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Mr. David A. Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Center
1155 21st Street, N.W.
Washington DC 20581

Re: Reopening and Extension of Comment Periods – Global Comment

Dear Mr. Stawick:

On behalf of Americans for Financial Reform, thank you for the opportunity to comment on the Reopening and Extension of Comment Periods for Rulemakings Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act.[1] Americans for Financial Reform is an unprecedented coalition of over 250 national, state and local groups who have come together to reform the financial industry. Members of our coalition include consumer, civil rights, investor, retiree, community, labor, religious and business groups as well as Nobel Prize-winning economists.

With passage of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress made clear its intent that our nation's over-the-counter derivatives market be operated in the public interest rather than for the benefit of a handful of financial institutions who profited greatly from its unregulated status. Toward that end, Congress sought to create a regulatory regime that would be comprehensive in its coverage, promote the safety and stability of the financial system, introduce transparency into a market that had long operated in the shadows, and end pervasive abuses and promote market integrity.

The Dodd-Frank Act was intended to and should to bring real change to the derivatives market. Clearinghouses will ensure sound credit management of counterparties and impose margin and capital requirements at levels that will safeguard the financial system against default. SEFs and exchanges are intended to bring pre-trade and post-trade transparency and greater efficiency to the market, resulting in lower costs for end-users. Swap dealers and major participants in the swap markets should register with the CFTC and SEC, and become subject to business conduct requirements to ensure fair treatment of their customers. All market participants are supposed to provide detailed information to regulators, to allow them to monitor the system and prevent dangerous buildups of risk and the kinds of financial contagion that helped drag the world economy into a "Great Recession" whose devastating effects on American families are still being felt.

[1] Reopening and Extension of Comment Periods for Rulemakings Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act, 76 Fed. Reg. 25,274 (May 4, 2011).

The Commission's decision to reopen and extend the comment period on 32 rule-makings implementing key provisions of this Title offers a welcome opportunity to measure progress toward achieving those goals. As part of that process, each of these proposed rules should be assessed for its effectiveness in promoting these goals. The following comments are intended to highlight areas where Commission rule proposals fall short of meeting these standards including:

- **Comprehensive coverage** – The definitions of key terms in Title VII are central to whether large swaths of the derivatives market continue to operate in the shadows. We believe that several of these terms are too narrowly defined in the proposed rules to achieve comprehensive coverage.

- **Transparency** – The rules related to swap execution facilities ("SEF") and swap data recordkeeping and reporting requirements are fundamental to whether the Dodd-Frank Act succeeds in bringing transparency to the opaque over-the-counter swaps market. We are concerned that the SEF proposal, by allowing trading platforms utilizing the request-for-quote system to be considered SEFs, would fail to achieve the transparency that Congress sought to bring to these markets. In addition, the swap data recordkeeping and reporting requirements could be strengthened to ensure that regulators receive comprehensive information that allows them to oversee the maximum scope of market activity. Finally, business conduct requirements should ensure that prices for customized swaps are fully transparent to swaps purchasers.

- **End market abuse and promote market integrity** – The goals of the Dodd-Frank Act will not be met if the incumbent dealers and large market players are permitted to manage market infrastructure for their own benefit and take advantage of less sophisticated participants in the swaps market. Derivatives market infrastructure serves a public utility function and should be managed in the public interest. The rules related to conflicts of interest, swap data repositories and business conduct must be strengthened to end market abuse and promote market integrity.

At the close of this letter, AFR also provides responses to the Commission questions regarding cost-benefit analysis and the possible phased implementation of rulemaking.

Comprehensive Coverage

The determination of what entities and products will be covered by regulations under Title VII of the Dodd-Frank Act will determine, to a large extent, whether the Act is successful in reining in systemic risk and abusive practices in the derivatives markets.

Definition of "Swap Dealer"

The proper identification and regulation of swap dealers and major swap participants is at the

heart of the future stability of the derivatives markets. Due to these entities' extensive activities in the derivatives markets and the resulting potential that their activities could lead to systemic risks, the Dodd-Frank Act directed the CFTC to implement business conduct standards and safety and soundness regulations specific to these entities. We believe that the CFTC's proposed rule appropriately defined who will be regulated as a swap dealer.

The CFTC identifies activities that are characteristic of swap dealers to include (i) accommodating demand from other parties; (ii) helping other parties interested in entering such transactions; (iii) setting the terms of swaps and security-based swaps transactions; and (iv) creating new transaction terms or types of swaps and security-based swaps. AFR believes that this is the proper test for determining whether an entity is a swap dealer or security-based swap dealer.

