dollars in  
7       generation transmission and distribution. In 2015  
8       alone it was projected that they have invested  
9       \$108.6 billion. Of that amount about 32 percent  
10      is generation, 18 percent is transmission, both of  
11      which are regulated by FERC. And so this a huge  
12      issue for our members.

13                And because of this I want to raise two  
14      points from a little bit of a different  
15      perspective. And I agree with all of the comments  
16      that were made by the three speakers here today.  
17      And I especially want to highlight the need for  
18      regulatory certainty. In order to make these  
19      types of investments in the electric markets --  
20      there are 15, 20, 30, 40-year capital investments  
21      -- there needs to be regulatory certainty. Now we  
22      understand that market rules change, regulators

1 change, but there needs to be a process so that we  
2 have input into the market rules so that we are  
3 able to make these long-term investments.

4           When the 2013 RTO/ISO order came out we  
5 weren't happy with everything in it, but it did  
6 provide regulatory certainty and set a clear  
7 delineation of what was FERC's jurisdiction and  
8 what the CFTC had retained. The inclusion of the  
9 language in the SPP order threw all of that into  
10 doubt since, as has already been indicated, it had  
11 not previously been discussed or contemplated or  
12 commented upon. And so because of this it raises  
13 serious concerns as to whether at any given time  
14 that exemption order can be changed without  
15 opportunity for notice or comment simply by a  
16 statement in an unrelated docket, which raises a  
17 lot of regulatory uncertainty. Even if the  
18 Commission decides to only apply this to the SPP  
19 RTO, since that's the proposed order in which the  
20 issue was raised, that still creates a lot of  
21 uncertainty for EEI members, primarily because  
22 most EEI members operate in more than one RTO.

1 And even -- and so there needs to be equal  
2 treatment and the regulatory rules need to be the  
3 same for all RTOs in order to minimize conflicts  
4 and to create certainty.

5 Thirdly, as has already been mentioned,  
6 the Commission did not address what -- whether  
7 these products were actually swaps. And so now to  
8 have the possibility of a number of district  
9 courts and lower-level courts opining on this  
10 decision further creates regulatory uncertainty  
11 for our members as to how these transactions will  
12 be regulated and how they will be addressed.

13 The second important issue that I want  
14 to bring up is that it's really important for my  
15 members that conflicts between their regulatory  
16 agencies are minimized. We are -- our members are  
17 regulated by the CFTC, by FERC, by state  
18 commissions, by environmental regulators. And  
19 that's just to name a few. And so it's very  
20 important that in areas where there might be  
21 conflicting jurisdiction or overlap, that these be  
22 minimized to the extent possible to provide



1 regulatory certainty. In this case since the  
2 Federal Power Act specifically does not allow  
3 third-party rights of actions, by giving a  
4 third-party right of action through the CFTC for  
5 an area which hasn't been clarified that creates a  
6 lot of regulatory uncertainty and creates a lot of  
7 conflict for market participants as to what rules  
8 will govern going forward.

9           And so for these reasons we would  
10 respectfully request that the court issue an order  
11 in the SPP case as requested by SPP without any  
12 reference to CEA Section 22. If the Commission  
13 still decides that third-party rights of action  
14 need to be given, then it should do so with the  
15 issuance of a proposed change to the exemption  
16 orders with full opportunity for notice and  
17 comment so that people can plan their regulatory  
18 lives and have some certainty as to what rules are  
19 governing their transactions.

20           And so this is a very important issue.  
21 I really appreciate the opportunity to address it  
22 and am happy to address any questions.

1 MS. WIGGINS: Lael?

2 MR. CAMPBELL: Yeah, thanks Dena. And  
3 thanks Lopa and I just want to follow up a little  
4 bit on Jim's question on costs, and I think Lopa  
5 hit on an important point about, you know,  
6 business certainty, regulatory certainty, and  
7 making long-term investments. So certainly if  
8 there's significant regulatory uncertainty,  
9 additional costs due to threat -- threats of  
10 lawsuits, meritless or not, that's going to impact  
11 the equation of whether someone wants to invest in  
12 a generation asset or build a generation asset or  
13 buy a generation asset and participate in these  
14 markets.

15 And I want to focus on another aspect as  
16 well where the regulatory uncertainty can impact  
17 businesses participating in these markets and  
18 ultimately the consumer. And an important thing  
19 to mention -- I appreciate Jeff. I thought your  
20 comments were great, and I think Jeff really  
21 pointed out an important fact that these are  
22 markets. They are marketplaces. And much like

1 the DCMs, the traditional markets that the CFTC  
2 regulates, the things that are important to make  
3 those markets work are also important to make the  
4 ISO and RTO markets work. And that is  
5 transparency, liquidity, people playing by the  
6 rules. And when you add regulatory uncertainty  
7 into the equation you're impacting those things  
8 that are essential to a well-functioning market.  
9 And in particular liquidity. I mean, some of  
10 these products, the financial transmission rights,  
11 virtual transactions, they're essential to  
12 generators like us being able to manage our risk.  
13 Basic FTRs allow us to manage basis risks between  
14 locations within the ISO and RTOs. For  
15 electricity transmission, Day-Ahead and Real-Time  
16 virtual markets allow us to manage the risk  
17 between a price that comes out in the Day-Ahead  
18 and a price that comes out in the Real-Time. And  
19 when there's regulatory uncertainty, the fear is  
20 you're going to lose liquidity in these markets so  
21 that a generator like us go to to manage those  
22 risks. And that ultimately is going to increase

1 the cost of doing business, and ultimately those  
2 costs will be passed on to consumers. So that's  
3 just another angle to consider as far as the  
4 regulatory uncertainty and the potential impact  
5 here.

6 MS. WIGGINS: I just want to note that  
7 as far as I know no one on the phone has requested  
8 to speak. So if someone is on the phone and wants  
9 to speak, please let me know. Arushi?

10 MS. FRANK: Thank you. Thank you,  
11 Commissioners and thank you speakers for  
12 addressing this issue today. The other side of  
13 the coin on uncertainty isn't just for the  
14 regulated industry but it's also for the  
15 regulators. And I want to make that point by  
16 emphasizing this whole notion of jurisdiction with  
17 district courts and the typical way in which you  
18 would traditionally see a decision by an agency on  
19 an order, rule, or appeal, which is through the  
20 federal courts of appeal.

21 The courts of appeal as we know -- if  
22 you're in litigation of the Federal Power Act,

1 have developed expertise to be able to look to  
2 doctrines like Chevron and give deference to the  
3 agency on its areas of expertise. By creating  
4 this new private right of action venue for private  
5 suits to take place in the federal district courts  
6 it unwinds the agencies' ability to create settled  
7 expectations for themselves in negotiations and in  
8 the policymaking and all the work that this  
9 Commission is probably doing now and continues to  
10 do in its coordination with the FERC and with  
11 other regulators. If the (inaudible) unwound in  
12 district court creates a new specter of  
13 uncertainty for the agency itself. It's all of  
14 the work, all of the time, all of the resources  
15 that this Commission spends on deciding what it  
16 will regulate, what it won't regulate. Even as  
17 aspirational goals, what it thinks -- should be  
18 regulated in the future. The private right of  
19 action issue just by virtue of the fact that it  
20 creates the specter of an entirely new course of  
21 litigation that is not subject to the traditional  
22 ways in which an agency would be able to defend

1 its own position in the federal courts of appeal.  
2 It's a very serious concern. And you can see that  
3 play out in a lot of the discussions that have  
4 happened around the lack of a very specific  
5 provision in Dodd-Frank that would permit the  
6 challenge for final CFTC rules and orders in the  
7 federal courts of appeal. The fact that those  
8 cases can also be brought in district court under  
9 general jurisdiction, Section 1221 of the U.S.  
10 Code. The fact that we already have that is  
11 already an issue, and creating this entirely new  
12 area where you can go to the district courts and  
13 effectively upend what this Commission has done  
14 and the work it will do to determine where it will  
15 be regulating and where it won't, that creates a  
16 problem for the agency too.

17 So the concern is from all sides. It's  
18 not just for the industry. I think there is a lot  
19 of value in thinking about what kind of problems  
20 does this create for the agency's own position and  
21 the aspirations it has for the markets it wishes  
22 to regulate and the ones that it wishes to forward

1 to -- would rather defer regulation to other  
2 regulators.

3 MS. WIGGINS: Sue, and then we'll turn  
4 it back to Jim.

5 MS. KELLY: Thank you. I believe that  
6 Lopa has raised a very good point when she talks  
7 about the procedural implications of proceeding  
8 this way by simply putting this in the SPP order  
9 instead of having a notice and comment and a full  
10 airing of the issue. Having worked a lot on these  
11 issues in the years right after the passage of  
12 Dodd-Frank, there were times when the relations  
13 between the CFTC and the FERC were rocky. And I  
14 think we've come into a period of relative calm  
15 more recently, which I think those in the industry  
16 have welcomed. So this could potentially -- you  
17 know, there's no one from FERC here, so let me  
18 just say it for them: this could really ruffle  
19 some feathers. So I think if you are going to  
20 tread into this area you need to do so very  
21 carefully and respectfully of the two agencies'  
22 jurisdictions and have a real full airing of this

1 issue. I would just like to make that point.

2 MS. WIGGINS: Jim?

3 MR. ALLISON: Thank you. A legal  
4 question from one of the non-lawyers in the room.  
5 So all three panelists and the subsequent  
6 commentaries have argued vigorously that a right  
7 of private -- private right of action is not  
8 appropriate in this context. So is there a  
9 context elsewhere in the U.S. legal system in  
10 which private right of action does work and if so  
11 how do we distinguish the current context from  
12 that context? I guess start with Paul on that  
13 one.

14 MR. PANTANO: Well, there have been --  
15 you know, it's been permissible to file a private  
16 right of action for, you know, a loss that you've  
17 incurred trading futures contracts, and now swaps.  
18 Or getting advice about those kinds of  
19 transactions. And those cases, you know, involve  
20 exclusively CFTC-regulated products. And, you  
21 know, they don't raise the jurisdictional  
22 questions that -- allowing those kinds of claims



1 would raise when you're dealing with exempt  
2 transactions. And as I mentioned at the  
3 beginning, you know, there -- all the exemptions  
4 that have -- that have been granted over the  
5 course of, you know, almost a quarter of a century  
6 have not permitted private rights of action  
7 because I -- you know, I think for good reason  
8 because if you allow private claims based on  
9 exempt transactions then it raises all the  
10 jurisdictional questions that the, you know,  
11 exemption is intended to avoid.

12 MS. WIGGINS: Lopa?

13 MS. PARIKH: And I'd also like to note  
14 that there is a venue for there to be private  
15 rights of action at FERC. As noted in the  
16 comments that EEI, APPA, EPSA, and NRECA filed on  
17 the proposed order, there is a provision in the  
18 Federal Power Act under Section 306 which allows  
19 private complainants to bring complaints to FERC  
20 on violations of the Federal Power Act. And so  
21 there is a provision for private parties to go to  
22 FERC if they feel like there is a concern. In

1 addition to the FERC enforcement, through their --  
2 enforcement division on the market manipulation --  
3 market monitors in the RTOs, ISOs, there's a  
4 significant oversight to make sure that there  
5 aren't any complaints or aren't any issues. So --  
6 but there is a provision. So it's not like there  
7 isn't anything that addresses the issue.

8 COMMISSIONER GIANCARLO: Lopa, do you  
9 know if that medium has been utilized in the past?  
10 Do you know if aggrieved parties have utilized  
11 that ability?

12 MS. PARIKH: I believe there have been  
13 some cases in which it's been utilized. I don't  
14 have any cites right now. I believe there was one  
15 in our filing that we made and I can provide more  
16 if needed.

17 MS. WIGGINS: If there are no other  
18 questions from the group, I have one question for  
19 --

20 COMMISSIONER GIANCARLO: (inaudible) the  
21 Chairman.

22 MS. WIGGINS: Oh, I'm sorry. I'm sorry,

1 Mr. Chairman. Go ahead. No, please. Very  
2 quickly then. I just have one question. I do  
3 want to make sure we get to the Chairman's  
4 question obviously. And that is you mentioned in  
5 your comments that you didn't think there was any  
6 systemic risk to the RTOs or to the U.S. financial  
7 system that would flow from an RTO or a ISO  
8 transaction. I was just wondering if you could  
9 expand on that a little bit?

10 MR. WALKER: Well, I think, you know,  
11 the RTOs don't involve global insurance companies,  
12 global swap dealers perhaps. Maybe they do in  
13 some cases. But the scope and scale of an RTO is  
14 certainly not something that would cause a global  
15 systemic issue like we saw back in 2008 to the  
16 financial system. And we don't see that any -- if  
17 you look at the RTOs they're all based upon  
18 location. They're not national markets. And so  
19 since they're not national they can't even be  
20 global either. And so I think you've got a lot of  
21 participation primarily by physical entities. And  
22 obviously the electric companies have to use

1 those. There may be others there. It could be a  
2 swap dealer, but we don't see the impact from  
3 within an RTO going to a global systemic issue in  
4 any way.

5 MS. WIGGINS: Mr. Chairman?

6 CHAIRMAN MASSAD: Well, I appreciate all  
7 of the discussion and the comments. And this is  
8 an issue we're thinking about very carefully. I  
9 would just like to make one point which is I guess  
10 I appreciate the desire of anyone in business to  
11 have regulatory certainty or to have less  
12 uncertainty. There's no question it's a lot  
13 easier to run your business when you know exactly  
14 what the rules are and what will happen in the  
15 future. The fact is we have a system involving  
16 administrative agencies that regulate and then  
17 many decisions go to courts. And there've been a  
18 lot of comments about the risk of, well, there  
19 could be a court action to which the  
20 administrative agency isn't a party. Or there  
21 could be district courts that render different  
22 decisions that are in conflict. We face that

1 every day. There are courts that have proceedings  
2 that affect our enforcement and interpretation of  
3 the law and we are not a party to those  
4 proceedings. We file amicus briefs in those  
5 cases. There are courts that render inconsistent  
6 decisions and we then have to deal with that. So  
7 I don't think that issue is really unique here.  
8 I'm not saying that to minimize your concerns. We  
9 certainly want to balance the value of regulatory  
10 certainty, if you will, with the need to make sure  
11 that there is adequate recourse for private  
12 actors. And, you know, our law does -- the CEA  
13 does provide for private rights of action.

14           So, you know, I'm still thinking about  
15 all these issues. I think we have taken a lot of  
16 public comments on this in the context of the SPP  
17 order. I think there's different views as to the  
18 history of what we've done in the past, whether,  
19 as Paul says, we've never preserved things or  
20 whether we've simply not been explicit. But in  
21 any event, I think the discussion was a very good  
22 one. It illuminated a lot of concerns in detail,

1 and that was very, very helpful. I think all of  
2 us, again, are trying to strike the right balance  
3 here. Thanks.

4 MS. WIGGINS: I think with that we are  
5 out of time for this panel and for this  
6 discussion. So thank you very much to all of our  
7 panelists who are coming here and sharing your  
8 thoughts and views with us. We very much  
9 appreciate it. And now we will take about a  
10 15-minute break and reconvene here at 11:45 for  
11 our next panel discussion. Thank you.

