



Americans for Financial Reform
1629 K St NW, 10th Floor, Washington, DC, 20006
202.466.1885

February 22nd, 2011

David A. Stawick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: RIN 3038-AD10 – End-User Exception to Mandatory Clearing of Swaps

Dear Mr. Stawick:

On behalf of Americans for Financial Reform, thank you for the opportunity to comment on the proposed rule, “End-User Exception to Mandatory Clearing of Swaps.” 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 renowned economists.

Reckless swaps and derivatives trading played a critical role in the financial crisis, turning the fallout from the crash of the domestic housing market into a global economic catastrophe. The Dodd-Frank Wall Street Reform and Consumer Protection Act put in place key statutory changes intended to prevent the recurrence of a systemic crisis like the one experienced in 2008. It is now up to the regulators to ensure the success of Dodd-Frank by putting rules in place that are comprehensive and do not create loopholes that will be exploited in the future. The proposed rule will be critical in providing the Commission a comprehensive view of the swap market and giving regulators access to data critical to the safety and soundness of the market.

Proposed §39.6(b)(5) Meeting Financial Obligations

Proposed §39.6(b)(5) requires end-users, when relying on the clearing exception to engage in an over-the-counter swap transaction, “to provide additional information regarding the methods used to mitigate credit risk in connection with non-cleared swaps.” The proposed rule defines several types of credit risk mitigation tools and requires end-users to disclose to the Commission

whether any or all of these tools are used in the swap transaction in question. We agree that this information should be disclosed. AFR believes, however, that in order to ensure the financial integrity of the swaps market, the Commission should collect substantially more information.

AFR urges the CFTC to require additional disclosures designed to provide a clear picture of financial risks associated with transactions believed to be eligible for the exception. The required “Financial Obligation Notice” should be strengthened to require information about:

- The types of collateral provided by the end-user and the impact of posting collateral on the end-user’s ability to meet its financial obligations;
- Whether the collateral requirements are unilateral or bilateral;
- Contractual terms and whether they are triggered by changes in the credit-rating or other financial circumstances of either of the counterparties;
- Whether any “third-party” guarantor of the end-user’s obligations is a parent or affiliate of the person invoking the end-user exception; and
- The identity of any collateral agent, custodian or other entity involved in segregating collateral.

In Footnote 13 of the proposed rule, the Commission states that in some swaps transactions “one or both of the counterparties to some non-cleared swaps may choose not to mitigate credit risk and instead rely on the general creditworthiness of their opposite counterparty, given the circumstances and financial terms of the transaction.” The Commission goes on to reference guidance issued by the Office of the Comptroller of the Currency that states “[c]redit exposure arising from derivative activities should be addressed within the same framework used to assess credit risk in traditional banking activities.” In other words, when an end-user enters an uncollateralized swap with a bank, the bank is still taking on credit risk and that risk is substantially similar to an uncollateralized loan or a credit facility. An uncollateralized swap transaction, therefore, is really two transactions – a hedging transaction and a loan. The bank charges the end-user for this implied loan by embedding a fee in the swap transaction.

If Dodd-Frank is to be implemented in a way that truly brings transparency to the derivatives markets, these two transactions must be separately reported to the CFTC. Americans for Financial Reform urges the CFTC to include in the Financial Obligation Notice a disclosure that breaks out the amount paid by the end-user for the swap and, separately, the fee paid for the implied loan. This will help the Commission to more effectively evaluate the derivatives market.

More importantly, however, it will provide end-users with the information they need to shop for the best price and make informed decisions about whether choosing to use the regulated, cleared swaps market is more cost effective.

Hedging or Mitigating Commercial Risk

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." In addition, we agree with the Commission's explanation in Footnote 23, "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." 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." 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."

Consideration of a Clearing Exemption for Small Banks, Savings Associations, Farm Credit System Institutions and Credit Unions

The Dodd-Frank Act directs the Commission to consider whether to exempt from mandatory clearing banks, savings associations, farm credit system institutions and credit unions with less than \$10 billion in assets. Americans for Financial Reform urges the Commission to ensure that any financial institution that engages in more than de minimis activity in the swaps market is required to clear, including small banks, savings associations, farm credit system institutions and credit unions. If these institutions' swap activity is truly de minimis, they should still be required to file Financial Obligation Notices in order to ensure that regulators have a comprehensive view of activity in the swap market and a clear picture of the counterparty relationships.

* * *

Congress has imposed on the CFTC the heavy responsibility of adopting regulations that bring meaningful reform to the over-the-counter derivatives markets and help to prevent a repetition of the devastating financial crisis of 2008. The proposed rule falls short of what is needed to meet that responsibility. Accordingly, we urge the Commission to require entities exempt from clearing swaps to disclose substantially more information than would be required by the

proposed rule and to ensure that any financial entity that engages in more than a de minimis amount of swap transactions is required to clear.

Thank you again for this opportunity to share our views on the proposed rule. If you have the further questions, please contact Heather Slavkin, AFL-CIO at (202) 637-5318.

Sincerely,

Americans for Financial Reform

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
- ACORN
- AFL-CIO
- AFSCME
- Alliance For Justice
- Americans for Democratic Action, Inc
- American Income Life Insurance
- Americans for Fairness in Lending
- Americans United for Change
- Calvert Asset Management Company, Inc.
- 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 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 Training and Information Center/National People's Action
- National Council of Women's Organizations
- Next Step
- OMB Watch
- 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