The CFTC would define an entity as a swap dealer "[i]f the person is available to accommodate demand for swaps from other parties, tends to propose terms, or tends to engage in the other activities discussed above, then the person is likely to be a swap dealer. Persons that rarely engage in such activities are less likely to be deemed swap dealers." Americans for Financial Reform strongly supports this application of the core test. We believe it strikes the right balance by regulating those entities as swap dealers that act as dealers in a significant amount of swap transactions while exempting those entities whose swap dealing activity is de minimis.

In defining the de minimis exemption, the Commission states that "the exemption should apply only when an entity's dealing activity is so minimal that applying dealer regulations to the entity would not be warranted." The Commission then defines factors to be considered in determining whether an entity's swap dealing activity is below the de minimis threshold. In general, AFR believes the Commission has defined the de minimis exemption appropriately. We believe, however, that to the extent an entity acts as a swap dealer or security-based swap dealer and a special entity serves as the counterparty, there should be no de minimis exemption. In reaction to news reports about special entities losing millions of dollars after signing up for derivatives deals they did not understand, Congress incorporated special protections for special entities into the Dodd-Frank Act. These protections only apply when a special entity engages in a transaction with a swap dealer. In order to ensure that pension funds and municipalities are protected when engaging in swap and security-based swap transactions, we urge the Commission to eliminate the de minimis exemption when dealers transact with special entities.

Definition of "Major Swap Participant"

Like the definition of "swap dealer", the definition of a "major swap participant" is central to the determination of which entities are subject to requirements related to registration, margin, capital and business conduct. The Dodd-Frank Act laid out three categories of major swap participant ("MSP"). They include (i) entities that have a substantial position in a "major" category of swaps; (ii) entities whose swaps create significant counterparty exposures; and (iii) highly-leveraged financial entities with substantial counterparty exposures from swaps. The first category relates simply to an entity's level of activity in the swaps market whereas the second and third categories are focused on counterparty exposures and risk.

The Commission proposed two tests for determining whether an entity maintains a substantial position in swaps and, therefore, must be regulated as an MSP– the "Proposed Current Exposure

Test" and the "Proposed Current Exposure Plus Potential Future Exposure Test." The first proposed test focuses solely on current uncollateralized exposures while the second is a risk-adjusted exposure calculation. AFR agrees that collateralization and risk-adjusted exposure are appropriate considerations for determining whether an entity falls within the second or third category of MSP defined in Dodd-Frank.

The proposed rules do not, however, include a definition that would capture the entities described in the first category of MSP laid out by the Dodd-Frank Act. This category is intended to capture all major players in the swaps market. It is particularly important that entities that conduct substantial swaps trading are covered by the MSP definition because some of the rules MSPs will be subject to, specifically business conduct standards, should apply to all major market actors regardless of risk. Furthermore, as we saw during the financial crisis, in times of market stress the value of collateral can plummet and hedges may become ineffective. For this reason, all entities with large derivative portfolios should be subject to MSP capital and margin requirements and business conduct standards. The definition of MSP must provide regulators with tools to designate an entity as an MSP simply because it maintains a substantial position in swaps regardless of collateralization or risk-adjusted exposures.

Definition of "hedging or mitigating commercial risk"

The definition of "commercial risk" is relevant to both the determination of whether an entity is an MSP and whether a swap is exempt from the clearing requirement under the Dodd-Frank Act. AFR agrees with the CFTC's statement that a swap position that hedges or mitigates commercial risk "could not be held for a purpose that is in the nature of speculation, investing or trading."[2] In addition, we agree with the Commission's explanation in Footnote 128, "that swap positions that are held for the purpose of speculation or trading are, for example, those positions that are held primarily to take an outright view on the direction of the market, including positions held for short term resale, or to obtain arbitrage profits."[3] We are concerned, however, that the definition proposed by the CFTC would create a loophole that allows entities that are truly speculating to claim that they are hedging or mitigating commercial risk.

The CFTC proposes to define "hedging or mitigating commercial risk" to include "swaps hedging or mitigating any of a person's business risks, regardless of their status under accounting guidelines or the bona fide hedge exemptions."[4] We are concerned that the CFTC"s inclusion of "business risks" in the definition of hedging or mitigating commercial risk is overly broad and that the proposal does not include sufficient substance to provide clear direction as to when a swap position will be considered to be held for the purpose of hedging or mitigating commercial risk.

We urge the CFTC to adopt a more prescriptive, narrow definition of "hedging or mitigating commercial risk." The definition should require that the swaps used match the commercial risk

[2]Further Definition of ''Swap Dealer,'' ''Security-Based Swap Dealer,'' ''Major Swap Participant,'' ''Major Security-Based Swap Participant'' and ''Eligible Contract Participant'', 75 Fed. Reg. 80,173, 80,194 (Dec. 21, 2010).
[3]Id at 80,195.
[4]Id.

exposures of the entity engaging in the transaction and do not expose the entity to new risks unrelated to the direct hedge. In order to implement such a definition, the CFTC will be required to collect and monitor data from companies about their commercial risk exposures and the unique identifiers of swaps used to offset those risks. We believe that level of reporting and monitoring is necessary and appropriate to implement Title VII of Dodd-Frank.