12 (Recess)

13 MS. WIGGINS: Eileen, I think you're  
14 leading us off, so whenever you're ready please  
15 feel free to start.

16 MS. FLAHERTY: Okay. Thank you. Good  
17 morning. My name is Eileen Flaherty and I'm the  
18 director of the Division of Swap Dealer and  
19 Intermediary Oversight. And what I'd like to do  
20 is just give a brief overview of this topic, the  
21 discussion on the de minimis. My colleague Sayee  
22 and I will briefly discuss it, but we'll try not

1 to take up too much time so we can allow the  
2 maximum for the committee members to give their  
3 views.

4           So we have issued jointly between my  
5 division and the Office of the Chief Economist,  
6 staff has issued a report on the de minimis level.  
7 It is a preliminary report. It was issued in  
8 November with a request for public comment. In  
9 simple terms, the requirement of the rule is an  
10 entity that engages in dealing activity in swaps  
11 at a level of \$8 billion or more is required to  
12 register as a swap dealer, and that is a  
13 significant undertaking with a lot of consequences  
14 that come with it and we're well aware of that.

15           We're in what's called a phase-in period  
16 right now. And set in December of 2017 that level  
17 drops to \$3 billion if nothing happens, if the  
18 Commission takes no action. So the rule required  
19 that staff, using the data that was available,  
20 come up with a report to try and help inform the  
21 discussion, get public comment, get the  
22 conversation going. So the report has different

1 aspects, different sections, discusses different  
2 things. It talks about the purpose of swap dealer  
3 registration. The importance of that, why  
4 Congress wanted that, what's in the public  
5 interest.

6 It also talks about the need to have a  
7 de minimis exception to allow entities to engage  
8 in a certain amount of swap dealing activity  
9 without having to trigger that obligation to  
10 become registered as a swap dealer. The report  
11 also talks about the \$8 billion notional level and  
12 whether that really is a good level, and whether  
13 that makes sense. It talks about there were  
14 possibly other ways to look at it: Transaction  
15 counts, counter party counts, maybe in combination  
16 with a notional threshold, and whether that makes  
17 any sense.

18 And the report also talks about, and  
19 raises the question, whether swaps that are  
20 dealing or non-dealing swaps, if they are executed  
21 or traded on a SEF or a designated contract market  
22 and/or cleared should they even be counted in that



1       \$8 billion notional level or that \$3 billion  
2       notion level. So it asks those questions in an  
3       effort to try and help draw out the discussion and  
4       help to inform the Commissioners, ultimately, if  
5       they choose to make any decisions.

6                 So I'd like to ask my colleague, Sayee,  
7       to maybe comment on some of the methodology used.

8                 MR. SRINIVASAN: Thanks. Eileen. My  
9       name is Sayee Srinivasan. I'm the chief economist  
10       in the Office of the Chief Economist. Looking at  
11       this report was an interesting experience. This  
12       is the first time we were putting out a report  
13       using swaps data. Staff in our office and in  
14       other divisions worked with this data, and we have  
15       been publishing this thing called the weekly swaps  
16       report since October 2013, and so we leveraged  
17       that data to perform the analysis for the study.

18                A lot has been written about, and also  
19       reflected in the comments, about the quality of  
20       the data. There are two big challenges we face  
21       when we are doing the analysis. Missing data,  
22       since required fields are there and people haven't

1       been filling in those fields. And in the data we  
2       describe some of the challenges that come from not  
3       having the further information. For instance, for  
4       interest-rate swaps, about 15 percent of the  
5       transactions that we were looking at did not have  
6       relevant LEI, so we want to do sort of analysis of  
7       who's doing what, and if the LEI information's not  
8       there it's a problem.

9               And the second issue is also the fact  
10       that we don't require all the relevant fields that  
11       we might need. For instance, if we want to study  
12       dealing activity then is there a flag for dealing  
13       activity? Now it's a big question in terms of  
14       whether we should even require people, can people  
15       even identify at the time of a transaction whether  
16       it's a dealing act or hedging act.

17               So the SDR data as such is a work in  
18       progress. Just a couple of days ago we had the  
19       Technology Advisory Committee further discussions  
20       about the data and the efforts that need to be put  
21       in place to improve the quality of the data. So  
22       in the report we spend quite a bunch of time to

1 describe the data that we have, missing fields,  
2 and then when we started doing analysis, and this  
3 goes as an economist doing empirical work, you  
4 never have perfect data. There'll always be  
5 missing data. You wouldn't have information  
6 relevant for the questions that you're trying to  
7 answer, so you would ordinarily make some  
8 assumptions, and what you try to do in the report  
9 is list all the assumptions.

10           So once again, returning to the issue of  
11 dealing activity, because we don't have a flag  
12 which identifies dealing activity, we come up with  
13 some proxies. And we describe the proxies, so we  
14 looked at number of counterparties, number of  
15 transactions, and there are many more that we  
16 could look at. But we just said for the purpose  
17 of the report that (inaudible).

18           We asked a bunch of questions in terms  
19 of the methodology. I won't go into all the  
20 detailed findings in there, but I think we  
21 resisted trying to draw any conclusions from our  
22 findings, but we also comment on how to interpret

1 the findings. One of the challenges we had in  
2 conducting that study is that -- one challenge,  
3 it's an interesting issue is with each of the  
4 asset classes they have different market  
5 structures. So I think it's in one of the comment  
6 letters it was identified that if you look at  
7 rates, credit, and FX, you have a dealer on at  
8 least one side of over 90 percent of the trades.  
9 But if you look at commodities that's not the  
10 case.

11           And even within commodities it's, as we  
12 know, it's difficult to identify the notional USIs  
13 of the trade, and when we look at commodity  
14 transactions, if a commercial end user is using a  
15 swap transaction to hedge the risk, if you want to  
16 look at the economic trade, the economic trade  
17 would be represented by four or five different  
18 individual USIs. So somebody uses an option  
19 structure, and many corporates use option  
20 structures to hedge their trades, you have to look  
21 at the SDR data and figure out which are the  
22 relevant transactions, and how do you sort of

1 combine them and figure out what's the economic  
2 trade that was done?

3           So there's all these complications that  
4 are there, and we have sort of limited resources  
5 in terms of being able to sort of get to that  
6 level of granularity. But we have sort of taken a  
7 good first crack at doing the analysis and  
8 presenting the results. And I'm sort of going to  
9 give it back to Eileen to sort of describe the  
10 next steps.

11           MS. FLAHERTY: Sure. Before I talk  
12 about the next steps, just maybe some observations  
13 on the comments because we've had some time to  
14 look at them. We received 24 comments, and this  
15 is a very important process for organizations to  
16 come forward and really give their views, and they  
17 did. Received 24 comments and some of these  
18 comments represent organizations that have large  
19 constituencies, so it really was a good cross  
20 section of comments, and a really good period for  
21 that.

22           Some of the observations, again, without

1 drawing any conclusions, but some of the  
2 observations. Two of the commenters preferred to  
3 go to the \$3 billion level, and they thought that  
4 that was appropriate. The majority of the  
5 commenters believe that the \$8 billion level or  
6 greater should be the level, and many, many  
7 commenters requested that the Commission take  
8 action to adopt an interim final rule so as not to  
9 allow the level to drop from \$8 billion to \$3  
10 billion.

11 Many commenters also said that trying  
12 to, you know, use transaction counts in addition  
13 to a notional or counterparty counts, those other  
14 two, the transaction counts and counterparty  
15 counts can be misleading for different types of  
16 market sectors, and they suggested not using and  
17 not going to that. And then another group  
18 commented on the insured depository institution  
19 exception, the exemption, stating that it was too  
20 complicated, mostly regional banks and groups like  
21 that were very interested in having some further  
22 views on that and for us to look at that further.

1                   So people say, so what now? And what  
2                   are the next steps? The next steps are a good  
3                   analysis of the comments and really, kind of,  
4                   getting our arms around those, and to draft a  
5                   final report. So staff working collectively  
6                   between the divisions, we will be producing a  
7                   final report. Thank you.

8                   MR. CAMPBELL: Thanks, Eileen. Good  
9                   afternoon. Chairman Massad, Commissioner Bowen,  
10                  Commissioner Giancarlo, fellow members, and  
11                  associate members of the EEMAC. Lael Campbell.  
12                  I'm here today on behalf of the Commodity Markets  
13                  Council, which did submit comments in this docket.  
14                  But full disclosure, though, I am an associate  
15                  member of the EEMAC and representing my company,  
16                  Exelon Corporation, and in particular, its  
17                  subsidiaries, Exelon Generation and Constellation.

18                  It's a pleasure to be invited here to  
19                  present on what is a very important topic to  
20                  commercial energy firms, and to be able to do it  
21                  alongside longtime friend and colleague, David  
22                  McIndoe. The purpose of our presentation is to

1 discuss the perspective of commercial end users on  
2 the recent preliminary report submitted on the  
3 swap dealer de minimis exception. Many of the  
4 perspectives we're going to discuss today were  
5 covered in comments or submitted by the Commodity  
6 Markets Council, Commercial Energy Working Group,  
7 and other associations and organization  
8 representing the interest of commercial commodity  
9 firms.

10 Chairman Massad, I just want to say at  
11 the outset, appreciate your thoughtful comments  
12 this morning on this topic. We certainly  
13 understand that it is a preliminary report, and  
14 hopefully the comments that you received from a  
15 broad array of folks in the marketplace will help  
16 the Commission as they move along here with this.  
17 What am I doing?

18 MR. MCINDOE: Let's do this.

19 MR. CAMPBELL: Okay. I am just adding  
20 icons everywhere.

21 MR. MCINDOE: There we go.

22 MR. CAMPBELL: All right. No.



1                   MR. MCINDOE: How about that? There we  
2 go.

3                   MR. CAMPBELL: All right. Just want to  
4 start off with the recommendations we'd like to  
5 make in these presentation. We recommend that the  
6 EEMAC should recommend to the Commission that  
7 first it issue an interim final rule setting the  
8 de minimis threshold at \$8 billion, and that the  
9 Commission do this as soon as possible.

10                   There is some urgency here. Changes are  
11 going to be -- need to be made beginning this  
12 year, 2016, and well before the end of the year.  
13 As of right now, the de minimis threshold is set  
14 to drop by as much as 60 percent at the end of  
15 2017. But because the threshold is calculated  
16 using a 12 month lookback, really, people are  
17 going to need to make changes heading into 2016,  
18 and those changes are going to have to happen,  
19 probably, well in advance of the end of the year  
20 because it's going to involve significant changes  
21 to policies and procedures within companies, and  
22 business decisions that those companies are going

1 to make. Those business decisions not only impact  
2 the individual companies but also the broader  
3 marketplace. So, again, these is some urgency,  
4 and the urgency is in 2016.

5 The other recommendation is that we  
6 dramatically improve the information it receives  
7 before taking any other action regarding the de  
8 minimis threshold. The CFTC identifies specific  
9 regulatory objectives that are not sufficiently  
10 met with the de minimis structure at its current  
11 \$8 billion. And also, in addition to that,  
12 analyze the costs and the benefits of obtaining  
13 these objectives. What are the objectives here?  
14 What are the costs and benefits of attaining these  
15 objectives?

16 Finally, and very important, getting  
17 back to the business certainty decisions that need  
18 to be made. As the de minimis drops, people will  
19 be making business decisions. A key component of  
20 that should be what the final capital rule is for  
21 swap dealers. It's very hard to make important  
22 business decisions about what it means to be a

1 swap dealer or not when we don't yet have a final  
2 capital rule.

3 MR. MCINDOE: All right. I'm going to  
4 talk about some of the concerns of commercial  
5 firms that are addressed by the proposals that  
6 Lael had just talked about. What would happen if  
7 there was an automatic drop in the de minimis  
8 threshold? I think the important thing for EEMAC  
9 and the Commission to think about is would there  
10 be any policy objectives served by letting that  
11 happen? And we think the answer is no. In fact,  
12 looking at the preliminary report, and granted,  
13 this observation is limited to the rates and the  
14 credit markets. That a drop to \$3 billion would  
15 take in only 83 firms. That's about 1 percent to  
16 2 percent of the market measured by notional  
17 amounts.

18 Now, that observation assumes that those  
19 83 firms wouldn't change their behavior, and I  
20 think one of the themes that we want to bring  
21 across in this presentation is that if you lower  
22 the de minimis threshold you should expect firms

1 to change their behavior, going to the point Lael  
2 said about business planning.

3 The other thing that we're going to talk  
4 about more in this presentation is the harm that  
5 commercial markets will suffer as a result of the  
6 lower de minimis threshold. And if you  
7 automatically let it drop you will have,  
8 essentially, not performed a cost-benefit analysis  
9 that really is crucially important to the market  
10 right now.

11 Now, I want to say some initial  
12 observations about the preliminary report. I will  
13 say it was very well-received by the commercial  
14 markets. We thought it was quite balanced. We  
15 noted the staff did a great job of saying, this is  
16 what our challenges are, here are the creative  
17 solutions, and here are some good proposals. We  
18 encourage that kind of dialogue with the  
19 commercial markets, the Commercial Energy Working  
20 Group, Commodity Markets Council, and many of the  
21 other EEMAC members and their organizations. This  
22 is the kind of process where getting dialogue with

1 the market, I think, instructs the Commission  
2 well. So we'd like to salute the good efforts  
3 from the staff.

4 One of the concerns that we had about  
5 the report though was the return of the concept of  
6 the counterparty count and the transaction count.  
7 You know, the market has adjusted to the swap  
8 dealer definitions, albeit with some flaws. One  
9 of the concerns that we have though is every time  
10 we, essentially, put in new criteria to measure  
11 swap dealing firms have to implement measures in  
12 compliance structures to adopt these new changes.  
13 Not seeing any policy objective by putting on  
14 commercial firms more compliance measures for a  
15 definition that's pretty well understood right  
16 now.

17 Also, you know, counterparty counts and  
18 transaction counts are measurements of numerical  
19 things. But the swap dealer definition goes to  
20 what is essentially a quality of behavior.  
21 There's a disconnect. Lots of people may do many  
22 transactions, but they may be doing it for

1 purposes other than swap dealing.

2 The last point, and this has come up a  
3 lot in this presentation in the prior panel, is  
4 that the \$8 billion threshold right now is  
5 something that businesses can plan to. But as it  
6 currently stands, there is uncertainty in the  
7 market. What will the Commission do? How do we  
8 make business decisions about the fact that the de  
9 minimis threshold may lower? That is a cost to  
10 businesses that they incur right now.

11 All right. Let's talk about the next  
12 one. I think on the other side of it we want to  
13 note and ask the Commission to note that the \$8  
14 billion threshold has actually worked pretty well.  
15 You've already captured a very large swath of the  
16 OTC market. You know, looking at the OCC data,  
17 granted that it's limited to commercial banks,  
18 that data already tells us in its most recent  
19 report that the top four commercial banks have  
20 about 90 percent of the OTC market. We note that  
21 those four banks, in fact, the top 12 banks  
22 identified in the OCC report are already

1 registered as swap dealers.

2 We also know from the preliminary report  
3 that about 78 percent of the transactions that you  
4 have information for involved a swap dealer  
5 already. Arguably, your \$8 billion threshold  
6 currently meets the regulatory objectives that  
7 were set out by Congress, and identified by the  
8 Commodity Futures Trading Commissions when putting  
9 out the swap dealer rule. And again, commercial  
10 firms have been able to adapt their businesses  
11 quite well to \$8 billion. They've set up  
12 infrastructure to know where they are relative to  
13 that structure.

