

Clients&Friends Memo

CFTC Energy End-User Swaps Pilot Program Reflects Renewed Reassessment of Dodd-Frank Energy Market Constraints

January 7, 2026

I. Executive Summary

On December 19, 2025, the CFTC's Market Participants Division ("MPD") issued Staff No-Action Letter No. 25-51, establishing a three-month pilot program under which certain energy commodity end-user swaps may be excluded from the swap dealer *de minimis* calculation.¹ Then-Acting Chairman Caroline D. Pham² characterized the initiative as a "recalibrat[ion] [of] outdated regulatory requirements" that have constrained liquidity in energy derivatives markets and increased hedging costs for commercial end users.³ The pilot reflects a broader Commission effort to reassess the continued appropriateness of post-Dodd-Frank swap dealer thresholds⁴ for non-financial commodity ("NFC") swaps because NFC swaps are fundamentally different from swaps on financial commodities, such as interest rates, financial indices and credits.

II. Background

The pilot program builds on long-standing CFTC recognition that the swap dealer *de minimis* framework, first adopted in 2010 with amendments to the Commodity Exchange Act ("CEA")

¹ CFTC Letter 25-51, *No-Action Position Regarding the Obligation to Include Energy Commodity End-User Swaps in De Minimis Calculations under subparagraph 4(i)(A) of the definition of Swap Dealer in 17 CFR 1.3* (December 19, 2025); available at: <https://www.cftc.gov/csl/25-51/download>. CFTC Letter 25-51 allows persons to exclude energy commodity swaps with commercial end-users from swap dealer *de minimis* threshold calculations.

² CFTC Release No. 9163-25, *Acting Chairman Caroline D. Pham Announces Departure from CFTC* (December 22, 2025); available at: <https://www.cftc.gov/PressRoom/PressReleases/9163-25>. Caroline D. Pham announced her departure from the CFTC on December 22, 2025, effective immediately. See also CFTC Release No. 9164-25, *Michael Selig Sworn In as 16th CFTC Chairman* (December 22, 2025); available at: <https://www.cftc.gov/PressRoom/PressReleases/9164-25>. Michael S. Selig was sworn in as CFTC Chairman on December 22, 2025. He was nominated by President Donald J. Trump on October 27, 2025, and confirmed by the U.S. Senate on December 18, 2025.

³ CFTC Release No. 9161-25, *Acting Chairman Pham Announces Pilot Program to Unleash American Energy Dominance* (December 19, 2025); available at: <https://www.cftc.gov/PressRoom/PressReleases/9161-25>.

⁴ See *De Minimis Exception to the Swap Dealer Definition*, 83 Fed. Reg. 56666 (November 13, 2018); available at: <https://www.federalregister.gov/documents/2018/11/13/2018-24579/de-minimis-exception-to-the-swap-dealer-definition>; see also *Further Definition of "Swap Dealer"*, 77 Fed. Reg. 30596 (May 23, 2012); available at: <https://www.federalregister.gov/documents/2012/05/23/2012-10562/further-definition-of-swap-dealer-security-based-swap-dealer-major-swap-participant-major>.

subsequent to the enactment of the Dodd Frank Act of 2010 and finalized by the CFTC in 2018,⁵ was established when the Commission lacked reliable data on NFC swaps and has proven difficult to apply in volatile commodity and particularly energy markets.⁶ In adopting the permanent \$8 billion aggregate gross notional amount (“**AGNA**”) threshold, the Commission acknowledged that setting the threshold too low could reduce liquidity, increase concentration among registered swap dealers, and raise costs for commercial end users⁷ relying on swaps to hedge physical energy exposure.

III. Discussion of CFTC Relief

The Edison Electric Institute (“**EEI**”) (an association that represents U.S. investor owned electric companies) requested the relief on the grounds that the AGNA is not a reliable metric for NFC swaps because commodity price volatility may cause swap dealers to exceed the \$8 billion threshold regardless of unchanged dealing activity levels.

The no-action relief defines a new category of swaps—the **Energy Commodity End-User Swaps** —which are energy swaps with any counterparty that is: (i) not a “financial entity,”⁸ and (ii) a producer, processor, or commercial user of, or a merchant handling the relevant energy commodity that is the subject of the energy commodity swap transaction, or the products or by-products thereof, and is entering into the energy commodity swap transaction solely for purposes related to its business as such.⁹

From this definition, however, it is not clear how the new category of Energy Commodity End-User Swaps will work with the existing concept of a “commercial” end-user in § 2(h)(7)(A) of the CEA, as well as the definition of “non-financial end user” in § 23.151 of CFTC Regulations, and CFTC’s prior interpretations (including relating to reporting) applicable to commodity trade options addressed in § 32 of CFTC Regulations,¹⁰ or whether the concept of “commercial swap dealer” will

⁵ *Id.*

⁶ See also *Swap Dealer De Minimis Exception Final Staff Report* (August 15, 2016), at 8-13; available at https://www.cftc.gov/sites/default/files/idc/groups/public/@swaps/documents/file/dfrreport_sddeminis081516.pdf. The Report, prepared by staff from the Division of Swap Dealer and Intermediary Oversight, described data limitations for non-financial commodity swaps, difficulties in calculating notional amounts for energy swaps, and explaining that aggregate gross notional amount may be a poor proxy for swap dealing activity due to price volatility, requiring reliance on transaction and counterparty counts as proxies; see also CFTC Letter 25-51, which cites reduced liquidity, fewer counterparties, and higher costs for energy end users as a basis for targeted relief and data-gathering through a pilot program.

⁷ § 2(h)(7)(A) of the CEA defines the term “commercial end users.”

