



**Americans for Financial Reform**  
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February 22<sup>nd</sup>, 2011

David A. Stawick  
Secretary of the Commission  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21<sup>st</sup> Street, N.S.  
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 Nobel Prize-winning 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.

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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.*

### **National Organizations**

- A New Way Forward
- AARP
- Accountable America
- Adler and Colvin
- AFL-CIO
- AFSCME
- Alliance For Justice
- American Family Voices
- American Income Life Insurance
- Americans for Democratic Action, Inc.
- Americans for Fairness in Lending
- American Sustainable Business Council
- Americans United for Change
- Business for Shared Prosperity
- 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
- Community Law Center
- Consumer Action
- Consumer Association Council
- Consumers for Auto Safety and Reliability
- Consumer Federation of America
- Consumer Watchdog
- Consumers Union
- Corporation for Enterprise Development
- CREDO
- CTW Investment Group
- Demos
- Economic Policy Institute
- Essential Action
- Green America
- Greenlining Institute

- Good Business International
- Help Is On the Way, Inc
- HNMA Funding
- 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
- Keystone Research Center
- Krull & Company
- Laborers' International Union of North America
- Lake Research Partners
- Lawyers' Committee for Civil Rights Under Law
- The Leadership Conference on Civil and Human Rights
- MoveOn.org Political Action
- NAACP
- NASCAT
- National Association of Consumer Advocates
- National Association of Investment Professionals
- National Association of Neighborhoods
- National Coalition for Asian Pacific American Community Development
- 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 Institute
- National Housing Trust
- National Housing Trust Community Development Fund
- National NeighborWorks Association
- National People's Action
- National Council of Womens Organizations
- National Workright Institute
- 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
- Responsible Endowments Coalition
- Sargent Shriver Center on Poverty Law
- Scam Victims United
- SEIU
- Sojourners
- State Voices
- Taxpayer's for Common Sense
- The Association for Housing and Neighborhood Development
- The Carrots and Sticks Project
- The Fuel Savers Club
- The Seminal
- UNET
- Union Plus
- United for a Fair Economy
- U.S. PIRG
- Unitarian Universalist for a Just Economic Community
- United Food and Commercial Workers
- United States Student Association

- USAction
- Veris Wealth Partners
- Veterans Chamber of Commerce
- We The People Now
- Western States Center
- Woodstock Institute
- Working America
- World Business Academy
- World Privacy Forum

### *State Organizations*

- 207 CCAG
- 9 to 5, the National Association of Working Women (CO)
- AARP Rhode Island
- Alaska PIRG
- Arizona PIRG
- Arizona Advocacy Network
- Arizonans for Responsible Lending
- Arkansas Community Organizations
- Arkansas Public Policy Panel
- Association for Neighborhood and Housing Development (NY)
- Audubon Partnership for Economic Development LDC (New York, NY)
- Aurora NAACP
- BAC Funding Consortium Inc. (Miami, FL)
- Beech Capital Venture Corporation (Philadelphia, PA)
- Bell Policy Center (CO)
- California PIRG
- California Reinvestment Coalition
- Center for Media and Democracy
- Center for NYC Neighborhoods
- 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)
- Club Change of Martin County (Florida)
- Coalition on Homeless Housing in Ohio
- Coffee Party of Pensacola, Florida
- Coffee Party of Union Square, New York City
- Colorado AFL-CIO
- Colorado Center on Law and Policy
- Colorado Immigrants Rights Coalition
- Colorado PIRG
- Colorado Spring NAACP
- Community Action of Nebraska
- Community Capital Development
- 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, AR)
- Connecticut Association for Human Services
- Connecticut Citizen Action Group
- Connecticut PIRG
- Consumer Assistance Council
- Cooper Square Committee (New York, NY)
- Cooperative Fund of New England (Wilmington, NC)
- Corporacion de Desarrollo Economico de Ceiba (Ceiba, PR)

- CWA 7777 (CO)
- 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 Enterprises, Inc. (Berea, KY)
- Fitness and Praise Youth Development, Inc. (Baton Rouge, LA)
- Florida Consumer Action Network
- Florida PIRG
- Forward Community Investments (Madison, WI)
- Funding Partners for Housing Solutions (Ft. Collins, CO)
- Georgia PIRG
- Grow Iowa Foundation (Greenfield, IA)
- Homewise, Inc. (Santa Fe, NM)
- Humanitas Community Development Corporation
- Idaho Chapter, National Association of Social Workers
- Idaho Community Action Network
- Idaho Nevada CDFI (Pocatello, ID)
- Illinois PIRG
- Impact Capital (Seattle, WA)
- Indiana PIRG
- Indiana University PIRG
- Information Press (CA)
- Iowa PIRG
- Iowa Citizens for Community Improvement
- JobStart Chautauqua, Inc. (Mayville, NY)
- Keystone Research Center
- 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
- Massachusetts Fair Housing Center
- MASSPIRG
- 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
- Montana Community Development Corporation (Missoula, MT)
- Montana PIRG
- Mortgage Recovery Service Center of L.A.
- 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
- Next Step (MN)
- NOAH Community Development Fund, Inc. (Boston, MA)
- Nonprofit Finance Fund (New York, NY)
- Nonprofits Assistance Fund (Minneapolis, MN)
- North Carolina Association of Community Development Corporations
- North Carolina PIRG
- Northern Community Investment Corporation (St. Johnsbury, VT)
- Northside Community Development Fund (Pittsburgh, PA)
- Ohio Capital Corporation for Housing (Columbus, OH)
- Ohio PIRG
- Oregon State PIRG

- Our Oregon
- PennPIRG
- Piedmont Housing Alliance (Charlottesville, VA)
- Rhode Island PIRG
- Rights for All People
- The Rocky Mountain Peace and Justice Center
- Rural Community Assistance Corporation (West Sacramento, CA)
- Rural Organizing Project OR
- San Francisco Metropolitan Transportation Authority
- Seattle Economic Development Fund dba Community Capital Development
- SEIU Local 105 (Colorado)
- SEIU Rhode Island
- Siouxland Economic Development Corporation (Sioux City, IA)
- Southern Bancorp (Arkadelphia, AR)
- TexPIRG
- The Association for Housing and Neighborhood Development
- The Fair Housing Council of Central New York
- The Help Network
- The Loan Fund (Albuquerque, NM)
- Third Reconstruction Institute (NC)
- V-Family, Inc.
- Vermont PIRG
- Village Capital Corporation (Cleveland, OH)
- Virginia Citizens Consumer Council
- Virginia Poverty Law Center
- War on Poverty – Florida
- Washington Community Action Network
- WashPIRG
- Westchester Residential Opportunities Inc. NY
- Wigamig Owners Loan Fund, Inc. (Lac du Flambeau, WI)
- WISPIRG

***Businesses***

- Blu
- Bowden-Gill Environmental
- Community MedPAC
- Diversified Env. Planning
- Hayden & Craig, PLLC\
- The Holographic Repatterning Institute at Austin
- Mid City Animal Hospital (Phoenix, AZ)
- UNET