14 MR. CAMPBELL: So I'll talk a little bit  
15 about, you know, the cost side of the equation  
16 with lowering the de minimis. The first bullet up  
17 here talks about regulatory costs since,  
18 obviously, a factor for the Commission to  
19 consider. You know, are these additional costs  
20 worth it to change, what is essentially, a very  
21 limited portion of the market?

22 The most important cost, you know, is

1 the cost to the market itself, to participants in  
2 the market. You know, there is going to be a  
3 natural business decision to lower your activity  
4 and swap dealing, and we're going to talk a little  
5 bit about an example we've already seen of that in  
6 the past. Less liquidity has a significant  
7 impact, ultimately, to end use consumers.  
8 Decreased liquidity, increased concentration of  
9 transactions into a limited number of  
10 counterparties increases hedging costs, increases  
11 bid ask spreads, volatility in commodity prices.  
12 And ultimately, those costs are passed on to the  
13 end use consumer.

14 We saw this. We saw this after the  
15 original swap dealer definition came out and there  
16 was a separate threshold for transactions with  
17 special entities. That threshold was  
18 significantly lower than the \$8 billion. It was  
19 only \$20 million. Businesses reacted, most  
20 businesses reacted in the way that we suspect they  
21 will act again if the de minimis is lowered again  
22 in that they ceased transacting with these



1 entities.

2 I remember sitting here in this room on  
3 a roundtable to discuss this issue of the special  
4 entity de minimis threshold. I was at the table,  
5 and, you know, APPA, Munis, Ags, Co-ops. Many of  
6 these counterparties that are physical  
7 counterparties with us were here to say, listen,  
8 we've lost liquidity. We are losing  
9 counterparties. There are people that will not  
10 transact with us anymore, and we're one of those  
11 parties. We made this decision not to do  
12 financial transactions with these entities. That  
13 was a business decision that we made. They were  
14 quick to point out, and there's a quote here from  
15 testimony before Congress, about just the impacts  
16 they've seen. The inability to hedge, and the  
17 fact that they were suddenly being subjected to  
18 wider bid ask spreads. So when these Munis and  
19 Co-ops are seeing wider spreads, more volatility,  
20 higher prices, those prices are ultimately passed  
21 on to the customers of those Munis and Co-ops.

22 MR. MCINDOE: I think one of the

1 encouraging things about hearing from staff  
2 already is that they've noticed that this  
3 commercial market, and the market for commodity  
4 derivatives, is different from other markets.  
5 Look, it's a very small slice of the overall OTC  
6 market. Looking at Bank of International  
7 Settlements and its data, and again, going to the  
8 point that no dataset is perfect, it does suggest  
9 that the market is about 1 percent of the OTC  
10 market.

11 Also, it's important to realize that the  
12 players in the commodities derivatives  
13 transactions, to the extent that they represent  
14 commercial firms, really are not the firms that  
15 are presenting systemic risk, one of the stated  
16 goals of the swap dealer definition. Important,  
17 and also echoed earlier, was that it's a very  
18 different market. A lot of people trade in a  
19 bilateral transaction, and in many of those  
20 transactions there is no swap dealer. This has  
21 been a repeated theme across many commercial  
22 commentators, even from the very beginning of the

1       Dodd-Frank and derivatives reform under that  
2       legislation, which is the derivative markets  
3       involving commodities often have transactions  
4       where no swap dealer is present and no swap  
5       dealing is being conducted.

6               The other comment that's been frequently  
7       made is that typically many of the transactions  
8       are done ancillary to a physical purchase and sale  
9       of a commodity. All right? We're going to talk  
10      about that in one of our examples.

11             MR. CAMPBELL: Thanks, David. You know,  
12      before I get into the example I just want to talk  
13      about the reason why non-swap dealers can meet  
14      each other in these markets, in these bilateral  
15      OTC swaps markets and transact with each other  
16      without their being a swap dealer present.

17             First of all, a lot of these  
18      transactions happen between counterparties that  
19      transact with each other all the time in the  
20      physical space. So you already have a credit  
21      relationship established with that counterparty, a  
22      business relationship with that counterparty. You

1 know who they are, who to call to discuss a  
2 transaction. There could also be collateral  
3 efficiency reasons why you'd want to transact with  
4 those counterparties. I mean, remember, when  
5 you're exchanging credit between counterparties  
6 you're factoring in all your exposure to that  
7 counterparty, both physical and financial, so  
8 there could also be specific reasons why  
9 transacting with another commercial entity is much  
10 more beneficial than transacting with a  
11 traditional financing entity, swap dealer, or  
12 bank.

13           Secondly, the physical commodity markets  
14 are diverse. There are participants on all points  
15 in the supply chain. And so throughout that  
16 supply chain you will have natural longs and  
17 shorts. People that are long the physical or  
18 short the physical that would have a natural  
19 reason to want to conduct a transaction with each  
20 other where it would serve as a hedge for both  
21 parties, so.

22           MR. MCINDOE: Are you going to try that?

1                   MR. CAMPBELL: I'm going to brave it  
2                   again and try to touch this clicker.

3                   MR. MCINDOE: I hear it.

4                   MR. CAMPBELL: I don't know if that's  
5                   the right thing. All right. Here we go. All  
6                   right. So I'm going to use this mouse here to  
7                   sort of walk through this chart. I mean, this is  
8                   a -- everybody should have a copy of this and this  
9                   will be made available, so people will be able to  
10                  stare at it later on if they don't quite  
11                  understand it.

12                  But this actually is a somewhat common  
13                  transaction that occurs in the electricity  
14                  markets. This will be a transaction in an  
15                  organized electricity market where there are  
16                  competitive retail suppliers. So in the bottom  
17                  middle here that is a retail supply. That's an  
18                  entity that's able under state regulations to go  
19                  out and sell electricity to retail customers,  
20                  customers over here. These could be businesses.  
21                  These could be houses -- you know, just you and I.  
22                  You know, right now we're in the PJM footprint and

1 the General Services Administration actually has a  
2 contract with a retail supplier to purchase  
3 electricity that's probably lighting up this  
4 building.

5 So there's a retail supplier here, and  
6 that retail supplier has customers. So the dotted  
7 lines here are the actual electrons. Those are  
8 the megawatts. So that retail supplier is selling  
9 electricity to the customer, and in return that  
10 retail supplier is receiving what is typically in  
11 these retail contracts a fixed price. Now, the  
12 key here is in these ISO and RTO markets, you  
13 know, we talked about on the last panel, these are  
14 our marketplaces.

15 And in these markets, there are  
16 wholesale electric markets, physical electric  
17 markets where all the power flows through the  
18 centralized marketplace. And that centralized  
19 marketplace has an hourly price signal that is  
20 changing, variable price signals every single  
21 hour. So both people that are selling into that  
22 market, and people that are buying from that

1 market, unless they hedge that price risk, they  
2 are going to be subject to that hourly change in  
3 prices that is constantly happening.

4           So for that supplier who has to procure  
5 his supply from the wholesale market to ultimately  
6 provide it to his customer, that supplier is  
7 exposed to those changes in market prices.  
8 Obviously, he's going to want to, ultimately,  
9 hedge his risks so that he's procuring his  
10 wholesale supply or has hedged in a way that his  
11 cost of procuring wholesale supply are lower than  
12 the fixed price he's receiving from his customer.  
13 The other way around, he'd be a pretty bad  
14 businessman and wouldn't be a retail supplier for  
15 very long.

16           Okay. Moving over to the left side here  
17 you have a generator, and so the generator is --  
18 and so by the way, the retailer supplier is  
19 naturally short the physical supply. He has to  
20 sell it to his customer. He has to buy it from  
21 the market. The generator here on the left, he's  
22 long the physical commodity. He is generating

1 megawatts and selling those megawatts into the  
2 marketplace. Again, price changes every hour.  
3 That generator would certainly prefer to sell his  
4 generation forward at a fixed price so he has  
5 certainty of how much the value of his generation  
6 is long term, and not be exposed to this hourly  
7 volatility in prices. So both supplier and  
8 generator are exposed to this ever-changing,  
9 floating price in the market.

10           The blue lines here sort of represent  
11 how that floating price is transferred in this  
12 transaction. So in this case, the generator who  
13 is naturally long and exposed to these market  
14 prices and wants to sell forward at a fixed price  
15 meets up with the supplier, who wants to buy at a  
16 fixed price, presumably a fixed price that is  
17 lower than the fixed price he's selling to his  
18 customer. So here you have a swap transaction,  
19 natural long, natural short, meeting in the  
20 marketplace, and neither party to this transaction  
21 is transacting for swap dealing purpose. Both are  
22 hedging legitimate risk that is incurred due to



1 price changes in the market that occur every hour.

2 MR. MCINDOE: This slide starts off with  
3 a bit of a misnomer by talking about information  
4 problems because really we're talking about  
5 problems that -- in the information that would  
6 suggest either allowing the de minimis threshold  
7 to drop or making a change downward in de minimis  
8 threshold.

9 I think one of the central themes that  
10 Lael and I are trying to get across is you have  
11 the data available to you to make a policy  
12 decision to keep the \$8 billion de minimis  
13 threshold based on the data that you have. You  
14 have data that suggests that you have a broad  
15 application of the swap dealer rule, and you have  
16 application -- you have data that suggests that  
17 that rule and its implementation has been  
18 reasonably dispersed in costs.

19 However, when you're looking at what  
20 data is out there and how it might impact the  
21 commercial and the commodity derivatives market  
22 that data is thin, and that's acknowledged by

1 staff, and we applaud staff for saying that. But  
2 we do think that making a decision that's going to  
3 impose costs on a commercial market really needs  
4 to be done in an informed decision-making process,  
5 and currently, that data isn't there.

6 We do think that in making a decision  
7 it's better to go get the data that you need to  
8 make the decision than finding an alternative path  
9 through other measures, particularly when that has  
10 impacts on the way other people understand the  
11 definitely of swap dealer.

12 The preliminary report. Again, I'd like  
13 to echo that the Commercial Energy Working Group  
14 felt that that report was very balanced and fair.  
15 One of the first things that we noted, and has  
16 been said earlier, the report itself notes that  
17 for commodity derivatives, better information is  
18 necessary. And essentially, one of the biggest  
19 concerns that we had representing many firms that  
20 actively trade and often do swap dealing in  
21 connection with their ancillary business is that  
22 reintroducing the concept of a counterparty test

1 and a transaction test is the wrong way to go  
2 about this problem. Again, go back and find  
3 information that you need, recognizing that your  
4 \$8 billion threshold right now is perfectly  
5 effective.

6 One of the other things that we were  
7 concerned about, and echoes the comments made  
8 earlier, is that not every transaction involves a  
9 dealing transaction, and that the data that was  
10 available to staff was probably over inclusive of  
11 what we would call just trading data or  
12 speculative transactions. The report also had  
13 some suggestions about other ways to look at the  
14 de minimis threshold and, perhaps, implement the  
15 de minimis threshold.

16 For the most part the commercial energy  
17 market said, we do not support any of these ideas.  
18 Basically, it boils down to the comment said  
19 earlier, that new ideas require new compliance  
20 measures, which just translates into costs. It  
21 ultimately gets passed through to end users.

22 We summarize our thoughts in these

1 bullet points, but at this point we'd just like to  
2 open up for questions and comments. And again,  
3 both Lael and I very much appreciate the chance to  
4 sit and talk about the concerns of commercial  
5 firms. Thank you.

6 MS. WIGGINS: Thank you all very much.  
7 I have lots of tent cards going up now. Lopa, I  
8 believe I saw yours go up first.

9 MS. PARIKH: So I agree with all of the  
10 comments that were made by Lael and David, and I  
11 actually just want to add one more item to that  
12 that wasn't really reflected in their comments.

13 That is that for energy commodity swaps,  
14 in particular, as Lael noted, the price of that  
15 can be very volatile. And so it's very important  
16 that the aggregate effective notional amount is  
17 set at a level to accommodate that volatility.  
18 For example, right now traded gas and power  
19 products are at levels much lower than they were  
20 just a few years ago.

21 If prices go up then, even for the same  
22 level of swap dealing activity, the gross notional

1 value for a utility engaging in that activity will  
2 go up. And so the threshold has to be high enough  
3 to reflect the underlying volatility in the  
4 commodity markets. And so that's why we filed  
5 comments supportive of the \$8 billion de minimis  
6 limit. And in our comments that we filed with the  
7 Commission on the preliminary report we attached  
8 an example that kind of shows this volatility in  
9 the markets and the need for the notional value  
10 amount to be reflective of that.

11 MS. WIGGINS: Professor?

12 MR. PIRRONG: Yes. I was actually going  
13 to make a comment that follows up on what Lopa  
14 said. The use of notional amount sort of reminds  
15 me about the old joke about the drunk looking for  
16 his keys under the lamppost because the light's  
17 better there. You know, the notional amount  
18 doesn't really match up with risk.

19 You know, so for example, right now we  
20 see an oil vix that has traded as high as 80 in  
21 the last couple days, but the oil price is low,  
22 and so notional amounts would be correspondingly

1 low for new transactions. So there's just not  
2 necessarily a good matchup between risk and  
3 notional amount. So we're not really capturing  
4 what we want to measure, and what we want to  
5 regulate. Also, the comments about the quality of  
6 the data suggest that maybe even the light end of  
7 the lamppost isn't that bright either.

8 Another comment I'd like to make, or  
9 actually a question, relates to the issue of, you  
10 know -- definition of how you would know what a  
11 swap dealer is. Well, the main characteristic of  
12 a swap dealer is there's somebody that has a  
13 relatively low net position, but they might have a  
14 large gross position? And was that one of the  
15 metrics that was used in order to identify who  
16 might be a swap dealer? And is that a metric that  
17 could potentially be explored going forward in  
18 order to come up with a more discriminating  
19 identification of who is and who is not a swap  
20 dealer?

21 MS. WIGGINS: Tyson, I think I saw your  
22 tent card go up next.

1                   MR. SLOCUM: Great. Thank you very  
2 much. I actually have a bunch of observations and  
3 questions, and so maybe I could just ask a few,  
4 and then yield my time back. Because I don't want  
5 to monopolize it all at once if that's okay?

6                   MS. WIGGINS: Thank you. That's fine.

7                   MR. SLOCUM: So my first point is just  
8 an observation for the Advisory Committee. We've  
9 been presented a very interesting presentation  
10 here, but for the purposes of -- in the future, if  
11 the nine member advisory committee seeks to draw  
12 conclusions through any report I think that the  
13 record needs to show that we only heard from one  
14 side of the debate on this issue.

15                   As the CFTC mentioned, there were other  
16 commenters that advocated for the threshold to  
17 drop to \$3 billion. The Advisory Committee has  
18 not heard from those commenters, and I think that  
19 it is critical that the Advisory Committee, before  
20 it makes any sort of conclusions in the future in  
21 any formal way that it must hear from those  
22 presenters as well, so that we have an opportunity

1 to see all sides of the debate.

2 My next question is for Mr. McIndoe, am  
3 I saying your name right?

4 MR. MCINDOE: Yes.

5 MR. SLOCUM: So I've got questions about  
6 who exactly the Commercial Energy Group is? I'm  
7 not clear as to your organization. Who are your  
8 members, for example?

9 MR. MCINDOE: Sure. That's a good  
10 question. We have, in every single one of our  
11 comment letters, described our organization as  
12 representing a cross section of the commercial  
13 energy space. The group has not decided to  
14 publish the list of its members, so I'm not in a  
15 position here to tell you who our members are, but  
16 I appreciate the question.

