February 22, 2011

Mr. David A. Stawick
Secretary
U.S. Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Via agency website

Re: End-User Clearing Exception / File Number RIN 3038–AD10

The Coalition for Derivatives End-Users (the "Coalition") is pleased to respond to the request for comments by the U.S. Commodity Futures Trading Commission ("CFTC" or the "Commission") regarding its proposed rule entitled "End-User Exception to Mandatory Clearing of Swaps." We are glad to work with the CFTC to ensure that the final rules appropriately govern the elective exception to the mandatory clearing of swaps available for end-users.

The Coalition believes that an unambiguous exemption for end-users from clearing, trade execution, margin, and capital requirements will ensure that these companies may continue to efficiently manage their risks, invest in our economy, and create jobs. As noted during congressional debate on the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"): "End users did not cause the financial crisis of 2008. They were actually the victims of it."[1]

End-users enter into swaps to enhance their competitiveness, provide stable pricing to their customers, and manage risk. Hundreds of companies have been active in the Coalition throughout the legislative and regulatory process, and our message is straightforward: The Coalition seeks to ensure that financial regulatory reform measures promote economic stability and transparency without imposing undue burdens on derivatives end-users. Imposing unnecessary regulation on derivatives end-users would create more economic instability, restrict job growth, direct capital away from productive investment and into margin accounts, and hamper U.S. competitiveness in the global economy. For end-users, to hedge is to permit the efficient and less risky functioning of their business. Not to hedge can expose a business to losses it might have otherwise avoided, which amounts to a kind of speculation.

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[1] 156 CONG. REC. H 5245 (daily ed., June 30, 2010) (statement of Representative Collin Peterson).

The End-User Clearing Exception

The Dodd-Frank Act directs the Commission to carve out a robust exception from mandatory clearing requirements for end-users. Without a well-defined exemption, many end-users of derivatives will be forced to divert working capital away from productive use to margin accounts.[2] They might also have to move their hedging practices overseas to stay competitive or forgo hedging altogether—leaving them exposed to the volatility and price uncertainty that over-the-counter ("OTC") derivatives have effectively helped mitigate. As the drafters of the Dodd-Frank Act explained, the CFTC, the Securities and Exchange Commission ("SEC"), and the prudential regulators "must not make hedging so costly it becomes prohibitively expensive for end users to manage their risk."[3] Distinguishing between end-user and more risky swaps should be a foundational component of the new derivatives regulatory regime.[4]

As outlined in Section 723 of the Dodd-Frank Act, the end-user clearing exception is available to a swap transaction party that: (i) is not a financial entity; (ii) is using swaps to hedge or mitigate commercial risk; and (iii) ensures that the Commission is notified of how the party generally meets its financial obligations associated with entering into uncleared swaps.[5]

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[2] Indeed, the drafters of the Dodd-Frank derivatives title have worked to clarify that this was never the intended result. Chairmen Dodd and Lincoln entered a letter to Chairmen Frank and Peterson into the Congressional Record stating, "If regulators raise the costs of end user transactions, they may create more risk. It is imperative that the regulators do not unnecessarily divert working capital from our economy into margin accounts, in a way that would discourage hedging by end users or impair economic growth." 156 CONG. REC. S 6192 (daily ed., July 22, 2010) (statement of Senators Christopher Dodd and Blanche Lincoln).

[3] 156 CONG. REC. S 6192 (daily ed., July 22, 2010) (statement of Senators Christopher Dodd and Blanche Lincoln).

[4] Regarding the risk that derivatives pose to the economy, the Senate bill managers explained that "[i]t is . . . imperative that regulators do not assume that all over-the-counter transactions share the same risk profile." 156 CONG. REC. S 6192 (daily ed., July 22, 2010) (statement of Senators Christopher Dodd and Blanche Lincoln).

[5] 7 U.S.C. § 2(h)(7); Dodd-Frank Act Sec. 723(a)(3).

Notification to the Commission

The proposed rule would require one counterparty[6] to notify a registered swap data repository ("SDR") *each time* an end-user elects to use the clearing exception. When an end-user elects to use the clearing exception, ten additional data items would be reported.[7]

The Coalition generally supports the Commission's proposed rules and the check-the-box notification process. A streamlined approach to the end-user clearing exception would be appropriate given that end-users do not pose systemic risks and therefore merit a lower regulatory and compliance burden.