The definition of "commercial risk" is also relevant to the procedure for exempting commercial end users from clearing requirements. In order to protect against abuse of this exemption while still maintaining ease and convenience for commercial end users, we believe it is important that this exemption be tied to a company-wide hedging program defining how swaps are used to hedge or mitigate commercial risk. This hedging program should define the commercial risks the company will hedge, describe how swaps used to hedge will align with these specific risks, how the company will assess the costs and benefits of using cleared and OTC products, and also include a statement of how the entity will meet its credit obligations under the program. To ensure that such hedging programs are considered with appropriate gravity and to provide accountability, the CFTC should require the hedging programs to be reviewed and approved by a committee of the company's board of directors and by senior management. All material modifications should also be approved by this committee.

Once such a program is approved by the company and filed with regulators, individual swaps can then qualify for exemption based on a simple "check the box" procedure indicating the hedging program that each swap is associated with. Such a procedure would inform regulators appropriately, ensure awareness of derivatives risk management by the end user company, and also allow individual swaps to be approved for the exemption in a straightforward and simple manner.

Introduce Transparency

A central and key objective of Title VII of the Dodd-Frank Act is to create transparency in previously unregulated derivatives markets. Indeed, the transparency goal is apparent in the short title of the section – "The Wall Street Transparency and Accountability Act". Transparency brings many benefits. For market participants, pre-trade transparency in particular lowers prices and prevents exploitation of smaller or less sophisticated participants by large market insiders. For society as a whole, it improves systemic stability, another central goal of the Dodd-Frank Act. When financial markets are opaque and the market prices of key assets are not understood, it is far more likely that investors and creditors will lose confidence in their counterparties, with consequent freezing of credit and the possibility of general financial panic beyond the counterparties. When prices are transparent, it is more likely that disruptions in financial markets can be resolved by participants in an orderly manner.

Core Principles and Other Requirements for Swap Execution Facilities

Swap execution facilities (SEFs) are central to achieving the key mandated objective of market transparency. More than any other factor, the rules for SEFs will determine the level of pricing

transparency that exists for swaps market users. AFR believes that the request for quote (RFQ) system described in this proposed regulation does not fully satisfy the statutory intent of creating pre-trade price transparency through multiple-to-multiple trading. This is a potential loophole that must be closed in order to fulfill Congress's objective of bringing transparency to the opaque over-the-counter derivatives market.

AFR believes the clear regulatory intent of the Dodd-Frank Act is to mandate that the trading in cleared swaps be performed through an open trading platform. Swaps execution methods must follow the "multiple-to-multiple" requirement of the legislation and must be designed to maximize the pre-trade transparency of swaps prices to market participants, specifically through the use of open trading platforms. This will improve market efficiency, lower derivatives transaction costs for swaps users, and increase confidence among swaps users that swaps dealers are not tilting the market in their own favor.

It is important to understand that the most customized, illiquid and thinly traded swaps are unlikely to be traded on SEFs. Use of SEFs is only mandated for trading in swaps that have already been approved for a clearing requirement. Such approval indicates that the swap is sufficiently liquid and standardized to permit a clearinghouse to accept it, and also guarantees each participant that a clearinghouse stands on the other side of the trade and not a counterparty of uncertain credit quality. Thus the cleared swaps required to be traded on SEFs are suitable for an open trading system.

The rule of construction provided in the Dodd-Frank Act regarding SEFs (section 5h(e) of the Commodities Exchange Act) states that the goal of the legislation regarding SEFs is to "promote pre-trade price transparency in the swaps market". In addition, the multiple-to multiple requirement in CEA 1(a)(50) clearly refers to a system in which multiple parties on both sides of any transaction have the opportunity to trade at a publicly posted price.

The combination of a mandate for pre-trade price transparency and a multiple-to-multiple requirement plainly describes an open system where bid and ask prices on every trade are available to a range of market participants, those participants can freely trade at such prices, and trades can be made between parties without a pre-existing relationship.

The Commission apparently interprets the multiple-to-multiple requirement as meaning simply that each market participant will have the *option* or *ability* to make prices transparent, should they choose to do so. AFR strongly believes that the multiple-to-multiple requirement reflects the overall statutory intent to require truly open and transparent trading of cleared swaps.

The RFQ system described in this proposed regulation does not fully satisfy the statutory intent of creating pre-trade price transparency through multiple-to multiple trading. Although the requirement to submit an RFQ to multiple counterparties is helpful in creating some transparency, this is not a multiple-to-multiple system, since only a single participant will see price offers from the counterparties. In addition, an RFQ system is at best only a limited version

of the open system contemplated in the legislation.

