Comments of Swap Financial Group, LLC on Proposed Rule regarding End-User Exception to Mandatory Clearing of Swaps, 17 CFR Part 39

Reference: RIN 3038–AD10

Swap Financial Group, LLC, ("SFG") submits the following comments on the above-reference proposed rule. SFG is the leading swap advisor for end-users of derivative products in the United States. Our clients include large numbers of state and local governmental entities and non-profit organizations, in addition to non-financial corporate end-users. Contact information for SFG is: Peter Shapiro, Managing Director, 76 South Orange Ave., Suite 6, South Orange, NJ 07079. Telephone: 973-378-5500. Email: pshapiro@swapfinancial.com.

Our concerns on the proposed rule are as follows:

1. Clarify that governmental and non-profit entities will be able to qualify. The rule makes use of the term "commercial" at multiple points, including terms like "commercial risk" and "commercial enterprise". The term could be interpreted to exclude governmental and non-profit entities, and counsel to several of our clients have expressed a concern that this may cause a lack of clarity preventing governmental and non-profit clients from getting clean legal opinions on the legality and enforceability of their swap obligations. In our reading of the statute, it is clearly intended that governmental and non-profit entities should be permitted to make use of the end-user exception. Otherwise, the extensive sections in the statute regarding "Special Entities" would make no sense. Regardless, based on the amount of query we are receiving from counsel to various entities, we believe the Commission should make this clear. We believe this is consistent with the Commission's intention, and is merely a clarifying point.

2. Clarify that key governmental entities are not "financial entities" which would be precluded from using the end-user exception. The proposed rule defines "financial entity" in part in reference to the Bank Holding Company Act of 1956. We are concerned that this definition may unintentionally pick up many governmental entities that engage in activities that could be classified as "lending" or "financing". These entities include governmental agencies that today make extensive use of over-the-counter swaps as a fundamental part of achieving their public purposes. The relevant examples are state and local housing finance agencies, state and local student loan agencies, state and local clean-water revolving fund agencies, and state and local bond banks. These entities uses swaps to lower the cost of various loans and mortgages that are authorized to be made by these specialized public entities. They also use interest rate caps to protect against the risk of rising floating rates. Typically, but not always, the financing provided by these entities is based on underlying municipal bonds (both tax-exempt and taxable) issued by these entities and permitted under state and federal law. These entities have been among the most active and successful users of swaps, which have enabled them to meet their public purposes of providing lower cost loans and mortgages to help support affordable housing, student loans, clean water facilities and other public purposes. They are clearly governmental entities, and should not be excluded from the end-user exception by having them be indirectly defined as "financial entities". It is important to clarify that they should not be picked up under the proposed definition of "financial entities".

3. The allowable categories outlined in the proposed rule of what constitutes “hedging or mitigating commercial risk” are thorough and well-described, but should not be subject to the narrowing phrase: “economically appropriate to the reduction of risks”. The statutes clearly uses the terms “hedging and mitigating”, not just “reduction”. Because of the extremely varied needs of American businesses, non-profits and governments, we believe it would be better to include a more workable phrase, such as “the management or reduction of risks”. If “management” appears too broad, the term “prudent management” could be used.

4. Notification to the Commission by an end-user of “how it generally meets its financial obligations” should be able to be done on a one-time “standing” basis, rather than being required each time a swap is entered into. A continual notification requirement, where an end-user would repeatedly provide what would likely be essentially the same information, provides no discernable public benefit, but palpably adds to the administrative burden on an end-user. A one-time or “standing” notice should suffice to meet the public purpose of the statute, with an additional requirement that the notice should be amended if there are material changes.