



**Americans for Financial Reform**  
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March 20, 2013

Dear Representative,

On behalf of Americans for Financial Reform, we are writing to express our opposition to HR 1256, the “Swaps Jurisdiction Certainty Act”.<sup>1</sup> This legislation would seriously undermine the CFTC’s efforts to properly regulate extraterritorial derivatives transactions that affect our economy and carry risk for U.S. taxpayers.

The proper oversight of extraterritorial derivatives transactions is of the highest importance to effective regulation of U.S. derivatives markets and indeed to the regulation of Wall Street banks in general. We have learned this lesson in many crises, most recently in the massive derivatives losses experienced at JP Morgan’s London office, and most painfully in the world financial collapse of 2008. As CFTC Chair Gary Gensler has stated:

“Swaps executed offshore by U.S. financial institutions can send risk straight back to our shores. It was true with the London and Cayman Islands affiliates of AIG, Lehman Brothers, Citigroup and Bear Stearns. A decade earlier it was true, as well, with Long-Term Capital Management. The nature of modern finance is that large financial institutions set up hundreds, if not thousands of “legal entities” around the globe... Many of these far-flung legal entities, however, are still highly connected back to their U.S. affiliates.”

Chairman Gensler’s statements are confirmed by extensive experience and data. Bloomberg News has documented that large Wall Street banks routinely transact well over half of their swaps business through foreign subsidiaries.<sup>2</sup>

Mindful of the importance of this issue, the CFTC has properly acted to address it as a high priority. The agency has written a complete guidance on the extraterritorial enforcement of U.S. derivatives. This guidance would in most cases permit overseas subsidiaries of U.S. banks to be regulated under ‘substituted compliance’ by their local (host country) regulator. ***But this would only be permitted in cases where the U.S. regulators found host country regulation to be equivalent to the relevant U.S. regulation.*** Maintaining this principle is critical to protecting

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<sup>1</sup> [Americans for Financial Reform](http://www.ourfinancialsecurity.org) is an unprecedented coalition of more than 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.

<sup>2</sup> See Brush, Silla, “[Goldman Sachs Among Banks Lobbying To Exempt Half of Swaps From Dodd Frank](#)”, Bloomberg News, January 30, 2012.

U.S. taxpayers from the risks of offshore swaps by U.S. institutions. If it is not maintained, we could see a ‘race to the bottom’ as derivatives transactions move to the least regulated jurisdictions to take advantage of lax rules. This is particularly dangerous since foreign (host) countries are not exposed to the risks to the U.S. taxpayer created by derivatives transactions undertaken by foreign subsidiaries of U.S. banks.

HR 1256 would significantly undermine the capacity of the CFTC to assure that extraterritorial derivatives transactions that impact our economy are subject to regulations that meet US standards. It does this in several ways. First, the legislation would effectively create a presumption that overseas derivatives transactions will be ruled by the host country rulemaking rather than U.S. rulemaking. The current CFTC guidance would only permit ‘substituted compliance’ by foreign regulators if U.S. regulators make a specific determination that foreign regulatory regimes are as strong as the U.S. regime for the specific rule at issue. In this manner, U.S. regulators will conduct proper oversight over the rules of each foreign regulator before exposing U.S. markets to derivatives transactions conducted according to foreign regulatory rules.

HR 1256 appears to switch the presumption so that derivatives transactions in G-20 nations are presumed to be governed by foreign regulatory rules in the host country rather than U.S. rules, unless the CFTC and SEC make a joint determination, supported by a formal report to Congress, that the foreign country rules are not ‘broadly comparable’ to U.S. rules. Thus, U.S. regulators would face a major new hurdle in applying derivatives rules to overseas transactions, even where these transactions clearly posed a risk to the U.S. economy. The best way to achieve a good result is to allow the CFTC to negotiate with the other jurisdictions from a position of strength. The legislation would undercut the agency before the negotiation is even begun.

Second, this legislation requires the CFTC to replace its guidance document with a new joint rulemaking between the SEC and CFTC. The SEC regulates less than 10 percent of the gross notional swaps market, and has jurisdiction for types of swaps (such as narrow and single-name credit default swaps) that are not regulated by the CFTC. Furthermore, the agencies are already required to harmonize their regulation where appropriate. A joint rulemaking is not necessary, but it would have the effect of hindering and delaying the CFTC in its own attempts to regulate extraterritorial derivatives transactions.

One of the most important ways that a joint rulemaking requirement could hinder the CFTC is by restricting the CFTC’s extraterritorial jurisdiction. Section 722(d) of the Dodd-Frank Act grants the CFTC jurisdiction over all activities that have a “direct and significant connection with activities in, or effect on, commerce of the United States”. This is clearly the appropriate jurisdiction to protect U.S. taxpayers and the U.S. economy – it is obviously critical that U.S. regulators have jurisdiction over potentially risky transactions that are directly connected to the U.S. economy. Yet the SEC has no such clear statement of jurisdiction in the Dodd Frank Act.

The effect of requiring joint rulemaking would be to eliminate the CFTC's clear grant of jurisdiction over those transactions that are directly connected to U.S. commerce.

Finally, a joint rulemaking requirement would permit industry to challenge extraterritorial requirements in court, further tying down the CFTC's ability to regulate. This is misguided, as industry can already take the agency to court 1) on the underlying swaps rulemaking to be enforced, and 2) on whether the CFTC has exceeded the bounds of its jurisdictional grant to oversee transactions with a 'direct and significant' connection to U.S. commerce. If the underlying rulemaking is appropriate, and the jurisdiction is appropriate as well, industry should not be able to file yet a third legal challenge.

This long and complex legislation raises other issues as well. However, the core issue here is that oversight of swaps transactions in foreign subsidiaries of U.S. banks is not a side issue in derivatives regulation. It is at the heart of effective oversight of these vast and complex markets. The ease with which cash flows, contracts, and risk are transmitted around the world through the thousands of subsidiaries of major Wall Street banks means that if overseas transactions are not properly regulated, then no derivatives regulation can be effective. It is important to leave regulators free to address this critical area and not hamper their efforts to properly regulate it by adding additional statutory restrictions as is done in this discussion draft.

Thank you for your consideration. For more information please contact AFR's Policy Director, Marcus Stanley at [marcus@ourfinancialsecurity.org](mailto:marcus@ourfinancialsecurity.org) or 202-466-3672.

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
- AFL-CIO
- AFSCME
- Alliance For Justice
- American Income Life Insurance
- American Sustainable Business Council
- Americans for Democratic Action, Inc
- 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
- Center for Effective Government
- 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
- Home Defender's League
- 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
- Lawyers' Committee for Civil Rights Under Law
- Main Street Alliance
- Move On
- NAACP
- 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 Council of Women's Organizations
- National Fair Housing Alliance
- National Federation of Community Development Credit Unions
- National Housing Resource Center
- National Housing Trust
- National Housing Trust Community Development Fund
- National NeighborWorks Association
- National Nurses United
- National People's Action
- National Urban League
- Next Step
- OpenTheGovernment.org
- Opportunity Finance Network
- Partners for the Common Good
- PICO National Network
- 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
- UNITE HERE
- 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

*List of State and Local Partners*

- 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
- Empowering and Strengthening Ohio's People (ESOP), Cleveland OH
- 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
- New Yorkers for Responsible Lending
- 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

***Small Businesses***

- Blu
- Bowden-Gill Environmental
- Community MedPAC
- Diversified Environmental Planning
- Hayden & Craig, PLLC
- Mid City Animal Hospital, Pheonix AZ
- The Holographic Repatterning Institute at Austin
- UNET