In the case of large block trades, a clear set of rules should be put forward to differentiate block trades from other transactions, and alternate, less transparent channels for swaps trading should be limited to such block trades. These rules should be narrowly tailored to ensure that only those trades that may cause significant moves in market prices due to their size are defined as "block trades."

AFR supports a strong requirement to use truly open and transparent trading for cleared swaps. Thus, SEFs should be required to use an exchange-like platform for swaps that are required to be traded. To the extent the RFQ process is permitted, it should be limited to qualified block trades.

Swap Data Recordkeeping and Reporting Requirements

Additional disclosure about swap market activities will only provide useful transparency and contribute to effective oversight and competition if the information is in a format that is usable by and meaningful to regulators and market participants. AFR, generally, believes that the CFTC's proposed rule on Swap Data Recordkeeping and Reporting Requirements will provide regulators with the information they need to fulfill these objectives.[5] We support the proposal to require disclosure of futures contract equivalents and futures contract equivalent units of measure in the primary economic terms data to be disclosed to the Commission. In addition, we strongly support the requirement for Unique Swap Identifiers, Unique Counterparty Identifiers and Unique Product Identifiers.[6] We believe that these data are essential to ensure compliance with the requirements of Dodd-Frank, prevent fraud and manipulation, and allow regulators to monitor and manage systemic risk.

We are concerned, however, that bespoke contracts that simply combine more straightforward swaps will obscure regulators' ability to monitor and analyze these markets. In order to ensure that regulators have comprehensive information that allows them to oversee the maximum scope of market activity, we urge the CFTC to strengthen the proposed rule by requiring reporting of disaggregated data about composite swaps into legs based on risk. Disclosures should include a market-based price of the various components of a composite swap. This information will also assist regulators in determining whether market participants are engaging in spurious customization to evade clearing and trading requirements.

In the discussion of business conduct requirements below, we also support a similar disclosure requirement for swaps dealers and major swaps participants when providing bespoke swaps. The extent to which customized swaps represent combinations of existing standardized swaps should always be fully transparent to market participants as well as regulators. This kind of transparency will encourage price competition and market efficiency.

[5]Swap Date Recordkeeping and Reporting Requirements, 75 Fed. Reg. 76,573 (Dec. 8, 2010).
[6] Id at 76,587.

End Pervasive Abuses and Promote Market Integrity

The goals of the Dodd-Frank Act will not be met if the incumbent dealers and large market players are permitted to manage market infrastructure for their own benefit and take advantage of less sophisticated participants in the swaps market. The rules related to conflicts of interest, swap data repositories and business conduct must be strengthened to end market abuse and promote market integrity.

Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest

The Dodd-Frank Act entrusts clearinghouses, SEFs, and exchanges with the duty of determining which swaps must be cleared and traded on SEFs or exchanges: if no clearinghouse offers to clear an instrument, it will remain a bilateral contract between a dealer and its isolated counterparties, and if no SEFs or exchanges offer to trade an instrument, it will continue to be traded in dark, inefficient single-dealer markets. Thus, dealers have every incentive to clear and exchange-trade as few contracts as possible, and if they are in control of market infrastructure, they will also have the power to bring about that result.

Section 726 of the Dodd-Frank Act directs the Commission to adopt rules to mitigate conflicts of interest, which may include numerical limits on the control of, or voting rights with respect to, derivatives clearing organizations ("DCOs"), clearing agencies that clear security-based swaps, swap execution facilities, security-based swap execution facilities, derivatives contract markets ("DCMs") that trade swaps, and national securities exchanges that trade security-based swaps. We believe that the restrictions proposed by the Commission would provide limited benefits and that much more needs to be done to address the risk and the shared self-interest of the derivatives oligopoly – referred to by antitrust expert Robert Litan as the "Derivatives Dealers' Club".[7]

As a general matter, AFR believes that the governance and ownership restrictions should be uniform for clearinghouses, SEFs and SDRs. We believe that the first part of the test the CFTC proposed for clearinghouses, which would limit voting control to 20% per stockholder, and limit to 40% (in the aggregate) voting control that may be held by Enumerated Entities, should apply to clearinghouses, SEFs and SDRs.[8] This would ensure that large financial institutions that are part of the current oligopoly do not control a majority of the voting interests in entities that are central to the swaps market infrastructure.

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[7] Robert E. Litan, "The Derivatives Dealers" Club and Derivatives Markets Reform: A Guide for Policy Makers, Citizens and Other Interest Parties," The Initiative on Business and Public Policy at Brookings (2010) (available at http://www.brookings.edu/~/media/Files/rc/papers/2010/0407_derivatives_litan/0407_derivatives_litan.pdf).

