



Americans for Financial Reform
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Elizabeth M. Murphy, Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: Interpretation of the Definition of “Commercial Risk”

Dear Ms. Murphy,

On behalf of Americans for Financial Reform, thank you for the opportunity to comment on the definitions contained in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act. 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. Financial institutions and their lobbyists, having failed to stop Congress from passing strong derivatives regulation, are now trying to weaken the law through the regulatory process. The latest example of this can be found in industry suggested definitions for “commercial risk.”

The definition of “commercial risk” is relevant to both the determination of whether an entity is a “major swap participant” and whether a swap is exempt from the clearing requirement under the Dodd-Frank Act.

The Dodd-Frank Act defines a “major swap participant” to include any entity, other than a swaps dealer, that “maintains a substantial position in swaps for any of the major swap categories as determined by the Commission, excluding positions held for hedging or mitigating commercial risk.” The definition also includes entities that engage in significant swaps trading and are systemically dangerous or highly leveraged financial entities. Institutions categorized as major swap participants under the Dodd-Frank Act are subject to registration, record-keeping, business conduct and prudential requirements.

The clearing requirement “does not apply to a swap if 1 of the counterparties to the swap (i) is not a financial entity; (ii) is using swaps to hedge or mitigate commercial risk; and (iii) notifies the Commission, in a manner set forth by the Commission, how it generally meets its financial obligations associated with entering into noncleared swaps.” As a result, the definition of “commercial risk” will have a direct bearing on whether a large portion of the over-the-counter derivatives market clears and trades as was intended by Congress when it passed the Dodd-Frank Act.

We are concerned by recent arguments made by financial industry groups that “commercial risks” should be defined to include financial risk where a commercial firm or a bank is hedging financial risk. For example, the International Swaps and Derivatives Association argued in a comment letter filed on September 20 that “commercial risk” should include anything “of, pertaining to, or characteristic of commerce... including financial risks.” Similarly, the American Bankers Association, in a September 20 comment letter,

recommended that “‘commercial risk’ be interpreted broadly enough to include financial risk for depository institutions.”

The argument that transactions engaged in by commercial firms that are hedging financial risks should be exempt clearly contradicts the intention of Congress. If the SEC were to interpret the legislation as industry groups have suggested, the effect would be that all swaps traded by non-financial entities would be exempt from clearing and trading requirements. The term “commercial risk” would be rendered meaningless. If that was Congress’s intent, however, it would have simply exempted commercial entities from the clearing requirement altogether, an approach that Congress explicitly rejected. Notably, Congress rejected language in earlier versions of the legislation that would have exempted firms that were hedging “operating or balance sheet risk,” because of the concern that this would have made firms hedging financial risk eligible for the exemption.

The SEC should also reject the arguments in favor of adopting a broad definition of “commercial risk” to allow financial institutions using swaps to hedge financial risks to avoid regulation as major swap participants. The broad definition recommended by the American Bankers Association would not only provide the means whereby financial entities such as hedge funds and insurance companies could escape regulation as major swap participants but it would also result in a broader exemption from central clearing.

We urge the Commission to adopt a narrow definition of ‘commercial risk.’ Barron’s Dictionary of Finance and Investment Terms defines “commercial hedgers” as “companies that take positions in commodities markets in order to lock in prices at which they buy raw materials or sell their products.”¹ References to “commercial risk” in the Dodd-Frank Act are clearly intended to apply to commercial hedgers. Regulators should, therefore, interpret the term “commercial risk” to include only those risks that arise as a result of companies’ exposure to fluctuations in prices of raw materials they use to manufacture products or fluctuations in the prices of products they manufacture.

Industry tried and failed to get an expansive end-user exemption included in the legislation. On behalf of Americans for Financial Reform, we urge you to reject the arguments made by financial industry groups in an attempt to maintain the opaque, unregulated over-the-counter derivatives market. The Commission must interpret “commercial risk” very narrowly to ensure that the legislation fulfills its promise to move the vast majority of derivatives out of the shadows and into the transparent, regulated market.

We appreciate the opportunity to comment on the definition of ‘commercial risk’ in Title VII of the Dodd-Frank Act. If you have any questions, please contact Heather Slavkin at Hslavkin@afcio.org or (202) 537-5318.

Sincerely,

Americans for Financial Reform

¹ Barron’s Dictionary of Finance and Investment Terms at 120 (6th ed. 2003).

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 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
- Leadership Conference on Civil Rights
- 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 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 Seminal
- 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