17 MR. SLOCUM: Could you? I mean, your  
18 organization serves as an associate member of an  
19 Advisory Committee. Would you publicly reveal the  
20 names of your member related to your service on a  
21 federal advisory committee?

22 MR. MCINDOE: I'm not aware of our



1 organization currently being on any advisory  
2 committee.

3 MR. SLOCUM: You --

4 MR. MCINDOE: We would welcome the  
5 opportunity --

6 MR. SLOCUM: Is not the Commercial  
7 Energy Working Group an associate member?

8 MR. MCINDOE: Are we?

9 MR. SLOCUM: Yes, you are.

10 MR. MCINDOE: Ron, I'm not aware of  
11 that. But if we are it still puts me in the same  
12 position of the same answer that I'd have to give  
13 that I have for you which is that would have to  
14 come to a vote of the members. We haven't put  
15 that vote of the members, but I'm happy to put it  
16 to a vote of members in light of your question.

17 MR. SLOCUM: Just a couple more  
18 questions, if I may. So I haven't been able to  
19 find any 990 annual reports that your organization  
20 files with the Internal Revenue Service or any  
21 registrations with any state or other entity. So  
22 is the Commercial Energy Working Group a legal

1       entity? I'm not clear as --

2               MR. MCINDOE: No. It's --

3               MR. SLOCUM: -- to exactly what it is.

4               MR. MCINDOE: That's a fair question,  
5       Tyson. The Commercial Energy Working Group is a  
6       non-organized, in other words, we have no legal  
7       entity to which any of those filings would apply.  
8       It is a group of firms that are held together by  
9       their own consensus. They're free to go at any  
10      time. And essentially, it's just a working group.  
11      Just a bunch of firms got together, the lynchpin  
12      is Southerland, and our representation of them and  
13      working together. But it's not the same kind of  
14      entity that your questions are aimed at.

15              MR. SLOCUM: I'd like to yield, but I'd  
16      first just like to say something for the record.  
17      That I think that if an organization is going to  
18      be providing formalized advice in the format of a  
19      federal advisory committee format, and it's going  
20      to participate as an associate member I think that  
21      it needs to operate with more transparency than  
22      what we see here. I think that it has to publicly

1 identify its members. I think it's got to be a  
2 legal entity that at least has -- I mean, every  
3 other organization and company here has to  
4 incorporate somewhere. I have to file 990 forms  
5 with the Internal Revenue Service, and I think  
6 that that should be a minimum request of  
7 participation in a format such as this. I yield,  
8 temporarily, my time. Thank you.

9 MS. WIGGINS: Ron?

10 MR. OPPENHEIMER: I don't think I can  
11 respond to any of that. But at the risk of being  
12 a little bit of a captain obvious, I just wanted  
13 to underscore the timing issue that we have with  
14 respect to the de minimis level. It's been said  
15 that firms need time to plan their operations,  
16 decide their business mix, establish compliance  
17 procedures and systems, and if we need to start  
18 counting dealing transactions under a new paradigm  
19 by January 1 of 2017 that activity has to take  
20 place early in 2016.

21 We have to contrast that with the  
22 notion, and we commend the Commission for the

1 process it's following with respect to de minimis  
2 having a preliminary report, having a final  
3 report, a proposed rule, an opportunity for  
4 comment, and then a final rule. But that leads  
5 you to the obvious conclusion that we won't know  
6 with certainty until at best very, very close to  
7 the end of the year. That's a collision course  
8 that I think we really ought to try to avoid. So  
9 an early decision in the form of, potentially, an  
10 interim final rule which just extends that  
11 deadline and avoids the collision course that we  
12 know is headed our way would be a very good thing  
13 to do.

14 MS. WIGGINS: Thank you. Michael?

15 MR. PROKOP: Thank you very much. I  
16 promise that Ron and I didn't visit in the hallway  
17 before the talk. Great segue about what I'm going  
18 to say. Lael, you brought up the economic impact  
19 of the potential of this going through as is right  
20 now. I would submit right now that the economic  
21 impact is actually already being felt. There are  
22 some firms that are being prudent, if you will.

1 That are already looking at what the overall cost  
2 is and the change to their business if this should  
3 go to \$3 billion.

4           You know, we have a safe zone down below  
5 \$3 billion where people operate. They know they  
6 won't fall into any trouble. We have those that  
7 are now our listed dealers. I refer to it as the  
8 no man's land between three and eight where we're  
9 seeing a lot of activity still in the five to  
10 seven, so there are firms that have to take that  
11 impact look. And the various costs that they have  
12 to incur for their business, whether it's people,  
13 policies, procedures, the overwhelming cost of  
14 capital, which in some cases is probably about 65  
15 percent to 70 percent of the total spend of  
16 becoming a dealer if they so choose. And then  
17 really looking at changing their business model,  
18 potentially are they doing it just to hedge? Are  
19 they possibly doing it as an opportunity to  
20 provide market liquidity as a dealer in the  
21 marketplace?

22           There are those decisions that need to

1 be made. I speak publicly and I do it on the  
2 record very often that if a firm is looking at  
3 doing something like this I encourage them to do  
4 it more sooner than later. My biggest fear is  
5 that the phones start ringing in September 2017  
6 and there won't be anybody there to answer. There  
7 are going to be a lot firms very far down the road  
8 in becoming dealers, potentially, if this goes to  
9 three, and I would encourage those out there to  
10 get started as quickly as possible if they have  
11 that inclination. Thank you.

12 MS. WIGGINS: Let me just review the  
13 people I have with tent cards up. We have Russ,  
14 Sue, Jim, Tyson, and Sharon. And, again, I do not  
15 have any indication of anyone on the phone that  
16 they wish to speak. And Paul also, so Russ?

17 MR. WASSON: Well, first I'd like to  
18 just state for the record that electric  
19 cooperatives are not special entities. We are not  
20 special entities, but we have a real concern about  
21 the lowering of the de minimis threshold because  
22 some of our larger members use utility operations

1 related swaps to hedge their commercial risk. In  
2 these cases we typically only have one, or perhaps  
3 at most, two counterparties. Those counterparties  
4 are usually large and best run utilities. The  
5 idea of being a swap dealer to them is so  
6 repulsive we are almost certain that if you lower  
7 the threshold that they will pull out of that  
8 market, and then our members will be exposed to  
9 more price volatility than they otherwise would  
10 have been prior to the lowering of the threshold.

11 MS. WIGGINS: Sue?

12 MS. KELLY: My members are special  
13 entities, unlike Russ, and it's true, we were  
14 forced to wear the scarlet letter when the special  
15 entities provision was implemented in this energy  
16 space. We very much appreciate the fact that the  
17 CFTC saw fit to reverse that, and I just am here  
18 to say thank you very much. We greatly appreciate  
19 that.

20 In preparation for this meeting I  
21 actually looped back to our members to see how is  
22 it going since, and have been told that their

1       counterparties, by and large, have returned. That  
2       they very much appreciate that. Some said, you  
3       know, I lost three counterparties and they have  
4       now come back. And they feel like this has been a  
5       great assistance to them and, obviously, one of  
6       the reasons we're still pursuing legislation is,  
7       you know, having been burned once we'd like to  
8       make sure that never happens again. But, you  
9       know, in the meantime, we're very appreciative of  
10      the relief that has been granted.

11                 I also did poll those same members to  
12      ask them about the three versus eight issue and  
13      actually got some mixed signals. Some are  
14      concerned, some less so, but I think that  
15      reinforces the need for the careful study that  
16      staff has been talking about, and a, you know,  
17      close review of this, so that we fully understand  
18      what a reduction would mean and, you know, if we  
19      need more time to study that I think that should  
20      be taken.

21                 MS. WIGGINS: Jim, I think you were  
22      next.



1                   MR. ALLISON: Let me join in commending  
2                   the Commission for creating this report and  
3                   getting it into the public's hands so quickly so  
4                   that we can have this discussion. I am something  
5                   of a data hog, and I've turned immediately to  
6                   Table 19 on Page 48, and at risk of creating, yet  
7                   again, the problem that Craig's old joke talked  
8                   about. This is, admittedly, limited to the  
9                   interest rate and credit default swap markets, but  
10                  it's really, really, really good data, or at least  
11                  it appears to be. I'm speaking to the usefulness  
12                  of the information, not necessarily the quality of  
13                  the data.

14                  And the question I was asking myself  
15                  was, suppose we had had this data in 2012 when we  
16                  were debating the level of the de minimis  
17                  threshold in the first place, before the rule was  
18                  put in place? Where's the sweet spot for the  
19                  threshold based on the data we have in Table 19?  
20                  My first observation is the sweet spot may be a  
21                  number bigger than any of the scenarios considered  
22                  in Table 19 because if I look at Column three of

1 Table -- Column 1 is the threshold, Column 3 is  
2 the notional value captured at that threshold.

3 In both cases, denominated in billions  
4 of U.S. dollars. I note that in Column 1 the  
5 numbers are one or two or three digits. In Column  
6 three the numbers are six digits. As you lower  
7 the threshold from 100 billion down to 1 billion  
8 you capture all of an additional 2 percent of the  
9 notional value. If you go from 100 billion to 8  
10 billion the number of entities captured as swap  
11 dealers goes up by 130 percent. The notional  
12 value goes up by 1 percent. Going from 100  
13 billion to 1 billion you increase the number of  
14 entities by 280 percent for 2 percent of notional  
15 value.

16 My conclusion is that of these scenarios  
17 represented in this table, the closest thing to a  
18 sweet spot is not one or three or eight, but at  
19 least 100 billion. And that by setting the  
20 threshold, admittedly, the Commission did not have  
21 these data when it set the threshold. But by  
22 setting the threshold so low the Commission has

1 overinvested in regulating swap dealers. In the  
2 private sector we would normally complain about  
3 all the costs that imposes on the private sector  
4 entities that are regulated. Yes, that's true.  
5 There is a dead weight cost to that. In the grand  
6 scheme of the global economy, not a big deal.

7 A more important issue. The Commission  
8 has a finite budget. I will carefully duck the  
9 question of how big that budget should be. But  
10 whatever the number is, it's finite which means  
11 that overinvestment in one activity forces you to  
12 underinvest in some other activity. The concern  
13 for me from this table is you are substantially  
14 overinvesting in regulating swap dealers.  
15 Something is going undone because of that. The  
16 biggest concern for me was the -- again, the data  
17 quality issue that the Commission staff, that  
18 David, that others, that everybody recognizes.  
19 We've been reporting swap data since 2013, yet we  
20 don't seem to be able to generate for the public  
21 or for ourselves what we really need. Something's  
22 wrong in there.

1           I am concerned that the Commission  
2 resources that have been devoted inefficiently to  
3 regulating swap dealers could, perhaps, be better  
4 devoted to trying to figure out how we fix the  
5 reporting issues. Again, this data was not  
6 available in 2012 when the level was set, but my  
7 interpretation of Table 19 is the level doesn't  
8 need to drop. The level is already dramatically  
9 lower than the sweet spot for setting the  
10 threshold. And, yes, I recognize we are only  
11 looking at the IR and CDS swap markets. But  
12 they're a huge part of the market, and that means  
13 if you actually looked at the total market that 8  
14 billion or 100 billion would be an ever smaller  
15 percentage of the total, so.

16           MS. WIGGINS: Tyson? I think you're up  
17 again.

18           MR. SLOCUM: Yes. So we've heard from  
19 the presentation, and again, thank you very much.  
20 Decreasing that exemption threshold from 8 billion  
21 to 3 billion would create some harm, and I see  
22 some vague pronouncements about harm. And so the

1 general feeling here is that a swap dealer that's  
2 got between \$3 billion and just under \$8 billion  
3 is what? A small business? Is an entity that has  
4 trouble finding compliance officers to comply with  
5 CFTC regulations? What is the burden of a  
6 business doing \$3 billion to \$8 billion?

7 MR. MCINDOE: A good question, Tyson.  
8 Your question brings a good point which is what is  
9 the cost of being a swap dealer? There are lots  
10 of different compliance items. In fact, the item  
11 that's probably most important is unknown,  
12 especially if you're a commercial firm, which  
13 would be the cost of capital. That's one of the  
14 reasons why at the beginning you have to think  
15 about what would be the cost of capital.

16 We advocate that one of the things the  
17 CFTC should do before making a drop or allowing a  
18 drop to happen is finalize the capital rules, thus  
19 allowing businesses to make and be in a better  
20 position to answer your question. Right now the  
21 question says, okay, what is the cost? Nobody can  
22 tell you right now. However, we do know from the

1 experience of firms that have registered that  
2 there are a lot of compliance costs. You have the  
3 external business conduct standards. You become  
4 subject to the margin rules. Those are costs that  
5 have to be dealt with and they go to different  
6 people.

7 Now, there are two ways to react to  
8 those costs. You could either pass them along to  
9 your counterparties, which are many of the end  
10 user firms that people may trade with or you can  
11 slide back from that business and say I do not  
12 want to incur that cost. So I think you have a  
13 good question. I think the point to the  
14 Commission and to the staff is we don't have the  
15 data right now to fully answer your question.

16 MR. SLOCUM: I'd just like to say I  
17 think that Congress was pretty clear about the  
18 need to have some sort of transparency to swap  
19 dealers and to the swap market. And that, you  
20 know, I believe that moving that threshold from \$8  
21 billion to \$3 billion, what captures 83 firms or  
22 thereabouts, it doesn't seem to be that

1 burdensome. These are dealers that are doing very  
2 large amounts of business, and if having to comply  
3 with some Commission regulations is overly  
4 burdensome for an entity doing in excess of \$3  
5 billion I think that firm has greater problems  
6 than CFTC compliance.

7 I do have a couple of additional  
8 questions just on the data issue for the CFTC  
9 witness unless -- I'm happy to yield to other --

10 MS. WIGGINS: While we're on the subject  
11 that you had teed up there.

12 MR. SLOCUM: Sure.

13 MS. WIGGINS: I know there are two other  
14 cards that have jumped. Did you have something to  
15 say that's directly relevant to the conversation  
16 that Tyson was just having with David?

17 MR. ALLISON: Yes, I was -- real world  
18 example, so at Conoco Phillips when the  
19 registration requirements were first being debated  
20 in -- well, first is probably the wrong word,  
21 2011/2012 we raised with management the strategic  
22 question, should we let our business become big

1       enough that we are required to register and, if  
2       so, having to register, do we then grow the  
3       business? Do we intentionally stay below the  
4       level or do we just run our business and if we  
5       have to register we have to register?

6               The strategic answer from management was  
7       unambiguously, do whatever you have to do to keep  
8       the business below the level at which you'll have  
9       to register. Driven both by the knowledge of the  
10      explicit costs associated with registration, and  
11      the uncertainty about the other costs, including  
12      the additional CFTC exposure that might be brought  
13      about by registration even though it wasn't  
14      identified as an explicit cost. But it was very  
15      clearly an explicit order from management to alter  
16      the business as however might be necessary to stay  
17      below the thresholds that would require  
18      registration. And the business is, sadly, smaller  
19      today than it was then, but it's still a pretty  
20      darn big business.

21              MS. WIGGINS: Tyson, I know you have  
22      some more questions. If you don't mind --



1 MR. SLOCUM: No.

2 MS. WIGGINS: -- if we could go to Paul  
3 and then we'll come back to you?

4 MR. SLOCUM: Of course.

5 MS. WIGGINS: Okay. Paul?

6 MR. HUGHES: I'll try to be quick. A  
7 couple of things. We've mentioned this a little  
8 bit. I think we have to acknowledge the  
9 volatility in the market. Lopa mentioned that  
10 earlier. We are at a -- it is -- the market is  
11 much different today than it was when this first  
12 came in. It's a different stage in the market.  
13 Fortunately, at this point we're able to pass on  
14 low fuel prices to our customers and whatnot, and  
15 that's great. But there's also an element to the  
16 energy market where guys are struggling right now.

