

June 17, 2010

TO THE CONFEREES FOR H.R. 4173:

The Coalition for Derivatives End-Users represents thousands of companies across the United States that employ derivatives to manage risks that they face in connection with their businesses. We have a number of concerns with the derivatives title in the conference base text and urge you to support amendments that would move key provisions closer to the derivatives title that passed the House.

We appreciate all of the work that you and your colleagues have undertaken to craft legislation designed to create a safer, more transparent financial system. Throughout the legislative process, the Coalition has advocated for a strong derivatives title that brings full transparency to over-the-counter derivatives market; imposes thoughtful, new regulatory standards that enhance the stability of the financial system; and provides a strong, unambiguous exemption from mandatory clearing and bilateral margining for end-users.

While a new regulatory framework for derivatives is essential, so is a strong, clear exemption for end-users. Without such an exemption, we believe many end-users of derivatives would be forced to divert working capital away from productive use to margin accounts, move their hedging practices overseas, or forgo hedging altogether – leaving them exposed to the volatility and price uncertainty that OTC derivatives have so effectively mitigated. Moreover, end-users, who did not contribute to the financial markets crisis, should not be subjected to the same regulatory structure as swap dealers and others who do not use derivatives to reduce legitimate business risks.

For the businesses that employ residents in each of your states, this is not an academic exercise; it is a jobs issue. A survey and analysis conducted by the Business Roundtable and Keybridge Research found that a requirement to impose initial margin on OTC derivatives could lead to a loss of 100,000 to 120,000 jobs within S&P 500 companies alone. The additional impact of variation margin could significantly increase this negative impact on jobs.

Previously, we have provided to House and Senate members draft amendment text that would fix many of the anti-business provisions in the two bills. Attached, we list, in no specific order, our greatest concerns with the derivatives title in the conference base text.

We hope that you will keep our views in mind as the conference proceeds and that we can support the final product of your deliberations. We share the goals of transparency and increased market stability and stand ready to work with you to achieve them.

Sincerely,

American Petroleum Institute  
Business Roundtable  
Financial Executives International

Information Technology Industry Council  
National Association of Corporate Treasurers  
National Association of Manufacturers  
National Association of Real Estate Investment Trusts  
The Real Estate Roundtable  
U.S. Chamber of Commerce

## Attachment

### Key Concerns with Derivatives Title in Conference Base Text

- Major Swap Participant (MSP): This is the linchpin of the end-user exemption and, therefore, it has to be both clear and fair to companies. We strongly prefer the MSP definition in the House and to it, we would add: (1) that operating and balance sheet risk (subject to definitions developed by the regulators) be added to commercial risk to constitute risk that, if hedged, would not be counted toward a “substantial net position;” and (2) the employee benefit plan language from the Senate bill.
- Capital Requirements: Capital requirements should be based on risk of loss directly associated with derivatives and should be aimed at promoting the safety and soundness of the financial system, not used to penalize OTC derivatives. We also do not support Senate language requiring regulators to set capital requirements for non-banks that are “as strict as or stricter than” levels set for banks. This language discriminates against commercial companies in a way that would increase costs without reducing risk. We prefer the House language on capital requirements.
- Margin Requirements: Consistent with the Senate bill, margin requirements should apply only to swaps between swap dealers and MSPs and should not apply to swaps in which an end-user is a party. By contrast, the House bill grants regulators authority to impose margin on the dealer counterparty in end-user transactions – unnecessarily increasing costs for end-users.
- Clearing Requirements: The Senate bill attempts to define what entities are “end-users” but does so too narrowly, omitting whole categories of non-systemically significant end-users, including captive and other types of finance entities and other ownership structures relied upon by commercial end users. The House approach is preferable as it limits the application of clearing requirements, but it should be further streamlined to ensure that legitimate end users are not subjected to unnecessary bureaucratic requirements to avail themselves of this exemption.
- No Retroactivity: Margin requirements should be applied only prospectively, recognizing that market participants negotiated existing trades based on the laws and market practices in effect at the time of these transactions.
- Swap Dealer: The term “swap dealer” should not include an affiliate of a company that enters into swaps on behalf of the company or its affiliates and does not hold itself out as a dealer or make a market in swaps. A swap should not be subject to clearing or margining requirements if it is between commonly-owned affiliates. The language of both the House and Senate titles is not clear on this point though we do not believe that it is the intent of either the House or Senate to regulate in-house swap execution arms as “swap dealers.” We also believe that a de minimis exception, like the one in the House bill, is needed.

- Foreign Exchange Swaps and Forwards: We believe that FX transactions should not be regulated as swaps under the new title. These derivatives are essential for domestic end users doing business abroad and are already overseen by the Federal Reserve. Our view is consistent with both the Administration's bill and the House-passed measure.
- Employee Benefit Plans: The definition of "major swap participant" should not include retirement and other employee benefit plans, as under the Senate bill. In addition, we oppose the Senate's provision that would impose on a swap dealer that enters into a swap with a public or private retirement plan (or other entity) a fiduciary duty, which would be inconsistent with the principal nature of the relationship between parties to a swap and could effectively exclude retirement plans (and other entities) from using derivatives to manage risk.
- Regulations and Effective Date: The derivatives title would require regulators to promulgate rules on a broad spectrum of issues before the new provisions could be implemented effectively. Regulators should be given ample time to promulgate these rules, and they should be promulgated through a full notice-and-comment process, and not through expedited rulemaking procedures. Furthermore, such rules should be subject to review by the Office of Information and Regulatory Affairs in the White House, and not allowed to bypass this essential check against excessive burdens imposed on the private sector. The effective date of the derivatives title should be no less than 12 months so that an effective and transparent regulatory process can take place.
- Reporting: The Coalition supports transparency through a robust reporting requirement that is both feasible and non-duplicative. The Senate bill imposes a duplicative and unnecessary burden on end-users to report their transactions to a central trade repository, even though swap dealers would be required to report the same transaction. End-users may not be operationally equipped to undertake this process and, in particular, may not be able to satisfy the real-time reporting requirements. The House bill, which allows parties to agree on who would meet the reporting requirement, is preferable.
- Swap Dealer Spin-Off: Separating swap dealing entities from depository institutions presents a number of practical problems for end users, including reducing or eliminating available counterparties, increasing the cost to hedge and possibly preventing some end users from hedging certain risks. Such problems would result from a swap dealer's limited ability to gain access to non-cash collateral pledged to a lender and a borrower's inability to net exposures between derivatives and loans.