[8] "Enumerated Entities" include bank holding companies with total consolidated assets of $50,000,000,000 or more; a nonbank financial company supervised by the Board of Governors of the Federal Reserve System; an affiliate of such a bank holding company or nonbank financial company; a swap dealer; a major swap participant; or an associated person of a swap dealer or major swap participant.

Furthermore, the limitations on ownership of voting equity, by themselves, are not sufficient to mitigate conflicts of interest. The sphere of influence within a DCO, DCM or SEF is not limited to its Board of Directors or shareholders that exercise voting rights. In light of this, the Commission should impose limits on economic interests to mitigate these kinds conflicts of interest. The Commission should impose the same 20 % individual as well as the 40 % aggregate restrictions on entities that have *economic interests*.[9] This would assure open access and encourage competition for the better of the public.

We would also recommend that the Commission considers requiring that a majority of independent representatives serve on the boards of directors and key committees of clearinghouses, SEFs, and SDRs. Only by ensuring that independent directors comprise a majority of the board and key committees can the regulations also ensure that independent, unconflicted decision-makers carry the day when market infrastructure entities face difficult choices.

Finally, there are core issues related to control of market infrastructure that we believe can only be addressed by implementing rules that prohibit SEFs, DCMs and DCOs from creating incentives for market makers to direct deal flow to their institutions. New SEFs, DCMs and DCOs will be competing for volume, which is the key to success among these institutions. Unless the Commission prevents them from doing so, it is likely that they will attract the market makers by giving them non-voting equity, revenue or profit shares or fee discounts. This could lead to an oligopoly of market makers. Once in place, the oligopoly can control decisions by the SEF, DCM or DCO. In order to effectively prevent conflicts of interest and ensure competition, we urge the Commission to prohibit SEFs, DCMs and DCOs from offering market makers incentives such as non-voting equity, revenue or profit shares or fee discounts in exchange in exchange for directing deal flow to their respective platforms.

Swap Data Repositories

Swap data repositories (SDRs) are a key component of the market infrastructure envisioned in the Dodd-Frank Act. Central goals of the legislation, such as greater transparency in the derivatives market and improved regulatory oversight of the systemic implications of derivatives exposures, cannot be attained without the derivatives transaction records gathered by SDRs. For this reason, the legislation mandates that market participants submit their trade information to SDRs for storage and analysis, that regulators have unimpeded and unqualified access to this data, and that elements and summaries of the data be made publicly accessible in real time to improve market transparency.

Regulation of SDRs must reflect their public utility mission and ensure that conflicts of interest do not hamper or distort their operations. There are several ways the Commission can ensure this. One is through the governance and conflict of interest requirements for SDRs. Another is through the affirmative duties imposed on SDRs.

The Proposed Rule clearly recognizes the potential for conflict of interest in SDR management, which is not surprising as this issue is addressed directly in the statute.[10] However, AFR strongly favors more aggressive and more specific actions to prevent such conflicts than are laid out in this proposed regulation. At a minimum, SDR governance rules should incorporate the same restrictions

[9]Economic interests other than voting equity may include, among other things, non-voting equity, revenue or profit shares and fee discounts.
[10]Swap Data Repositories, 75 Fed. Reg 80,898 (Dec. 23, 2010).

on board membership and ownership that have been proposed for other derivatives infrastructure organizations such as DCOs, DCFs, and SEFs. As stated above regarding the governance rules for DCOs and DCFs we proposed an individual ownership limit of 20% and an aggregate ownership limit of 40% for Enumerated Entities, and a requirement that a majority of members of the board be independent. We favor these safeguards for SDRs as well.

In addition, the access and pricing requirements laid out in the proposed rule should be more stringent and more detailed. The current proposal simply requires fees to be uniform, equitable, and non-discriminatory. These requirements are vague and non-specific. They also do not establish any relationship between SDR pricing and actual costs of SDR operations. As entities with a public utility mission, SDRs should be required to serve the broadest possible range of market participants compatible with earning a reasonable profit. This object may not be fulfilled if SDRs set the highest possible fees the market will bear. There are natural economies of scale in the operation of SDRs, which may lead to some SDRs having significant market and therefore pricing power. SDRs should be required to set fees that are reasonable in relation to their costs of operation and to justify such fees to their regulator.

The proposal also allows volume discounts under certain circumstances, so long as they are not limited to a "select number" of market participants. But such discounts by their nature are limited to a select number of large customers. AFR believes volume discounts are discriminatory and urges the Commission to prohibit them in the final rule.