17 If you look at what's happening in the  
18 markets and what is expected in the next, you  
19 know, over the next summer and the number of  
20 companies, and folks that may be subject to  
21 bankruptcies, this, that, and the other. The  
22 truth of the matter is, for an element or a sector

1 in the energy market margins are thin, and yet, we  
2 have wide bid ask spreads. And so I get concerned  
3 when we start talking about this and Lael  
4 pointedly mentioned it and we have the same issue.  
5 Liquidity cannot be just tossed around lightly.  
6 We have to tread very, very lightly on anything  
7 that could impact liquidity.

8 This is a little bit different situation  
9 that we've had. We actually have some pretty good  
10 recent history. He brought this up as well. And  
11 the APPA in their issue where they had too low a  
12 threshold before, obviously, they felt it. We  
13 pulled back from that activity as well, and we  
14 say, well, you know, we want to show transparency.  
15 There's some very noble things that we want to do,  
16 but what we don't want to do is somehow drive  
17 folks away. And we talk about the costs and we  
18 don't know. They're uncertain.

19 What we do know is certain because  
20 almost all of us in there hedge, and the reason we  
21 hedge is because uncertainty is expensive. And we  
22 cannot forget that. We saw -- you know, even with

1 the \$8 billion we saw counterparties, we saw what  
2 would be considered traditional swap dealers leave  
3 the market. I can't say with certainty that those  
4 swap dealers left because of the \$8 billion  
5 threshold. There's a whole lot of different  
6 elements and activities that have gone on in the  
7 last five or six years. I fully acknowledge that.  
8 But this is just one more.

9 And you look where we are now as a  
10 market, you just throw in one more pebble in the  
11 pile, so to speak. At some point you hit a  
12 tipping point. If we do this without a whole lot  
13 of thought and tread very, very lightly then you  
14 hit a tipping point where we lose more liquidity  
15 in the markets, and that would be the absolute  
16 worst-case scenario.

17 MS. WIGGINS: Tyson?

18 MR. SLOCUM: Yeah, my question is for  
19 the two CFTC panelist. First of all, thank you  
20 very much for your time and for your work. I'm  
21 interested in some of these data issues. You had  
22 mentioned that some of the incomplete data was a

1 result of missing fields where not enough  
2 information was entered in. Is that something  
3 that the Commission has -- what's the reason that  
4 this data is not in there, and is there a way to  
5 forcibly compel those missing fields to be entered  
6 again? I'm just trying to understand some of this  
7 problem, and then I've got other questions about  
8 the data as well.

9 MR. SRINIVASAN: I'll stay away from  
10 forcing people to sort of report data. There are  
11 challenges. There also are challenges across the  
12 different asset classes. And some have to do with  
13 plumbing, some have to do with operational  
14 challenges, some have to do with maybe lack of  
15 clarity from our perspective.

16 So I think what you have done is just,  
17 you know, said this is what we have. These are  
18 the challenges that we have. And even in, sort  
19 of, the exchange-traded markets it took a while  
20 for us to get good data. It's just that this is  
21 going to be how the process works. So, once  
22 again, it's -- there are, as I said, there are

1 rules in terms of when you missing LEIs one reason  
2 could be there are small firms who haven't updated  
3 an LEI yet. So if there is -- one of the  
4 counterparties for the trade is a registered swap  
5 dealer than the reporting burden is on --  
6 responsibility is on the swap dealer.

7           If both the counterparties to the trade  
8 are not dealers than they have to decide who is  
9 going to be reporting. It's possible they don't  
10 have an LEI yet. So there are all sorts of  
11 challenges, and, you know, it's hard for us to  
12 even go and -- given the large number of  
13 transactions, the large number of participants  
14 with the resources we have we just can't chase  
15 down and figure out why people haven't done it.  
16 So what we're trying to do is, at least from an  
17 analysis perspective, this is the data we have and  
18 what do we do?

19           But the presumption is that, the hope is  
20 that as time goes on actually the quality of data  
21 will be better, and there are multiple efforts  
22 underway. And many of the focus actually would be

1 on the rates and credit side because they're  
2 larger markets and the most standardized. But the  
3 expectation is that, you know, in the next few  
4 years we get better quality data, so.

5 MR. SLOCUM: Thank you very much. You  
6 had also mentioned that another limitation was  
7 that the Commission doesn't require the disclosure  
8 of some of this data, and so I guess my questions  
9 are is this just something that is elective on the  
10 part of the Commission that you haven't figured  
11 out a way to ask for this data or is it that you  
12 have the lack of authority to ask for this data?

13 MR. SRINIVASAN: So this goes back to  
14 this question of when we started when the rules  
15 were adopted we didn't have any information in the  
16 marketplace, so we didn't have any -- so we had a  
17 fair idea of the market structure, but then the  
18 devil is in the details, and it's (inaudible).  
19 And data reporting is at a level of granularity  
20 where we can capture the aspect of the trade. So  
21 it tends to be an iterative process, and we speak  
22 about that in the data. Even in sort of moving

1 away from commodity markets to the so-called more  
2 standardized markets and sort of the rates and  
3 credit. There are all sorts of challenges.

4           If you look at the transactions, and the  
5 market is typically evolving also, when  
6 transactions get into clearing what happens with  
7 the trades is the ultimate trade is reported.  
8 What we call an alpha swap. And then when it gets  
9 to central clearing it gets novated. The original  
10 swap is novated and torn and replaced by two  
11 different swaps.

12           Now, when we wrote the report, when we  
13 wrote the additional rules we didn't differentiate  
14 between these different types of swaps. Now, we  
15 could have said that, you know, we can comment  
16 that we should have anticipated these things.  
17 Because I'm saying it's like we wrote the report  
18 with sort of an understanding in mind, as we  
19 understand the data better, the market better, we  
20 are in the process of adopting new rules. But  
21 once again, it's a consolidation process that's  
22 underway, so.

1                   MR. SLOCUM: That's very helpful. I'd  
2                   just like to say for the record that I think it's  
3                   critical that the Commission have the resources it  
4                   needs to make sure that we've got adequate  
5                   transparency and regulation over these markets.  
6                   You know, Mr. Allison, you made a comment that I  
7                   would echo. I just come to a different conclusion  
8                   in that the Commission does have finite resources,  
9                   but I don't think that finite resources should  
10                  force us to conclude that, well, we don't have the  
11                  resources to deal with these swaps markets, so we  
12                  should not do it.

13                  I think that instead one of the jobs of  
14                  the advisory committee should be advocating  
15                  strenuously to Congress to ensure that this  
16                  Commission has all the resources at its disposal  
17                  to effectively carry out its duty to ensure that  
18                  markets are operating with integrity and that  
19                  consumers are ultimately protected. Thank you.

20                  MS. WIGGINS: Sharon?

21                  MS. BROWN-HRUSKA: Thank you very much.  
22                  Boy, there's so much raised here from when I put



1 my card originally up. I just kept going. I  
2 mean, very excellent discussion and I especially  
3 appreciate Jim Allison's comments, which I think,  
4 you know, the idea that -- or at least, the  
5 endeavor to explore with -- in a rigorous manner  
6 the optimal level of the de minimis threshold is  
7 really where the Commission and then the good  
8 economists should also look after there's some  
9 action to create certainty with regard to where  
10 the Commission is going to go with the \$8 billion  
11 threshold.

12           You know, we, in fact, when I was --  
13 earlier, we did do a study at NERA Economic  
14 Consulting of the costs and benefits of the swap  
15 dealer de minimis level, and how much, based on a  
16 sampling of commercial energy firms, how much, in  
17 terms of the costs that they would face as a  
18 result of registering as a swap dealer using 2012  
19 swap data. We were able to find that the  
20 incremental costs imposed on a typical  
21 non-financial energy company regulated as a swap  
22 dealer was \$153 million in increased margin costs,

1       \$204 million in capital costs. Again, that was  
2       based on proposed capital requirements which are  
3       still largely uncertain. And \$31 million to  
4       comply with business conduct reporting and record  
5       keeping requirements for a total of \$388 million,  
6       which we found to be non -- you know, trivial.

7                 And also, I think even more important,  
8       and I think this is the work that really is more  
9       interesting and also more important, is to  
10       determine the impact of the level on market  
11       quality. And that's where I've been the most  
12       concerned as a former regulator of these markets,  
13       wanting to see them flourish because they are so  
14       important to the hedging and risk management  
15       activities of not only these firms that are  
16       producing energy, but to those firms and those  
17       people that consume and utilize that. It's the  
18       backbone of our economy, and so the impact on the  
19       markets have been felt. And we've definitely seen  
20       a price discovery, I think, hard by that.

21                 We see liquidity. The stories that I  
22       hear from market users that their bid ask spreads

1 have increased. The entities that are no longer  
2 using swaps because of concerns that they cannot  
3 -- that they would, you know, push up against or  
4 get the attention of the regulatory authorities,  
5 would push up against the swap dealer registration  
6 requirements. And the potential that we will see  
7 more concentration in market share among the large  
8 players and the financial entities.

9           We are also seeing, and I recently did a  
10 little study, sort of back of the envelope  
11 calculations for Risk Magazine, where we looked at  
12 swap dealers and, you know, given the confluence  
13 of the leverage ratios, the capital requirements,  
14 and other compliance costs, which are significant.  
15 That those led many traditional financial players  
16 to want to divest their swap dealer activity and  
17 to, basically, spin it off to private equity  
18 firms.

19           So we're seeing substantial changes in  
20 the marketplace as a result of these proposals and  
21 the uncertainty that they create. I hope that --  
22 and I'm always happy to help, you know, try to

1 think through these things, but I hope that the  
2 Commission in its effort will continue to seek  
3 more information and do a rigorous cost-benefit of  
4 those impacts on market quality.

5 MS. WIGGINS: Raymond?

6 MR. KAHN: Thank you for the Commission  
7 for allowing me to participate as the FIA  
8 representative for the first time on this  
9 important and, you know, helping work through a  
10 number of complex issues. I think what everyone  
11 has said --and the individuals to the right that  
12 have presented very good data.

13 Our commercial and end user members are  
14 looking to the ability to hedge their risk and not  
15 have limitations -- have the least amount of  
16 limitations. I think the recent activity that  
17 we've seen in the market basically shows the  
18 rationale and the importance of being able to  
19 hedge strategically and pragmatically. At the  
20 same time, I think, and what Sharon just alluded  
21 to and Paul alluded to that before, what I did  
22 hear is that liquidity, business planning, cost of

1 capital, all the major commercial users are trying  
2 to figure that so they can basically figure how  
3 they can best hedge their risk, best run their  
4 businesses.

5 I think it's far more challenging than  
6 it was two or three years ago. Part of that  
7 reason is because of conditions that are market  
8 conditions that, obviously, get better and worse,  
9 and that's just a factor of free and open markets.  
10 At the same time, when you, as the Commission, are  
11 trying to decide what is the right number, and I  
12 don't know what the right number is, honestly say.  
13 I think we have to put in the added challenges  
14 that we now know exist, and Sharon just spoke to  
15 that. If you are trying to hedge your risk,  
16 depending on what products you're using, you have  
17 higher capital requirements coming from your  
18 clearers, right? So you may have higher bid-ask  
19 spreads. That may go away. That may not. That's  
20 a market condition.

21 You also have more challenges in order  
22 to find clearing capacity, which is a capital

1 issue which we don't need to really discuss here,  
2 but that's -- so when you factor in all these  
3 various challenges of, basically, hedging risk and  
4 entering into these types of transactions what the  
5 FIA, really end user, commercial user is just  
6 looking for and asking us to help with is trying  
7 to, basically, reduce the amount of hurdles they  
8 may have so they're allowed to, basically, execute  
9 their business plans in a way that has the least  
10 amount of potential hindrances that can be  
11 avoided.

12           None of them are trying to avoid  
13 regulation or trying to avoid that. They're just  
14 trying to run their businesses in a pragmatic way  
15 with -- and so whether that's \$3 billion, \$8  
16 billion, I don't know. I can't answer that. But  
17 I think it needs to be factored in what Paul said,  
18 you know, the challenges. What the panelists  
19 said. What Sharon said. All the -- basically,  
20 the challenges that the, basically, the commercial  
21 end users have, and then, basically, make the  
22 final decision based on that along with the

1 challenges you have with the data, which has  
2 gotten much better, but continue to be movements.  
3 Thanks.

4 MS. WIGGINS: I want to sort of take off  
5 my hat here as trying to moderate this discussion  
6 and just be a member of EEMAC here for a moment  
7 and just echo some of the comments that have  
8 already been made. The Natural Gas Supply  
9 Association has submitted comments and I just want  
10 to briefly point out a couple of those concerns  
11 that we have raised in the past which are similar  
12 to many that have been raised here before today,  
13 which is we are very concerned about having this  
14 threshold drop from \$8 billion to \$3 billion.

15 We are very concerned that it will force  
16 market participants to make choices to leave the  
17 market rather than bear the cost of having to  
18 register as a swap dealer. And I was just  
19 wondering, this is a question to -- I guess this  
20 would go to David and Lael, if you all have an  
21 estimate as to -- even for those who want to stay  
22 in the registration business, if the de minimis

1 threshold drops I'm assuming that there are  
2 computer systems and other kinds of compliance  
3 systems that will have to be retooled. And do you  
4 have an estimate for the cost of that, sort of,  
5 retooling?

6 MR. MCINDOE: I don't have a good  
7 estimate for you. However, I will say that a  
8 preponderance of my clients would echo what Jim  
9 had said which is the natural reaction is to make  
10 a business decision, and many of the firms suggest  
11 that they will curtail their activity which then  
12 brings into the liquidity and the widening and  
13 volatility for the expense. So in some sense,  
14 when we're talking about the rule here it's not  
15 the expense to firms, but it's going to be the  
16 expense as that commodity flows through the value  
17 chain, and is ultimately consumed by households.

18 MR. CAMPBELL: Just one thing to add  
19 because there's been a lot of questions around the  
20 cost side of that equation, that business  
21 decision. But I think one thing we mentioned in  
22 our presentation is that, you know, you've also



1 got to factor in what's the business value of  
2 being in this business to these entities, right?  
3 The key thing we said was this is not our main  
4 business. You know, commercial firms aren't doing  
5 these types of transactions, like, as the core of  
6 their business. These are ancillary transactions  
7 that happen every now and again, for the most  
8 part.

9 I think what they would really have to  
10 weigh is, you know, how valuable is, sort of,  
11 going all in on this business to me versus cost.  
12 So the cost side actually may not need to be that  
13 high for a business to say, yeah, let's just focus  
14 on what we do best which is generating, producing,  
15 and delivering commodities, so.

16 MS. WIGGINS: I'll reclaim my moderator  
17 hat. Michael?

18 MR. PROKOP: Thank you. Just an  
19 interesting answer to your question. So each firm  
20 that's looked at is unique, obviously. You have  
21 to look at the commodities they trade, where they  
22 trade, what they trade, how they trade. It can be

1 as high, I think Sharon you're in the neighborhood  
2 of about 300 to 350. But the last one I did was  
3 upwards of \$1 billion. They were in agricultural  
4 markets. They had the full gamut of energy  
5 markets, but, you know, when you talked about the  
6 compliance systems and things like that there's so  
7 much more to that.