Frequency of Notification

The proposed rule would require the reporting counterparty to notify an SDR every time an end-user elects to use the clearing exception. The Coalition encourages the Commission to provide end-users with the option of a less frequent notification process. End-users who anticipate using the clearing exception would report all of the required items (including information about eligibility for the clearing exception and how an end-user generally meets its swap-related financial obligations) to an SDR on an annual or other periodic basis. Once an end-user provided the required information, the entity would automatically be classified as an end-user for all of its future swaps. This would have the effect of pre-qualifying that business as a bona fide end-user. Additional end-user reporting for specific swaps would be required only if an end-user used a swap for reasons other than hedging or mitigating commercial risk. In practice, end-users use swaps to hedge or mitigate commercial risk in the normal course of business. Using a swap for purposes *other* than hedging or mitigating commercial risk would be rare for an end-user. A less frequent notification process would accomplish the same reporting objectives as the proposed rule's reporting requirements and have the benefit of potentially reducing the reporting burden on end-users and their counterparties.

In addition to the normal notice filing procedure, the Commission should provide a structure for curing inadvertent failures to file notice that would perfect the end-user exemption. This is particularly important if an SD or MSP is the counterparty that is filing notice. If an SD or MSP files, an end-user should be permitted to reasonably rely upon the undertaking by the SD or MSP that notice was filed. End-users, too, should have the option to file notice themselves under the end-user exemption.

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[6] The proposed rule regarding swap data reporting and recordkeeping would determine which party to a swap is the reporting party. *See* 75 Fed. Reg. 76600 (Dec. 8, 2010).

[7] 75 Fed. Reg. 80748-49 (Dec. 23, 2010).

Meeting Financial Obligations

Under Title VII, the reporting counterparty to a swap must report information about how a non-financial entity that elects to use the end-user clearing exception "generally meets its financial obligations associated with uncleared swaps."[8] End-users can meet their financial obligations in a number of ways including by credit support, pledged or segregated assets, a guarantee, sole reliance on available financial resources, or other means to mitigate credit risk.[9]

The Coalition appreciates the Commission's efforts to streamline the reporting of end-user exception information using a simplified, check-the-box approach. We do not believe that the Commission should require the reporting of additional information. Additional information on meeting obligations would be non-standard information not easily captured and reportable in a systematic fashion. Obtaining additional information would require further manual review of documentation and interpreting and rekeying information. Because end-users do not pose systemic risk, it is unclear how the reporting of more information on meeting financial obligations comports with the legislative intent of the Dodd-Frank Act.

Financial Entity Status

The proposal notes that the end-user clearing exception is available only to non-financial entities or certain affiliates of non-financial entities.[10] The Commission specifically asks for comments about whether an entity that is designated as an SD or MSP with respect to only certain of its swaps should be treated as a financial entity for purposes of the end-user clearing exception. The Coalition believes that it would be most appropriate and in line with the intent of the Dodd-Frank Act to make SD and MSP designation determinations on a category-by-category basis, rather than automatically designating entities as SDs or MSPs for all swap categories.

The Commission should also allow an affiliate of an MSP to use the end-user exception for the swaps the affiliate uses to hedge or mitigate commercial risk. We note that the notice of proposed rulemaking regarding entity definitions contemplates an exemption for certain affiliates of a major participant. The notice states that, even where a subsidiary's positions are attributed to a parent for purposes of major participant calculations, "there still may be questions as to whether the requirements applicable to major participants—e.g., capital, margin and business conduct—should be placed upon the parent or the subsidiary."[11] We agree with the Commission's determination to question the applicability of these requirements to certain

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[8] 7 U.S.C. § 2(h)(7)(A)(iii); Dodd-Frank Act Sec. 723(a)(3).

[9] 75 Fed. Reg. 80749 (Dec. 23, 2010).

[10] 75 Fed. Reg. 80750 (Dec. 23, 2010).

[11] 75 Fed. Reg. 80202 (Dec. 21, 2010).

subsidiaries or affiliates and urge the Commission not to subject end-users to such regulation simply because of the corporate structure in which they reside. The drafters of the Dodd-Frank Act did not intend for end-users to be classified and regulated as major swap participants. In a colloquy after the bill's passage, Chairman Dodd and Chairman Lincoln agreed that "few end users will be major swap participants."[12]

The end-user exception is particularly appropriate for affiliates of parent entities where the parent entity is designated as an MSP but the affiliate, viewed separately, is not. For example, when entering into a swap to hedge or mitigate commercial risk, an affiliate or subsidiary may rely on credit support from an MSP parent entity. In such a situation, the affiliate or subsidiary should qualify as an end-user, regardless of its reliance on the parent entity for credit support. The issuance of such guarantees does not increase or alter the risk profile of the parent guarantor because the underlying commodity or other position of the subsidiary provides offsetting collateral.

As a further example, a parent company that is primarily financial in nature may be designated as an MSP because it uses swaps for financial reasons other than reducing risks associated with its business. Although the parent company is primarily financial in nature, it also acts as a holding company and wholly or partially owns several subsidiaries. These subsidiaries are manufacturing businesses, which make and supply tangible goods to consumers. The manufacturing subsidiaries, by practice, agree to deliver materials to customers and receive payment for those materials at a later date. After delivering the materials, the manufacturers might enter into credit hedges to hedge or mitigate the risk that they would not receive payment from the customers.