Business Conduct Rules for Swap Dealers and Major Swap Participants with Counterparties

Adoption of strong business conduct rules is central to efforts to bring integrity to the OTC derivatives markets. As we noted in our original comment letter, we believe the Commission has overall done a good job of outlining a strong and comprehensive set of business conduct rules to govern this market. In particular, we support Commission proposals to:

- impose both "know your counterparty" and "suitability" obligations as essential components of the business conduct regulatory regime;

- adopt broad anti-fraud rules and apply them to swap dealers and major swap participants acting in any capacity in relation to counterparties generally;

- impose disclosure requirements that are timely and designed to aid counterparties to make informed decisions, in particular with regard to risks and conflicts of interest;

- define acting as an adviser to include making a recommendation;

- lay the foundation for a best execution standard for this market; and

- impose pay to play restrictions.

Not surprisingly, industry groups have made these rules a target in their on-going effort to weaken derivatives market oversight through the rule-making process, in ways that Congress refused to provide in the legislation. If the rules are to deliver the benefits intended in the statute,

however, the Commission must resist calls to weaken them.

One area of industry comment does deserve greater attention, however. That is the concern that has been expressed that the CFTC business conduct rules conflict with Department of Labor's ("DOL") proposed expansion of the definition of fiduciary under the Employee Retirement Income Security Act ("ERISA"). We agree with those who have argued that there is a potential conflict between these rules. Specifically, it appears that conduct that firms would be required to engage in under the CFTC business conduct rules when dealing with special entities could trigger fiduciary status under the revised DOL definition. Moreover, we agree that Congress did not intend to impose an ERISA fiduciary duty on swaps dealers and major swaps participants in their dealings with special entities. We do not agree, however, that the answer is to weaken the CFTC business conduct rules. Rather, we encourage the Commission to continue to work with DOL as that agency both refines its proposal and develops prohibited transaction exemptions under its proposal to ensure that swaps dealers and major swaps participants do not automatically trigger fiduciary status under ERISA simply by complying with CFTC business conduct standards.

Although we support the general outline of the Commission's business conduct rules, we urge that the rules be strengthened in several important areas:

- Strengthen or clarify protections against recommending swaps that expose the hedger to risks that are greater than those they seek to hedge, either by identifying this as a violation of fraud standards or clarifying that it would be a violation of suitability and best interest standards.

- Clarify that recommending a customized swap where the counterparty could achieve the same result at a lower risk-adjusted price using standardized swaps would violate the suitability and best interest standards.

- Strengthen requirements regarding scenario analysis, by making them mandatory for all bilateral swaps that are not available for trading through a DCM or SEF and by requiring clear disclosure of the assumptions underlying the analysis and its sensitivity to those assumptions.

- Explicitly require swap dealers and major swap participants that recommend customized swaps to disclose alternative approaches using listed or standardized swaps and provide an assessment of the relative risks and costs of the two approaches.

- Where dealers recommend customized swaps, require disclosures of that detail and separately price the standardized component parts of such a customized swap based on current market prices. The price of the customized portion of the swap should then be represented as the additional charge in excess of these standardized components. Such disclosures should also include the price of any embedded credit for forgone collateral. As

discussed in the transparency section above, it is crucial for all market participants to fully understand the extent to which customized swaps represent combinations of standardized swaps that are already transparently priced, and widely traded.

- Strengthen conflict of interest disclosure requirements by clarifying that swap dealers and major swap participants disclose (and not just in boilerplate language) the full range of conflicts and incentives they have relevant and particular to a specific recommended transaction, including conflicts and incentives that relate not to specific payments but to their overall trading strategy.

- Strengthen the institutional suitability standard by limiting reliance on representations, requiring a suitability analysis wherever the swap dealer or major swap participant is the initiator in recommending the transaction or, at the very least, wherever the swap dealer or major swap participant recommends a customized swap or a trading strategy that uses a customized swap.

Since the Commission first issued these proposed rules, publication of the Report of the Permanent Subcommittee on Investigations detailing extensive conflicts of interest in bank dealings with customers, as well as revelations regarding industry pricing practices in the spot foreign exchange market, have brought renewed attention to pervasive abusive practices. These issues can only be addressed through a strong, comprehensive set of business conduct rules. We urge the Commission not to falter in its commitment to adopting such standards.

Response to Commission Questions

Cost-benefit analysis

In conjunction with the Commission's reopening of the comment period for these proposed rules, the Commission sought comment "on the costs and benefits of the proposed rulemakings, individually, in combination, or globally."[11]

AFR believes that the CFTC should consider the costs and benefits of the proposed rulemakings from a global perspective. The rules should be considered jointly as an overall framework for regulation of the derivatives market, and the costs and benefits of proper regulation should be considered in terms of the global benefits to the entire economy, not simply in terms of the costs and benefits to the financial industry narrowly.