8           There's the record keeping. The  
9 retention. There's the reporting, which is  
10 tremendous. The people that have new  
11 responsibilities: Training, compliance, all  
12 around that. Obviously, additional risk, new risk  
13 that people are now aware of. All have to be  
14 trained and more people hired. Of course, as I  
15 submitted before, again, the cost of capital.

16           I think we're in a little bit of a lull  
17 right now in our attitude around this, if you  
18 will, because we're looking at the cost of what it  
19 means to become a dealer. And I think Lopa hit it  
20 right on the head. We're sitting here with oil  
21 where it is, natural gas where it is. You may  
22 make a decision to stay at about, you know, \$2.5

1 billion. Real quickly, with a couple of good  
2 market moves, you could be at \$4 billion, and very  
3 quickly. So not only do you have to hover just  
4 under \$3 billion. I feel that you have to go way  
5 below it if you're going to make that conscious  
6 decision it goes down below \$3 billion, so thank  
7 you.

8 MS. WIGGINS: Paul and then Sharon.

9 MR. HUGHES: I really just want to ask a  
10 question, and I'm not exactly sure -- it may be  
11 directed more towards you guys and your study. It  
12 may be just kind of open. We have, like Lael  
13 said, talked a lot about cost versus benefit, and  
14 there -- you know, kind of what is the benefit  
15 from the perspective of the commercial business?  
16 I'm curious to know what is the real benefit of  
17 adding an additional, you know, or trying to  
18 capture some higher percentage that's not being  
19 captured right now with the \$8 billion? Is that  
20 going to give us better-quality data? Is it to  
21 get a quantity of data and reporting that we  
22 currently don't have that's going to be a

1       tremendous advantage based on what we have today?  
2       Or is it in any way going to enhance the quality?

3                 Because I think what I heard was you  
4       said, and it makes sense, you know, this is kind  
5       of an iterative process. Nobody had done this  
6       before when we first started. You're trying to  
7       get the data. What do we ask for exactly? How do  
8       we communicate that? How do we fill out these  
9       data forms? And then how do we turn in this mass  
10      of data? And so I get it. It's an enormous  
11      amount. What do you do with it?

12                Let's say we do go to \$3 billion, and  
13      I'm just kind of setting aside all our issues and  
14      concerns, but what does that -- how -- is there  
15      much enhancement? Is the -- you know, we're  
16      talking about how high the cost is, but is the  
17      benefit -- it seems like the benefit may not be as  
18      high as we -- we're assuming it's really high, but  
19      I'm struggling to see the benefit on the other  
20      side. Can somebody else maybe help me out on  
21      that?

22                MS. FLAHERTY: I will let my colleague,

1 Sayee, who's an economist, comment on the data.  
2 And we don't have a view, as staff, so -- but in  
3 the report it discusses what Congress suggested  
4 were some of the factors that were behind  
5 requiring swap dealer registration, which are  
6 systemic risk, more transparency, counterparty  
7 protections, which are some of them. So, again, I  
8 guess those are some of the reasons -- some of the  
9 things that Congress believed would be captured by  
10 swap dealer registration. If you want to comment  
11 on that data?

12 MS. BROWN-HRUSKA: I was just going to  
13 say, I mean, I think we looked at a lot of those  
14 firms that would have been pulled into the  
15 requirements of registration if they fell below  
16 the threshold, and we evaluated them to the extent  
17 that we could see their financials. You know, the  
18 expectation, of course, the benefits that the  
19 Commission and I think Congress hoped would advert  
20 to regulating these entities as swap dealers are,  
21 of course, yes, increase transparency as Eileen  
22 mentioned, and also a reduction in systemic risk,

1 and, you know, that there would not be a chance  
2 for these firms to -- their credit or their bad  
3 business practices or to pose a risk to the  
4 financial system such that we would, again, have  
5 to have a government backstop.

6 In our analysis, those risks were not  
7 there. That these entities didn't pose systemic  
8 risk of the nature that I think Congress was  
9 concerned about. You know, I think it would be  
10 useful to take a fresh look at the numbers given  
11 so much has changed. It occurred to me in the  
12 discussion that when we did our back-casting to  
13 try to make a determination about margin and  
14 capital costs we had to make assumptions based on  
15 proposed rules, and also based on the assumption  
16 that the amount of margin that would be required  
17 to support -- because as you know, if you have to  
18 register as a swap dealer you have to post margin  
19 on all of your swaps transactions.

20 And so we also used the values that we  
21 anticipated which were for cleared margins.  
22 That's all we really had at the time, but in light

1 of the fact that the large majority of the swaps  
2 that were held by these energy entities were  
3 uncleared -- were not cleared, who would have  
4 thought we'd create a term uncleared when I was  
5 back at the -- when I was at the Commission. I  
6 mean, it was an OTC derivative that usually has  
7 customized attributes that really wasn't amenable  
8 to clearing, and that we do see that the cost to  
9 clear these transactions or the cost to support  
10 these transactions in terms of collateral capital  
11 is even greater than in the clearing environment,  
12 so I think we vastly underestimated the cost, and  
13 I think Michael's probably update is well-received  
14 as more likely the cost.

15 MS. WIGGINS: Chairman?

16 CHAIRMAN MASSAD: As always, it's been a  
17 very interesting, helpful discussion. I've made  
18 comments earlier on the de minimis level and its  
19 importance. And, obviously, we'll take all the  
20 comments we're getting into account. I just want  
21 to make one comment to the budget point that was  
22 raised and, obviously, I've expressed the view

1 that I think our budget is not commensurate with  
2 our responsibilities, but I'm not going to get  
3 into that.

4           It was suggested, if I understood the  
5 comment, that our limited resources should somehow  
6 be considered in where we set the level, and I  
7 don't think that is how we should think about it.  
8 Obviously, the limits on our resources affect how  
9 we allocate things and we should, and we do, think  
10 about risk and priorities, particularly when it  
11 comes to compliance and enforcement.

12           But with a rule like this, and frankly,  
13 with all of our swap dealer oversight regime, we  
14 set the rules based on what we think is the right  
15 policy in light of the goals articulated by  
16 Congress. And we assume people will comply. We  
17 don't set them based on how much we have for  
18 enforcement of that compliance. And I assume  
19 everybody in this room would say they also do  
20 comply without us taking enforcement action. So I  
21 don't really think that should be a relevant  
22 consideration, if I understood the comment



1 correctly.

2 MS. WIGGINS: Arushi?

3 MS. FRANK: Thank you, Mr. Chairman.

4 Just to respond, not to the direct point, which I  
5 think is very valuable and relevant, but to  
6 something that was raised at the TAC meeting on  
7 Tuesday, and I think it's valuable to raise it  
8 here, too, is that one of the ways that the  
9 Commission can get more resources towards  
10 analyzing the data it has, and its staff can  
11 figure out how to get this data more accurate,  
12 complete, and reliable is to reconvene the data  
13 standardization harmonization committee. Bring  
14 the SDRs, bring the SROs back in the room and  
15 create more opportunities and interaction so that  
16 that data can be reviewed and looked at more  
17 comprehensively.

18 I think another part of that is going to  
19 also be looking at the exogenous factors on the  
20 marketplace, and figuring out now whether the  
21 problem that we're trying to solve by reducing the  
22 threshold is at the same level or is greater than

1 the problem we're trying to solve on the data  
2 reporting side, in general, with Part 45. So  
3 while I'm not making a case on prioritizing the de  
4 minimis threshold versus Part 45, at least for end  
5 users, my member companies being among them. I  
6 think that the Part 45 data challenge, the amount  
7 of compliance we do, and the fact that the  
8 commission is really trying to figure out how to  
9 make that data that's already being reported more  
10 relevant. That's where the money's at for my  
11 members and for a lot of those who are in this  
12 room.

13 And so in terms of resources, A, the  
14 committee being reconvened will be really helpful  
15 to get that work done more quickly, and we also  
16 think it will be really helpful for us, as  
17 industry, to be able to see the Commission  
18 fulfilling its priorities, all of them, through  
19 more outreach to industry. But also to the SROs  
20 and to the other warehouses of data that the  
21 Commission is actually quite fortunate to have.  
22 Unlike other energy market regulators, who really

1 don't have that type of outside expertise at their  
2 disposal.

3 MS. WIGGINS: I think that's all the  
4 time we have.

5 MR. SLOCUM: One quick little comment  
6 just to the --

7 MS. WIGGINS: Okay.

8 MR. SLOCUM: -- on the budget and  
9 financing. So, you know, Public Citizen has  
10 vigorously supported appropriations efforts and  
11 other efforts to make sure that the Commission has  
12 all of the adequate resources at its disposal. I  
13 think one thing that's interesting is learning a  
14 lesson from the Federal Energy Regulatory  
15 Commission, which is another agency that I spend a  
16 lot of time working before.

17 And it is a self-financing agency and,  
18 of course, that's beyond the capabilities of this  
19 Commission to undertake. It's a measure of  
20 Congress. But Congress gave FERC that  
21 self-financing authority in the 1968 Omnibus  
22 Budget Act as a deficit reduction effort. I think

1 that that's, you know, in light of discussions in  
2 Congress today about making sure we have a  
3 balanced budget, and at the same time, making sure  
4 that the Commission can have 100 percent of its  
5 needed resources to undertake all of its  
6 responsibilities. Thank you.

7 MS. WIGGINS: Now, we really have used  
8 up all of our time on the subject, so thank you  
9 all for the presentation. Thank everyone for the  
10 discussion and the input. We really appreciate  
11 everyone's thoughts and feedback on the issues  
12 that we discussed. And I think it's now time to  
13 move to the last item on our agenda.

14 We're not going to take a break now,  
15 right? We're just going to move on. Okay. The  
16 last item on our agenda is the presentation of  
17 EEMAC's report summarizing its 2015 proceedings  
18 and closing remarks. As Commissioner Giancarlo  
19 said at the outside of our meeting today, there  
20 are several objectives that EEMAC is supposed to  
21 pursue pursuant to what we -- the authority that  
22 we were given under Dodd-Frank, and one of them is

1 to conduct public meetings, which we've done today  
2 and did twice in 2015.

3 And another is to submit reports and  
4 recommendations to the Commission, including  
5 dissenting or minority views, if any. And today  
6 we have a report to present. I'm going to ask Jim  
7 Allison to present an overview of the report. As  
8 you all know, there was a dissenting opinion that  
9 was also filed, and after Jim presents his  
10 overview of the report I'll ask Tyson to present  
11 his overview and summary of his dissenting opinion  
12 on that, and then we will have a discussion,  
13 hopefully focused on the merits of the report. So  
14 Jim?

15 MR. ALLISON: Thank you, Dena. And I  
16 trust that all of you have a copy of the report  
17 available to you at this point. One technical  
18 point. The statutory authority to issue the  
19 report went along with the committee that the  
20 statute created which was this nine-person  
21 committee. The Commission, I think wisely,  
22 expanded the activities around this table

1 substantially versus that nine members in order to  
2 do a better job capturing the scope and spread and  
3 diversity of the energy and environmental markets.

4 For the paper, however, the vote to  
5 release the paper was limited to those nine  
6 members. And our names are in the report along  
7 with the direction in which we voted, but the --  
8 what we call -- sometimes call the associate  
9 members were not invited to vote, and I think it's  
10 appropriate to recognize that as we make the  
11 presentation on the report.

12 As Dena said, we had meetings in 2015.  
13 We had two meetings. We generated hundreds of  
14 pages of transcript. We generated additional  
15 comments in the comment filings, including some  
16 comments that were actually new. Those have been  
17 somewhat rare of late. We did generate some new  
18 comments, and now we have a report.

19 Let me focus on four points: Necessity,  
20 liquidity, the scope of the bona fide hedge  
21 definition, and what I'll call some practical  
22 challenges that will have to be addressed if,

1 indeed, the Commission does proceed to finalize a  
2 federal speculative position limits regime.

3 First, with respect to necessity. The  
4 conclusions from our meetings, as reflected in the  
5 transcript, found little to no evidence that a  
6 federal position limit regime would be necessary  
7 to reduce or deter excessive speculation. Now,  
8 we've reviewed academic literature. We heard, in  
9 particular, from Craig Pirrong. There is some  
10 divergence in the academic literature, but the  
11 best consensus of the academic literature is that  
12 the evidence does not support the conclusion of  
13 excessive speculation. And I would note that in  
14 the comment filings after that February meeting,  
15 and this is in Footnote 11, there was an  
16 additional academic study filed that further  
17 supports that conclusion and rebuts one of the  
18 earlier studies that appeared to show a connection  
19 between speculative activity and pricing.

20 We also heard from the Energy  
21 Information Agency and Administrator Sieminski,  
22 who made it very clear that the change in energy

1 prices that we were observing and that has  
2 continued since then was driven by supply and  
3 demand considerations, the fundamentals. In  
4 particular, what we call the shale oil revolution.  
5 In the absence of more complete information about  
6 the necessity for a rule, the report concludes  
7 that it is unlikely that any federal speculative  
8 position limit rule could pass a cost-benefit  
9 test.

10           Second, liquidity. We heard in both  
11 meetings last year and have heard again today  
12 about the reduction in trading liquidity both in  
13 physical markets and in derivative markets, the  
14 adverse effect that has already had and is  
15 continuing to have on the ability of entities that  
16 are interested in hedging and finding  
17 counterparties and the correct hedging  
18 instruments. The liquidity issues are more severe  
19 the further out you go on the curve, and are more  
20 severe at specific delivery points versus the  
21 NYMEX delivery points, for example, with the  
22 physical futures contracts. Unfortunately, it's



1       that specificity of time and location that is  
2       necessary for an efficient hedge, so the mere fact  
3       that there is still good liquidity at Cushing or  
4       Henry Hub is not sufficient to get good liquidity  
5       for efficient hedging. We also saw evidence on  
6       widening of bid-ask spreads and reduction in depth  
7       of market.

8               Third, the scope of the definition of  
9       what is a bona fide hedge. This has been the  
10      topic of many, many pages in comment letters. We  
11      heard presentations, specifically from Ron, about  
12      particular examples of hedges that are commonly  
13      used to reduce risk in the commercial space that  
14      would not appear to be authorized as bona fide  
15      hedges under the rule as it currently stands. And  
16      we were not able to elicit any cogent rationale to  
17      explain why they were excluded. The limitation on  
18      what is allowed as a bona fide hedge would, again,  
19      have significant effects on entities that wish to  
20      hedge.

21              Finally, if the commission does decide  
22      to go ahead and finalize the rule, there are

1 several practical challenges that I think should  
2 be addressed in finalizing it. Practical  
3 challenges in terms of where do the resources come  
4 from to manage all of the details that must be  
5 managed in a federal regime. The exchanges have  
6 substantial resources and substantial experience  
7 doing this, and exploiting those resources and  
8 that experience would seem useful.

9 I don't think that will reduce all of  
10 the potential harms of the proposal. We also  
11 talked about using, in the out months,  
12 accountability levels rather than position limits  
13 in order to reduce some of the threats of the  
14 regime. Again, based on what we heard eight  
15 members of the committee voted in favor of the  
16 report, one voted against it.

17 In terms of the proposals, again, if the  
18 committee goes forward, we would recommend that  
19 the flaws in the bona fide hedging restriction be  
20 addressed. We need access to bona fide hedging  
21 treatment for all of the hedging strategies that  
22 have traditionally been used to reduce risk. And

1 the rule as proposed grossly restricts that.