Here, the manufacturing subsidiaries are end-users of swaps, using them to hedge or mitigate their commercial risks associated with the manufacturing business. They would each be eligible to use the end-user clearing exception if they were not wholly or partially owned by a holding company that is primarily financial in nature, or that is an MSP. The fact that the affiliate companies are owned by a financial parent entity should not prevent the manufacturers from using the end-user clearing exception. The manufacturers' reasons for using these swaps are the same—to hedge or mitigate commercial risk—regardless of the corporate form and character of their parent.

These and many other possible examples demonstrate the same point: the mere fact that an end-user is affiliated with a parent does not make the affiliate's swaps more risky. It is imperative to keep in mind the Dodd-Frank Act's overarching goal: to reduce systemic risk. A counterparty's true exposure and the risk it poses to the system can be determined only by looking at offsetting positions, the purpose behind its trades, and the potential it has to affect

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[12] 156 Cong. Rec. S 5904 (daily ed. July 15, 2010).

other parties in the system.[13] We agree with the Commission's statements in its proposed rulemaking regarding entity definitions that commercial hedging positions "may not raise the same degree of risk to counterparties as other swap or security-based swap positions"[14] and that swaps used for hedging positions, in general, "pose fewer risks to counterparties and to the markets as a whole than positions that are not for purposes of hedging."[15] Thus, because risk from an end-user's swaps to other counterparties and to the markets is not increased when an end-user is an affiliate of a financial parent entity, they should be regulated in the same manner as if they were not so affiliated.

In addition, we believe that the definition of "Financial Entity" should be clarified to ensure that it excludes entities that enter into commercial hedging on behalf of end-user affiliates. In determining whether an entity is predominantly engaged in financial activities (and is thereby a Financial Entity), swaps entered into by such entity to hedge the commercial risks of its end-user affiliates should not be considered "financial activities." Many end-users use one particular subsidiary for commercial hedging activities. Such swap entities hedge risk by entering into individual back-to-back swaps with affiliates or by entering into swaps to hedge corporate group risk on an aggregate basis. If such swap entities do not engage in other "financial activities," they should be covered by the end-user clearing exception because they are hedging the commercial risk of affiliates that are themselves end-users.

In determining whether an entity is predominantly engaged in financial activities, the activities of its subsidiaries should be taken into account. For example, if a holding company enters into swaps to hedge the commercial risks of its manufacturing subsidiaries, the activities of such manufacturing subsidiaries should be included in determining whether the holding company is predominantly engaged in financial activity. If the holding company is entering into swaps to hedge the commercial risk of the corporate group and the corporate group is predominantly engaged in manufacturing, then the end-user clearing exception should be available to the holding company.

Finance Affiliate Status

The proposed rule requires an indication of whether a person electing to use the end-user clearing exception is: (i) a captive finance affiliate of another person qualifying for the exception

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[13] The Commission itself recognized in the rulemaking proposal that "whether a position is used to hedge or mitigate commercial risk should be determined by the facts and circumstances at the time the swap is entered into, and should take into account the person's overall hedging and risk mitigation strategies." 75 Fed. Reg. 80753 (Dec. 23, 2010).

[14] 75 Fed. Reg. 80198 (Dec. 21, 2010).

[15] 75 Fed. Reg. 80198 (Dec. 21, 2010).

or (ii) an affiliate of another person qualifying for the exception and acting as agent for such person and using a swap to hedge or mitigate commercial risk of such person.[16]

The Commission should interpret this provision for certain finance affiliates to include situations in which a corporate group has centralized its commercial hedging activities in a single affiliate. Such affiliates should qualify as end-users because their sole purpose is to hedge or mitigate the commercial risk of other members of a corporate group, notwithstanding the fact that they may engage in certain financial activities that may cause them to fall under the definition of a "financial entity." The fact that a corporate group may hedge or mitigate its commercial risk via swap transactions executed primarily through centralized hedging centers should not be an artificial barrier to inclusion in the end-user exception.

End-User Board Approval

The proposed rule requires that all persons electing to use the end-user clearing exception indicate whether they are an issuer of securities registered under Exchange Act Section 12 or required to file reports under Exchange Act Section 15(d) ("SEC Filer"). SEC Filers can elect to use the end-user exception only if an *appropriate committee of the SEC Filer's board* has reviewed and approved the decision to not clear a swap.[17]

The Coalition seeks to clarify that board approval would not be required on a per transaction basis. Rather, if board approval is required pursuant to the proposed rules, the board approval would be obtained once and applied to future transactions until otherwise amended. The boards and associated committees of SEC filers only meet periodically (perhaps once a quarter), thus making transactional approval particularly onerous. The Commission should also consider allowing boards to delegate the power to grant approval to executive officers. In short, a streamlined process would be appropriate.