Title VII of the Dodd-Frank Act is a comprehensive framework designed to restructure the swaps market. It would be a futile exercise to consider the individual costs and benefits of its component parts because the costs and benefits of each rule are dependent upon their

[11] Reopening and Extension of Comment Periods for Rulemakings Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act, 76 Fed. Reg. 25,274, 25,275 (May 4, 2011).

interactions with other rules. The benefit of comprehensive, effective regulation of the swaps market is the mitigation of systemic risk and, ultimately, avoidance of another financial crisis. According to Bank of England Executive Director for Financial Stability Andrew Haldane, the estimated cost of the crisis is between $60 trillion and $200 trillion for the world economy.[12] The overall economic benefit of avoiding another crisis of this magnitude will vastly exceed the potential cost to the financial industry of complying with reasonable regulations.

Statement of Commissioner Scott O'Malia Phased Implementation of Rules

The release also included a request for comment on a proposal by Commissioner O'Malia to phase in implementation of the rules under Title VII of Dodd-Frank.[13] We believe that the Act provides for an implicit phasing in of the regulations through the process by which swaps are gradually made available for clearing and trading. As a result of this approval process, swaps will not be forced into clearing or trading until the mechanisms are in place at DCOs and SEFs to allow clearing and trading to take place. As the rules are finalized and the markets are provided with the certainty that comes from knowing the regulatory requirements, DCOs and SEFs will begin to introduce products for clearing and trading as they are ready. This is the process of phasing in intended by the framers of the Dodd-Frank Act.

Replacing this process with delays in the promulgation of final rules will create ongoing uncertainty around who will be required to comply and on what dates. This will create a disincentive for market participants to begin preparing for implementation. Therefore, we urge the Commission to move forward with the passage of final rules as quickly as possible.

We appreciate the opportunity to comment on the proposed rule. If you have any questions, please contact Heather Slavkin at Hslavkin@aflcio.org or (202) 637-5318.

Sincerely,

Americans for Financial Reform

[12]Andrew G. Haldane, The $100 Billion Question (Mar. 2010) available at http://www.bankofengland.co.uk/publications/speeches/2010/speech433.pdf.
[13]Reopening and Extension of Comment Periods for Rulemakings Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act, 76 Fed. Reg. 25,274, 25,276 (May 4, 2011).

Following are the partners of Americans for Financial Reform.

All the organizations support the overall principles of AFR and are working for an accountable, fair and secure financial system. Not all of these organizations work on all of the issues covered by the coalition or have signed on to every statement.

- A New Way Forward
- AARP
- AFL-CIO
- AFSCME
- Alliance For Justice
- Americans for Democratic Action, Inc
- American Income Life Insurance
- Americans United for Change
- Campaign for America's Future
- Campaign Money
- Center for Digital Democracy
- Center for Economic and Policy Research
- Center for Economic Progress
- Center for Media and Democracy
- Center for Responsible Lending
- Center for Justice and Democracy
- Center of Concern
- Change to Win
- Clean Yield Asset Management
- Coastal Enterprises Inc.
- Color of Change
- Common Cause
- Communications Workers of America
- Community Development Transportation Lending Services
- Consumer Action
- Consumer Association Council
- Consumers for Auto Safety and Reliability
- Consumer Federation of America
- Consumer Watchdog
- Consumers Union
- Corporation for Enterprise Development
- CREDO Mobile
- CTW Investment Group
- Demos
- Economic Affairs Bureau/Dollars & Sense
- Economic Policy Institute
- Essential Action
- Greenlining Institute
- Good Business International
- HNMA Funding Company
- Home Actions

- Housing Counseling Services
- Information Press
- Institute for Global Communications
- Institute for Policy Studies: Global Economy Project
- International Brotherhood of Teamsters
- Institute of Women's Policy Research
- Krull & Company
- Laborers' International Union of North America
- Lake Research Partners
- Lawyers' Committee for Civil Rights Under Law
- Move On
- NASCAT
- National Association of Consumer Advocates
- National Association of Neighborhoods
- National Community Reinvestment Coalition
- National Consumer Law Center (on behalf of its low-income clients)
- National Consumers League
- National Council of La Raza
- National Fair Housing Alliance
- National Federation of Community Development Credit Unions
- National Housing Trust
- National Housing Trust Community Development Fund
- National NeighborWorks Association
- National People's Action
- National Council of Women's Organizations
- Next Step
- OMB Watch
- OpenTheGovernment.org
- Opportunity Finance Network
- Partners for the Common Good
- PICO
- Progress Now Action
- Progressive States Network
- Poverty and Race Research Action Council
- Public Citizen
- Sargent Shriver Center on Poverty Law
- SEIU
- State Voices
- Taxpayer's for Common Sense
- The Association for Housing and Neighborhood Development
- The Fuel Savers Club
- The Leadership Conference on Civil and Human Rights
- The Seminal
- TICAS
- U.S. Public Interest Research Group
- United Food and Commercial Workers
- United States Student Association
- USAction
- Veris Wealth Partners
- Western States Center
- We the People Now