2 That can be done through expanding the  
3 list of enumerated hedges. It can be done through  
4 an effective and efficient process for handling  
5 non-enumerated hedges. Most likely to be a  
6 combination of the two.

7 Second, the recommendation was imposing  
8 a position limit only in a spot month and doing  
9 only that, originally, reserving any action for  
10 the out months until we've got more experience  
11 with how the federal regime affects things in the  
12 spot month.

13 Third, the position limits as they stand  
14 now are predicated on deliverable supply  
15 estimates. The deliverable supply estimates we've  
16 been working with are grossly out of date, and we  
17 must have deliverable supply estimates that are up  
18 to date and reflect particular characteristics of  
19 each commodity. There have been proposals from  
20 both CME and ICE on updating deliverable supply  
21 estimates. Those, I think, have not yet gone  
22 through.

1           The rule that was vacated provided for  
2           updating position limits -- updating deliverable  
3           supply estimates every two years. I would note  
4           that we are now well beyond when we should have  
5           updated the updated results that were tentatively  
6           mentioned in the current proposed rule. So we are  
7           out of date on deliverable supply, and we are  
8           getting further out of date every day. The market  
9           has changed radically. Again, that is part of the  
10          shale revolution that has radically altered the  
11          deliverable supply at these delivery locations.

12                 Finally, I mentioned earlier the  
13           expertise, the resources, the experience the  
14           exchanges bring to bear on these issues. I  
15           believe the exchanges are willing to participate  
16           in administering the regime. And I believe it  
17           would be wise, and the report suggests it would be  
18           wise, for the Commission to find a way to engage  
19           the exchanges actively in helping to administer a  
20           federal regime if one is, indeed, created. Let me  
21           stop there.

22                 MS. WIGGINS: Thank you, Jim. Tyson?

1                   MR. SLOCUM: Thank you very much.  
2                   First, I believe that our meeting is scheduled to  
3                   end at 1:30, and if that is the case, I think our  
4                   discussion needs more time than that and I would  
5                   just -- I don't know if I need to make a motion to  
6                   be able to extend the time of this meeting so that  
7                   we can discuss, as much time as the advisory  
8                   committee needs to address these issues?

9                   MS. WIGGINS: I don't intend to cut you  
10                  off at 1:30, don't worry.

11                  MR. SLOCUM: Okay. But not just me, but  
12                  I would imagine --

13                  MS. WIGGINS: No.

14                  MR. SLOCUM: -- we've got a lot of  
15                  people here at the table that would probably like  
16                  to weigh in.

17                  MS. WIGGINS: No.

18                  MR. SLOCUM: So, you know, my dissent is  
19                  part of the public record. I hope that you all  
20                  have read it. I'm not going to read it word for  
21                  word. This has been one of the most strangest  
22                  experiences that I've had in that it was not a

1 collaborative or consultative process. At neither  
2 of our two public meetings that we had in 2015 was  
3 there any discussion at either one of those  
4 meetings that the advisory committee was going to  
5 embark on writing a report. There was no  
6 discussion about forming a subcommittee. There  
7 was no appointments of people to lead efforts to  
8 write a report. There were no public mentions at  
9 all.

10           It is in the statute, and I can tell you  
11 as an advisory committee member I received no  
12 offline communications. No phone calls, no  
13 emails, no smoke signals indicating that two  
14 individuals were taking independent initiative on  
15 their own to offer a report that would speak for  
16 all nine members of the advisory committee.

17           I know that an advisory committee is  
18 supposed to be a collaborative process, so there  
19 was absolutely nothing collaborative in the way  
20 that this report was produced, and I don't think  
21 it's a valid report of this committee because it  
22 failed to engage, from the very beginning, the

1 members or the associate members. And I  
2 understand that the associate members, by statute,  
3 cannot vote. That does not mean that they cannot  
4 be consulted. There's nothing in the statute that  
5 says a report shall not consult at all with all of  
6 the associate members.

7           And to be honest, if I was an associate  
8 member I would be a little offended that I'm asked  
9 to come here, attend meetings, listen in, give my  
10 voice, but when it came time to issue a formal  
11 report you're not consulted at all. Think about  
12 me as an actual member of the nine-member  
13 committee. I was not consulted that a report was  
14 forthcoming. When the report was finally provided  
15 to me on February 5th I was given two weeks to  
16 accept the conclusions of the report or to issue a  
17 dissent.

18           Had I been involved or consulted with  
19 that a report was being created I would have  
20 worked collaboratively. We may not have agreed on  
21 issues. I would have suggested academic research.  
22 I would have suggested other witnesses. I would

1       have suggested associate members to consult with.  
2       I was not in the loop, and I do have a number of  
3       questions for the two co-authors about how they  
4       decided to initiate this process because that  
5       still has never been explained to me. I  
6       appreciate your initiative, but I don't appreciate  
7       not being consulted.

8                   And then when we get to the conclusions  
9       of the report it becomes a self-referencing echo  
10      chamber where it references previous meetings of  
11      the advisory committee which did not feature,  
12      necessarily, balanced panels that were providing  
13      multiple points of view on some of these very  
14      technical and detailed issues. We cannot produce  
15      a report that relies on bad data. And relying on  
16      transcripts of meetings that did not have a robust  
17      presentation of views and ideas is bad data. And  
18      I think for that second reason this report cannot  
19      be considered a valid product.

20                   So at this point, you know, again, the  
21      details of my dissent are available for anyone to  
22      read. And I have a lot of questions. I'm sure



1 other people do, so I don't know how you would  
2 like to proceed?

3 MS. WIGGINS: I think we should open it  
4 up to members to make comments or ask questions,  
5 and just one IT-related issue. I believe one of  
6 our participants on the phone, Todd Cook, would  
7 like to make a comment at some point. We can  
8 recognize him now, but I'm not sure how to do  
9 that.

10 MR. CREEK: Can you hear me now?

11 MR. SLOCUM: My goodness.

12 MS. WIGGINS: There, there. Okay. Yes.

13 MR. CREEK: Wonderful.

14 MS. WIGGINS: Please go ahead.

15 MR. CREEK: Thank you. It's actually  
16 Todd Creek, that's okay. I'm with ICAP Energy.  
17 We're a leading global energy intermediary. I'm  
18 also an associate member of EEMAC. As an  
19 interdealer broker we feel like we have a unique  
20 perspective on the commodity market activity. We  
21 deal, primarily, in spread trade markets that  
22 trade at low frequency, and typically for large

1 size. These include the, you know, increasingly  
2 illiquid electricity and natural gas basis markets  
3 that are important to the utilities and other end  
4 users.

5 It's important to note that these  
6 markets serve in quite contrast to, let's say, a  
7 front-month futures contract, which is typically  
8 the domain of a high-frequency trader that  
9 generates headline volumes. That's not the market  
10 that we provide services for today.

11 Since the inception of Dodd-Frank we've  
12 seen a material decrease in the liquidity for the  
13 markets that we serve. The depth of market has  
14 decreased. The ability to efficiently hedge is  
15 materially diminished as there are less  
16 counterparties willing to take the other side.  
17 Since the inception of Dodd-Frank we've seen 20  
18 percent decrease in the number of active  
19 counterparties in natural gas alone, and all of  
20 this results in increased costs to the end user,  
21 the customer. So we feel that the position limit  
22 rules as proposed will only increase the liquidity

1 challenge that has already been created, and we  
2 support the report. Thank you.

3 MS. WIGGINS: Craig?

4 MR. PIRRONG: Yes, thanks. Just a  
5 couple of brief comments about the process. You  
6 said independent effort, initiative like I just  
7 decided to, hey, I think I'll write a report and  
8 get everybody to agree to it. That's not the way  
9 that it happened.

10 MR. SLOCUM: How did it happen?

11 MR. PIRRONG: Excuse me, sir, don't  
12 interrupt me again, please, okay?

13 MR. SLOCUM: Sure.

14 MR. PIRRONG: Thank you. Commissioner  
15 Giancarlo told me that under Dodd-Frank the  
16 Commission had to produce a report. He asked me  
17 to produce the report and that would then be  
18 submitted to the members of the committee in order  
19 to have their evaluation, feedback, and an  
20 ultimate vote. I viewed my task as being a  
21 faithful scribe of what transpired during the two  
22 meetings. As a result, I spent several days

1 reviewing the transcripts, summarizing the  
2 transcripts, taking notes on the transcripts, and  
3 then summarizing those transcripts.

4           You have not made any substantive  
5 objections to the representations that I made of  
6 the transcript. And I think that it stands. And  
7 everybody here can read it. Everybody can go back  
8 to the transcript and they can see that, in fact,  
9 it does, you know, faithfully reflect what  
10 transpired during the two meetings. It's that  
11 simple.

12           COMMISSIONER GIANCARLO: Thank you,  
13 Professor. Let me jump in here. Thank you,  
14 Professor. Let me just make very clear it's on  
15 me. I asked Mr. Allison and Professor Pirrong to  
16 go to the transcripts and stay within the scope of  
17 the transcripts and very carefully to summarize  
18 what is there. I chose those gentlemen because of  
19 Jim Allison's long history and encyclopedic  
20 knowledge of the industry and his stature in the  
21 industry, frankly, and the Professor because of  
22 his understanding of the academic literature.

1           I asked them to stay within the confines  
2           of that as well as the record. All of the  
3           transcripts they use are on the CFTC's website.  
4           They strayed not an inch from what was discussed  
5           last year in two meetings pursuant to Dodd-Frank,  
6           and they summarized those. That was the extent of  
7           their work. They broke no new ground. It was  
8           then submitted to the nine members, any one of  
9           whom could have dissented, as you did, entirely  
10          within your right, could have challenged that the  
11          work was not within the transcript. But, in fact,  
12          they agreed with it.

13                 Really that is the extent of it. We  
14          could spend a lot of time, but the fact of the  
15          matter is it's the substance that we are here to  
16          discuss. You know, the EEMAC is a unique  
17          creature. I've often said that when it comes to  
18          Title VII I think Congress got it right. And I've  
19          often said that referring to a lot of provisions  
20          for swaps rules. EEMAC is a creature of Title  
21          VII, but it's one of the more unique ones, and I  
22          have to say that until I joined the CFTC and, in

1 consultation with my colleagues, agreed to take on  
2 EEMAC, I hadn't really studied its charter. But  
3 it presents some unique challenges.

4           It asks us to cover a broad waterfront  
5 with only nine members. And it restricts the  
6 formal activities of the committee to those nine  
7 members. So within nine members, and I'll read  
8 you who we have to look to, we have to address  
9 matters of concerns to exchanges, firms, and I'm  
10 not sure what firms mean, but I'm not sure it only  
11 includes incorporated entities, end users, and  
12 regulators regarding energy and environmental  
13 markets.

14           Now, as you know, the United States has  
15 one of the biggest and deepest energy markets in  
16 the world. Everything from natural gas to  
17 electric power to oil to coal to renewables, as  
18 well as environmental. And we need to do that and  
19 take into account of the views of exchanges, of  
20 utilities, of end users, of producers, a broad  
21 cross section of people. We try to do that with  
22 nine members, but as someone noted, I think Jim

1 did, we decided to create a category of associate  
2 members to broaden that mandate, and even that was  
3 challenging to get the right balance.

4 Now, accept that the process of  
5 balancing a committee like this is not a onetime  
6 event. It's an ongoing event. But just for the  
7 record, the current balance was approved by the  
8 full commission unanimously, including four  
9 members, so it wasn't just at my discretion. It  
10 was broadly shared.

11 It is possible that going forward in the  
12 future we'll continue to look to balance the  
13 membership and bring broader views. But as for  
14 this report, this report is a report on two  
15 meetings that took place last year, and you may  
16 have concerns about the shortcomings of the views  
17 expressed, but the fact of the matter is this  
18 report is in the four corners of what was  
19 expressed at those meetings.

20 MS. WIGGINS: Thank you. Sue, I think  
21 your tent card was up next and then Tyson and then  
22 Sharon.

1                   MS. KELLY: Thank you, Dena. First of  
2 all, I want to express appreciation for the  
3 opportunity to be an associate member, you know,  
4 kind of I guess the JV team of this committee. So  
5 I just want to say thank you. Don't take anything  
6 I'm going to say henceforth as in any way, you  
7 know, kicking about that. And I do appreciate Mr.  
8 Allison's explanation of the fact that the JV team  
9 did not vote on this report.

10                   I do think it's important to also make  
11 clear that we did not see this report and did not  
12 have an opportunity to comment on this report.  
13 You know, I think it has to be made clear to --  
14 you know, to this group and to the wider world  
15 that APPA doesn't necessarily endorse what's in  
16 this report. Although I can say that there's one  
17 footnote that I strongly support which is  
18 indicated where you took a poll, and yes, we  
19 participated in that poll, Footnote 17. We  
20 definitely agree that trade options and forward  
21 contracts with volumetric optionality should be  
22 excluded from position limits. Yes, we're with



1       you on that point.

2                   As to the rest, I can't say that that's  
3       APPA's position and we stand by, you know, the  
4       comments we have filed with the Commission on  
5       these issues, including the comments we filed on  
6       March 30th regarding proposed speculative position  
7       limits. So I just want to make that clear and  
8       thank you for the opportunity to do that.

9                   COMMISSIONER GIANCARLO: Let me just say  
10       that the decision not to circulate it to the  
11       associate members was a deliberate one because  
12       there was some concern expressed that that would  
13       be exceeding the role of EEMAC which specifically  
14       says it's the nine members who shall prepare and  
15       submit the report.

16                   MS. WIGGINS: Tyson?

17                   MR. SLOCUM: Commissioner, I very much  
18       appreciate your explanation. But again, the nine  
19       members did not prepare the report, right? I  
20       mean, two people. One, and with all due respect,  
21       Professor, you weren't a member of -- you weren't  
22       one of the nine members at the time of your co-

1 authorship of the report. So we only have one  
2 actual member that prepared the report, and then  
3 offered what, essentially, was a final draft for  
4 the other eight members to consult.

5           So I think that makes it not a valid  
6 product of this advisory committee. Especially,  
7 Mr. Commissioner, if the initiative for drafting  
8 the report came from you. I know that you're the  
9 sponsor of the committee, but you're actually not  
10 technically a member of the advisory committee.  
11 And so I think the origins of the report did not  
12 come from the advisory committee, but from its  
13 sponsor. I don't think it's a valid product at  
14 this point, and I think that it needs to be  
15 recommitted for further consideration by the  
16 advisory committee.

17           And I do think that there is some --  
18 there are a lot of substantive issues. I didn't  
19 have, necessarily, the time in my dissent. But,  
20 for example, in the sections talking about that  
21 there is no evidence of excessive speculation, one  
22 of the footnotes goes to the witness from the

1 Energy Information Administration. His remarks  
2 absolutely did not confirm the absence of  
3 excessive speculation, and so he is being  
4 misattributed. There was nothing in his  
5 presentation.

6 And so I do actually think that the  
7 advisory committee has more work to do to review  
8 this report, and I don't think it should be  
9 submitted formally to the Commission because it's  
10 still a work in progress because the nine members  
11 did not produce this report. Voting on it is not  
12 producing a report.

13 COMMISSIONER GIANCARLO: I've never  
14 participated in a nine-person drafting committee,  
15 but I do know that the nine members of this  
16 committee are very, very busy people. I think if  
17 we had asked all nine to form a drafting committee  
18 our report on our 2015 activities may have been  
19 ready in 2017 and not serve much recommendation  
20 power to the Commission.