⁸ § 2(h)(7)(C)(i) of the CEA.

⁹ As was defined in 17 C.F.R. § 32.3(a)(2) of CFTC Regulations.

¹⁰ See Trade Options, 81 Fed. Reg. 14966 (March 21, 2016); available at <https://www.federalregister.gov/documents/2016/03/21/2016-06260/trade-options>.

be further addressed by the CFTC,¹¹ and how this relief will work under the CFTC's cross-border rules.¹² Presumably, these and other questions will be addressed in the subsequent rule-making.

During the pilot period, MPD will not recommend enforcement action if a swap dealing entity (i.e., a "covered person") excludes Energy Commodity End-User Swaps from its AGNA threshold calculation when assessing its swap dealer status, subject to certain conditions in the pilot program relief, including notice, recordkeeping, and monthly reporting requirements.

Specifically, covered persons (i.e., unregistered swap dealers) must: (i) maintain records in accordance with CFTC Part § 45.2;¹³ (ii) file a notice with the MPD of intent to rely on this relief specifying covered persons' legal names and Legal Entity Identifiers; (iii) submit monthly reports for three months containing AGNA value ranges and counterparty counts by commodity sub-category (and other data specified in Annex A to relief). The MPD emphasized that enhanced reporting is intended to provide CFTC staff with market data necessary to evaluate whether excluding these Energy Commodity End-User Swaps expands access to hedging counterparties (i.e., swap dealers) and lowers costs (for commercial end user counterparties) without undermining systemic risk safeguards put in place by the Dodd-Frank Act.

The Department of Energy ("DOE") publicly endorsed the pilot program, citing its focus on "policies that reduce energy prices and volatility for consumers and industrial customers" and "support[ing] the energy needed to achieve America's global AI dominance."¹⁴ Although DOE did not opine on

¹¹ The CEA and CFTC regulations distinguish between financial and non-financial market participants for particular regulatory purposes. See 7 U.S.C. § 2(h)(7)(A) (exempting certain "commercial" end users from mandatory clearing); 7 U.S.C. § 2(c)(D)(i)(I) (defining "eligible commercial entity"); 17 C.F.R. § 23.151 (defining "financial entity" and "non-financial entity" for purposes of the uncleared swap margin rules); 17 C.F.R. § 32.3 (commodity trade option exemption, as interpreted by the CFTC to apply to commercial counterparties entering into swaps to hedge or mitigate commercial risk). Although market participants sometimes refer to "commercial swap dealers," the CFTC has not established a separate dealer category by that name, instead applying different regulatory treatment to swap dealers depending on whether the registrant is a financial institution or a non-financial commercial firm. See Capital Requirements of Swap Dealers and Major Swap Participants, 81 Fed. Reg. 91252 (December 16, 2016); available at: <https://www.federalregister.gov/documents/2016/12/16/2016-29368/capital-requirements-of-swap-dealers-and-major-swap-participants>. See also Further Definition of "Swap Dealer," 77 Fed. Reg. 30596 (May 23, 2012); available at: <https://www.federalregister.gov/documents/2012/05/23/2012-10562/further-definition-of-swap-dealer-security-based-swap-dealer-major-swap-participant-major>.

¹² See CFTC, *Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants, Cross-Border Rule*, 85 Fed. Reg. 56924 (September 14, 2020) (the Adopting Release); available at: https://www.cftc.gov/sites/default/files/2020/09/2020-16489a.pdf?utm_source=govdelivery.

¹³ See *SWAP DATA RECORDKEEPING AND REPORTING REQUIREMENTS*, 77 Fed. Reg. 2197 (January 13, 2012); available at: <https://www.ecfr.gov/current/title-17/chapter-I/part-45>.

¹⁴ Department of Energy Letter to CFTC Acting Chairman Caroline D. Pham (December 15, 2025); available at: <https://www.cftc.gov/media/12871/Dept.%20of%20Energy%20Letter/download>.

the legal basis for the no-action relief, it expressly supported the Commissions efforts to reform the swap dealer *de minimis* framework as applied to energy markets.

IV. Industry Implications; What's Next?

Although the relief is temporary and nonbinding on the Commission, the pilot signals a broader willingness by the CFTC (under then- Acting Chairman Pham)¹⁵ to revisit foundational Dodd-Frank era assumptions through data-driven, targeted initiatives. Energy market participants that have constrained dealing activity to remain below the *de minimis* threshold may view the pilot as a meaningful step toward more durable recalibration, particularly if Commission staff determine that expanded end-user access improves market liquidity without increasing systemic risk.

This relief seems particularly timely, and as the DOE has specifically noted, in the context of a dramatically increased energy demand driven by the digital assets industry, crypto mining and specifically the generation of computing power that is critically vital for further development of American AI applications.

If the pilot program produces data supporting the Commission's stated objectives (expanded liquidity, increased hedging capacity for commercial end users, and reduced energy costs without adverse systemic effects), it could serve as a predicate for broader Commission action. The pilot may inform future rulemaking or interpretive guidance recalibrating the swap dealer *de minimis* framework for energy commodities, or more generally, reassessing the use of AGNA as a proxy for swap dealing significance in highly volatile non-financial markets. Market participants should also expect that the Commission will rely on the enhanced reporting required under the pilot to evaluate whether targeted, asset-class-specific relief can be implemented on a durable basis without undermining transparency or risk oversight.

* * *

If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

Peter Y. Malyshev	+1 202 862 2474	peter.malyshev@cwt.com
Eli Lee	+1 202 862 2417	elijah.lee@cwt.com
Christina E. Mille	+1 212 504 6551	christina.mille@cwt.com

¹⁵ See supra note 2.