- Woodstock Institute
- World Privacy Forum
- UNET
- Union Plus
- Unitarian Universalist for a Just Economic Community

Partial list of State and Local Signers

- Alaska PIRG
- Arizona PIRG
- Arizona Advocacy Network
- Arizonans For Responsible Lending
- Association for Neighborhood and Housing Development NY
- Audubon Partnership for Economic Development LDC, New York NY
- BAC Funding Consortium Inc., Miami FL
- Beech Capital Venture Corporation, Philadelphia PA
- California PIRG
- California Reinvestment Coalition
- Century Housing Corporation, Culver City CA
- CHANGER NY
- Chautauqua Home Rehabilitation and Improvement Corporation (NY)
- Chicago Community Loan Fund, Chicago IL
- Chicago Community Ventures, Chicago IL
- Chicago Consumer Coalition
- Citizen Potawatomi CDC, Shawnee OK
- Colorado PIRG
- Coalition on Homeless Housing in Ohio
- Community Capital Fund, Bridgeport CT
- Community Capital of Maryland, Baltimore MD
- Community Development Financial Institution of the Tohono O'odham Nation, Sells AZ
- Community Redevelopment Loan and Investment Fund, Atlanta GA
- Community Reinvestment Association of North Carolina
- Community Resource Group, Fayetteville A
- Connecticut PIRG
- Consumer Assistance Council
- Cooper Square Committee (NYC)
- Cooperative Fund of New England, Wilmington NC
- Corporacion de Desarrollo Economico de Ceiba, Ceiba PR
- Delta Foundation, Inc., Greenville MS
- Economic Opportunity Fund (EOF), Philadelphia PA
- Empire Justice Center NY
- Enterprises, Inc., Berea KY
- Fair Housing Contact Service OH
- Federation of Appalachian Housing
- Fitness and Praise Youth Development, Inc., Baton Rouge LA
- Florida Consumer Action Network

- Florida PIRG
- Funding Partners for Housing Solutions, Ft. Collins CO
- Georgia PIRG
- Grow Iowa Foundation, Greenfield IA
- Homewise, Inc., Santa Fe NM
- Idaho Nevada CDFI, Pocatello ID
- Idaho Chapter, National Association of Social Workers
- Illinois PIRG
- Impact Capital, Seattle WA
- Indiana PIRG
- Iowa PIRG
- Iowa Citizens for Community Improvement
- JobStart Chautauqua, Inc., Mayville NY
- La Casa Federal Credit Union, Newark NJ
- Low Income Investment Fund, San Francisco CA
- Long Island Housing Services NY
- MaineStream Finance, Bangor ME
- Maryland PIRG
- Massachusetts Consumers' Coalition
- MASSPIRG
- Massachusetts Fair Housing Center
- Michigan PIRG
- Midland Community Development Corporation, Midland TX
- Midwest Minnesota Community Development Corporation, Detroit Lakes MN
- Mile High Community Loan Fund, Denver CO
- Missouri PIRG
- Mortgage Recovery Service Center of L.A.
- Montana Community Development Corporation, Missoula MT
- Montana PIRG
- Neighborhood Economic Development Advocacy Project
- New Hampshire PIRG
- New Jersey Community Capital, Trenton NJ
- New Jersey Citizen Action
- New Jersey PIRG
- New Mexico PIRG
- New York PIRG
- New York City Aids Housing Network
- NOAH Community Development Fund, Inc., Boston MA
- Nonprofit Finance Fund, New York NY
- Nonprofits Assistance Fund, Minneapolis M
- North Carolina PIRG
- Northside Community Development Fund, Pittsburgh PA
- Ohio Capital Corporation for Housing, Columbus OH
- Ohio PIRG
- OligarchyUSA
- Oregon State PIRG
- Our Oregon
- PennPIRG
- Piedmont Housing Alliance, Charlottesville VA
- Michigan PIRG
- Rocky Mountain Peace and Justice Center, CO

- Rhode Island PIRG
- Rural Community Assistance Corporation, West Sacramento CA
- Rural Organizing Project OR
- San Francisco Municipal Transportation Authority
- Seattle Economic Development Fund
- Community Capital Development
- TexPIRG
- The Fair Housing Council of Central New York
- The Loan Fund, Albuquerque NM
- Third Reconstruction Institute NC
- Vermont PIRG
- Village Capital Corporation, Cleveland OH
- Virginia Citizens Consumer Council
- Virginia Poverty Law Center
- War on Poverty - Florida
- WashPIRG
- Westchester Residential Opportunities Inc.
- Wigamig Owners Loan Fund, Inc., Lac du Flambeau WI
- WISPIRG