21 MR. SLOCUM: I take my service very  
22 seriously. If I had been asked I would have been

1 more than happy to dedicate the time necessary.  
2 I've attended every meeting. I don't go out for  
3 phone calls. I've been an active participant in  
4 both meetings, and to not include me in the  
5 process, I think, is an unfortunate oversight.

6 MS. WIGGINS: Sharon?

7 MS. BROWN-HRUSKA: I just wanted to just  
8 commend the drafters of the report. I did think  
9 it was a faithful representation of what was  
10 discussed at the meetings. I think that, you  
11 know, it is, to Commissioner Giancarlo's credit he  
12 picked some people that I have great regard for in  
13 terms of their understanding of how these markets  
14 work and their experience in working with them.  
15 So I do support the report and I think that, you  
16 know, it will -- I hope that we will have  
17 additional opportunity to comment as required or  
18 as Tyson has requested. I think that I would look  
19 forward to his additional comments in addition to  
20 his first shot at the report.

21 I think there are some excellent  
22 academics out there who could do some more

1 rigorous and useful analyses of these issues, some  
2 of them even affiliated with Public Citizen, so I  
3 would say that it would be great to see more work  
4 in this area, but I think that in terms of the  
5 conclusions that came out of the report based on  
6 the body of the record that came out of those two  
7 meetings, and the public comment process  
8 associated with it, I would, again, commend the  
9 Commission and Commissioner Giancarlo for putting  
10 it forward.

11 MS. WIGGINS: Benjamin?

12 MR. JACKSON: Thanks, Dena. I want to  
13 thank, as well, the drafters of that report as  
14 well as the Commissioner, as I thought it was an  
15 accurate reflection of the discussions that we had  
16 in those EEMAC meetings. And, in fact, I used the  
17 term when I read it internally and we were talking  
18 about it at ICE, I used the term that it was  
19 actually read like meeting minutes. That it  
20 actually accurately reflected all the discussions  
21 that we had.

22 Just to pivot off the report onto the

1 context around position limits and how important  
2 it is for the people that are customers at  
3 Intercontinental Exchange. And to correct a  
4 little bit of a misperception that's out there  
5 because every time these meetings come out I see  
6 articles that come out around these meetings that  
7 paint a picture for the public that there are no  
8 limits out there. And to be clear, there are  
9 limits in all these markets.

10 And the discussions around position  
11 limits is about substantial modifications being  
12 applied to a regime in place that the effects are  
13 still being understood. Thus, a thoughtful,  
14 data-driven approach while thinking about the  
15 obligation that I mentioned in the first EEMAC  
16 meeting that the Commission and all of us should  
17 have is do no harm to these markets is necessary  
18 while we're thinking about implementing changes.

19 Third thing I'd highlight is that it's  
20 not clear from any of the discussions we have had  
21 that federal limits, in addition to the existing  
22 exchange limits that are in place, will offer any

1 added protections to our markets. And it is clear  
2 that if they're not applied correctly they can be  
3 harmful. So let's wait and assess the impact of  
4 the existing position limit regime before  
5 implementing changes.

6 Final comment I want is to highlight  
7 something that Jim mentioned a little while ago  
8 that where our focus should be right now is on  
9 getting accurate deliverable supply estimates in  
10 place that reflect current market conditions in an  
11 expanding energy market in the United States.  
12 Thank you.

13 MS. WIGGINS: Bryan?

14 MR. DURKIN: I, too, on behalf of CME  
15 Group and as a member of this committee, want to,  
16 first of all, thank and commend the Commission for  
17 having this committee formed. A lot of us have  
18 put a great deal of time and effort and commitment  
19 over the past year to deal with very, very  
20 substantive issues that could impact the  
21 fundamental operations of these markets that are  
22 important to the entire global economy, and so

1 none of us takes lightly around this table our  
2 responsibility to this assignment.

3           As to Craig and to Jim Allison, I want  
4 to thank you for your efforts in summarizing very  
5 articulately, and in a very concise manner, the  
6 substance of those meetings that we've held. And  
7 everyone around this table has had an opportunity  
8 to make their viewpoints known, and those  
9 viewpoints are on the record. So what has been  
10 summarized here is an accurate reflection of the  
11 discussions that were held in those meetings.  
12 There's opportunity here for us to move forward.  
13 There was great progress that has been made as a  
14 result of those meetings in the context of  
15 fundamental issues of hedge exemptions, for  
16 example.

17           I, for one, walked away from those  
18 meetings feeling like the Commission very much  
19 appreciated the dialogue that took place during  
20 those meetings. And I have faith that there will  
21 be some consideration as a result of the people  
22 around this table, and the comments that have been



1 provided during the wonderful comment period. And  
2 I commend the Commission for having extended that  
3 comment period on a number of occasions because it  
4 reflected that there was a need for more  
5 validation and consideration of the information.

6 But if you take a look at the  
7 recommendations that are in this report, they're  
8 very reasonable in terms of a step forward, and  
9 there's an acknowledgement here that if the  
10 Commission were to move forward, let's do it in a  
11 very pragmatic and judicious fashion, as I'm sure  
12 it will. Look at the spot month limits, consider  
13 the accountability regime that's been in place and  
14 is operating very effectively for non-spot month  
15 contracts, address the issues and challenges  
16 associated with hedge exemptions which, again, I  
17 believe will happen.

18 I just kind of had that hope and faith  
19 because a lot came out in these meetings and there  
20 were comment periods that allowed the Commission  
21 to give greater consideration to that definition.  
22 And, also, we are very committed as exchanges to

1 assist in this endeavor and carry out our  
2 responsibilities, as we have. Again, echoing  
3 Ben's comments, very frustrating to see out in the  
4 public domain a lack of acknowledgment that there  
5 is a regime that is in place, and a regime that  
6 has worked very effectively for many, many decades  
7 to preserve the integrity of these markets.

8 MS. WIGGINS: Thank you. I am mindful  
9 of the clock. I'm mindful of the fact that we  
10 have a few more tent cards that were up, and I was  
11 hoping that we could ask people to make fairly  
12 brief comments, and hopefully we can get people  
13 out of here and perhaps off to lunch or back to  
14 whatever else they need to attend to by about  
15 2:00. And the list I have is Susan, Tyson, and  
16 then Vincent, if you would be so kind as to wrap  
17 this up for us. So Susan?

18 MS. BERGLES: Thank you. The American  
19 Gas Association certainly appreciates the fact  
20 that it can participate as an associate member on  
21 this committee and it has been broadened. AGA has  
22 gone on record several times in the position

1 limits proceedings to make its position known on  
2 its concerns with the proposed rule, and in terms  
3 that we appreciate the efforts that have gone into  
4 putting together this report. And it appears to  
5 be consistent with what has been discussed by this  
6 committee on position limits, and we particularly  
7 agree with the comment on trade options and  
8 forward contracts with volumetric optionality  
9 should not be included. Appreciate it. Thank  
10 you.

11 MR. SLOCUM: Thank you. I just have a  
12 quick question and then a quick comment. So for  
13 the two co- authors, how long did the preparation  
14 of the report take from when the Commissioner  
15 asked you to do it to where a draft was produced?

16 MR. PIRRONG: This took place over  
17 several months. The actual time involved with my  
18 review of the transcripts and then subsequently  
19 writing it probably, you know, it was probably  
20 three or four full days of activity. Maybe even  
21 more than that. But, you know, so then the -- you  
22 know, Mr. Allison and I exchanged, you know,

1        comments, made edits, and then provided that to  
2        Commissioner Giancarlo.

3                MR. ALLISON: The single most time  
4        consuming aspect of it was reviewing the  
5        transcripts because our mandate was not to create  
6        new material, but to summarize the transcript and  
7        to highlight the key points in the transcript. So  
8        the time spent reviewing the transcripts was the  
9        critical part of this.

10               MR. PIRRONG: So, and just let me add to  
11        that, I mean, if you look in the report it  
12        meticulously, you know, cites the comments, who  
13        made them, what pages of the transcript they are  
14        on, so it's very easy for someone to go back and  
15        review the actual transcripts in order to see what  
16        was actually said, and to see whether that was --  
17        you know, what is represented in the report  
18        actually reflects what was said during the  
19        meeting.

20               MR. SLOCUM: I agree that it's very easy  
21        to follow. My point is, and this follows on the  
22        comment by the gentleman from CME that said

1 everyone had an opportunity. You had several  
2 months. I had two weeks. That's not equal. I  
3 was kept in the dark about this process. If I had  
4 several months I could have produced a very  
5 similar dissent report that addressed a number of  
6 substantive issues. I was not given that  
7 opportunity. So this was not an equal process,  
8 and I think that it's only fair that this report  
9 be sent back to the advisory committee so that --  
10 I'm still going to be alone in my dissent, but at  
11 least a dissent report can be added to, and that I  
12 be given the same amount of time that the two  
13 primary authors of the majority report were given.

14 And then I just have one more quick  
15 comment. I know that we're short on time, but  
16 again, the gentleman from CME is speaking very  
17 passionately about a system that's been in place  
18 for decades, this accountability regime. And I  
19 just need to remind people that Amaranth, under  
20 CME's accountability regime at the time, exceeded  
21 those accountability regime limits 14 times and  
22 was given exemptions on 12 of them. This is one

1 of the biggest market disasters we saw in natural  
2 gas over the last decade. And it demonstrated an  
3 absolute failure of the for-profit exchanges'  
4 administration of the accountability regime.

5 I know very well about these issues.  
6 And it is important that the public interest  
7 through government regulators take the lead on  
8 mandates from Congress in setting and regulating  
9 and enforcing position limits as articulated in  
10 Dodd-Frank. Thank you.

11 MS. WIGGINS: Vincent?

12 MR. JOHNSON: I'll be quick. First of  
13 all, on behalf of BP I want to thank you for  
14 allowing us to be an associate member. And my  
15 quick point is, first of all, I want to say thanks  
16 for the report and for Jim, the professor, we  
17 support it. I also want to thank staff. It may  
18 be covered here, but everybody's talked about the  
19 deliver supply estimates, and I want to thank CFTC  
20 staff because they have reached out to us from our  
21 natural gas to our oil and other business, to  
22 discuss deliverable supply.

1                   But specifically, the methodology on  
2 deliverable supply. I think if there was one  
3 thing, if I had a wish list, to add, it would be  
4 more around -- because we had a really good,  
5 robust discussion, we brought in some of our  
6 traders to discuss with them on our thoughts on  
7 deliverable supply, so in the methodology for  
8 calculating that, and in light of all the changes.  
9 I just think if I had one wish list it would just  
10 be more of an enhancement of what's the proper  
11 methodology to determine deliverable supply?

12                   MS. WIGGINS: Commissioner Giancarlo, I  
13 think I will turn it back to you for final  
14 comments. Before I do, I just want to express my  
15 appreciation to everyone here for the quality of  
16 the discussion. I know we don't always agree, but  
17 a civil conversation about both agreements and  
18 disagreements, I think, can only advance the  
19 interests that we're trying to advance here. So  
20 thank you all and thank you Commissioners,  
21 Chairman and Commissioners, for hosting us here  
22 and for your hospitality in enabling us to have

1 this conversation.

2 COMMISSIONER GIANCARLO: Dena, that was  
3 extremely well said. I thank everybody for their  
4 participation, their candor, their preparedness,  
5 their thoughtfulness on some of these very, very  
6 important issues. And I want to thank my fellow  
7 commissioners who, as I mentioned at the outset,  
8 work very hard. We cover a broad waterfront, the  
9 three of us, and I think we are somewhat  
10 unprecedented in our attendance at our various  
11 hearings. We truly demonstrate, I think, what is  
12 characteristic amongst this Commission and that is  
13 the desire to understand the issues thoroughly and  
14 be well-briefed. Whatever our policy choices are,  
15 I think we go into every one of them extremely  
16 well-considered, and I think that is a public  
17 service to the public that we're all proud to  
18 bear. So thank you all very much for your public  
19 service, and I think we're finished for the day.  
20 Thank you very much, Dena.

21 CHAIRMAN MASSAD: I think Commissioner  
22 Bowen wants to speak.





1 everything that Commissioner Bowen said. I think  
2 the report sets forth various observations that,  
3 as she noted, have kind of already been made. It  
4 does have a tone of being quite negative about a  
5 position limits rule; the basic message, at least  
6 in the first few pages, seems to be that a  
7 position limits rule isn't necessary and nothing  
8 should be done.

9 I would note that many of the EEMAC  
10 committee members here today, including several of  
11 the eight who supported the report, I believe, are  
12 affiliated with organizations that have filed  
13 comment letters which, at least to my mind, were  
14 much more nuanced. And while their letters  
15 clearly express concerns about some of the  
16 specifics of the rule, one letter, for example,  
17 says, "Position limits are, in my opinion,  
18 valuable and necessary for the fair and smooth  
19 functioning of physically deliverable  
20 commodities." Another says they "support position  
21 limits if property applied." Another said the  
22 energy markets "can function well under a position

1 limits regime as long as the limits are set  
2 appropriately."

3           So I guess it's my hope that we can come  
4 together and try to come up with a rule that  
5 works. It seems to me that's our job. And I say  
6 that for a few reasons. One is, I think Congress  
7 has directed us to establish a rule. Second, I  
8 think it's been noted, first of all, we have had  
9 federal position limits in place in agricultural  
10 commodities for decades. There's still liquidity  
11 in those markets. And third, being against any  
12 position limits rule on the basis that it may  
13 affect liquidity or constrict hedging strikes me  
14 as a difficult position to defend from a practical  
15 standpoint.

16           It strikes me a bit like saying you're  
17 against speed limits because they may make you  
18 late for work. If there's a speed limit of 10  
19 miles an hour on Interstate 95, yeah, that would  
20 be highly inefficient and would discourage people  
21 from using the highway. But having no speed  
22 limits can put everyone at risk. So if we get

1       this right it should not constrict liquidity or  
2       affect hedging, and that, obviously, goes to where  
3       you set the limits and how you write the  
4       exemptions. And it does surprise me that there  
5       was actually, despite having said position limits  
6       may restrict liquidity, there was no discussion of  
7       the actual limits. Seems to me that's something  
8       that's quite relevant.

9                        So I would just say that, you know, it's  
10       my desire to try to work with my fellow  
11       commissioners to come up with a rule that works.  
12       And I would hope that all of you would lend your  
13       expertise and support to that end. Thank you.

14                       COMMISSIONER GIANCARLO: We're done.  
15       Thank you.

16                               (Whereupon, at 2:00 p.m., the  
17       PROCEEDINGS were adjourned.)

18                               \* \* \* \* \*

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CERTIFICATE OF NOTARY PUBLIC

DISTRICT OF COLUMBIA

I, Stephen K. Garland, notary public in  
and for the District of Columbia, do hereby certify  
that the forgoing PROCEEDING was duly recorded and  
thereafter reduced to print under my direction;  
that the witnesses were sworn to tell the truth  
under penalty of perjury; that said transcript is a  
true record of the testimony given by witnesses;  
that I am neither counsel for, related to, nor  
employed by any of the parties to the action in  
which this proceeding was called; and, furthermore,  
that I am not a relative or employee of any  
attorney or counsel employed by the parties hereto,  
nor financially or otherwise interested in the  
outcome of this action.

(Signature and Seal on File)

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Notary Public, in and for the District of Columbia

My Commission Expires: May 31, 2018