Hedging or Mitigating Commercial Risk

To qualify to use the end-user clearing exception with respect to a particular swap, Title VII requires that a non-financial entity must be using the swap to hedge or mitigate commercial risk. The proposed rule would disqualify a swap from the clearing exception if it is held for a speculative, investing, or trading purpose, or if it hedges another swap that is not held for hedging purposes.[18] As the Coalition stated in its Advance Notice of Proposed Rulemaking comment for entity definitions, the definition of "hedging or mitigating commercial risk" should be interpreted broadly to incorporate all risks associated with entities' operations, including, but not limited to, interest rate risk, currency risk, credit risk, equity price risk, and risks arising from

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16 75 Fed. Reg. 80750 (Dec. 23, 2010).

17 75 Fed. Reg. 80750 (Dec. 23, 2010).

18 75 Fed. Reg. 80757 (Dec. 23, 2010).

the purchase, ownership, production, storage, sale, financing, or transportation of commodities.[19] In a 2009 survey, the Bank for International Settlements found that the top risk hedged with OTC derivatives was foreign currency risk, followed by interest rate risk. It is imperative that all forms of hedging used by end-users be protected by the exemption from clearing requirements.[20]

This reading is consistent with both the Dodd-Frank Act's legislative history and text. Chairmen Lincoln and Dodd emphasized in their letter to Chairmen Frank and Peterson that the hedging of both financial and non-financial risk should be included in the end-user exception, noting that financial firms, such as credit unions, community banks, and farm credit institutions, could employ the end-user exception for their hedging activities.[21] This reading also harmonizes with subparagraph D of the "major swap participant" definition, which excludes entities "whose primary business is providing financing, and use[] derivatives for the purpose of hedging underlying *commercial risks* related to interest rate and foreign currency exposures . . . ."[22] By describing hedging that is linked to financing activities as hedging of "commercial risks," this provision indicates that "commercial risks" are not limited to non-financial risks. That interpretation applies with equal force to the use of the term "commercial risk" throughout the Dodd-Frank Act.[23]

We agree with the premise that "whether an activity is commercial should not be determined solely by an entity's organizational status as a for-profit company, a nonprofit organization, or a governmental entity" and that the "determinative factor should be whether the underlying activity to which the swap relates is commercial in nature."[24] Just as the Commission has proposed a "facts and circumstances" test to determine when a swap qualifies as "hedging or mitigating commercial risk" for the "major swap participant definition," it should employ the same test for end-users. The test should be based on the conditions at the time the swap was entered, taking into account the entity's "overall hedging and risk mitigation strategies."

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19 *Available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=26181&SearchText=.

20 *OTC Derivatives Market Activity in the Second Half of 2009* at 1, Bank for International Settlements, May 2010, www.bis.org/publ/otc_hy1005.pdf?noframes=1.

21 156 CONG. REC. S 6192 (daily ed. July 22, 2010, letter from Senators Lincoln & Dodd to Representatives Frank & Peterson).

22 Dodd-Frank Act Sec. 721(a)(16) (emphasis added).

23 *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992) (noting the "basic canon of statutory construction that identical terms within an Act bear the same meaning").

24 75 Fed. Reg. 807502-53 (Dec. 23, 2010).

The Coalition agrees with this approach because "commercial end users, who are those who use derivatives to hedge legitimate business risks, do not pose systemic risk because they solely use these contracts as a way to provide consumers with lower cost goods."[25] Congress based the availability of the end-user clearing exception in part on an end-user's reason for using a swap—i.e., whether it would be used for hedging or mitigating commercial risk. By doing so, Congress signaled that an entity's motivations for using a swap should affect whether the end-user clearing exception is available. If the fact that an affiliate entity may be partially or wholly-owned by a large parent does not change the reasons for which an affiliate entity enters into a swap, then this strongly suggests that it should not change how the Commission regulates the swap.

The Coalition appreciates that the Commission's interpretation of hedging or mitigating includes not only bona fide hedging and hedging for accounting purposes, but also other types of hedging or mitigating of business risks in six enumerated areas.[26] Defining the meaning of "hedging or mitigating commercial risk" broadly will help ensure that "a consistent Congressional directive throughout all drafts of [the Dodd-Frank Act], and in Congressional debate," is carried out.[27] As Congress intended, a broader definition of "hedging or mitigating commercial risk" will "protect end users from burdensome costs associated with margin requirements and mandatory clearing."[28]

In response to the proposed rules for end-users, the Coalition recommends the following:

1. **That the Commission establish an optional pre-screening process for end-users, whereby information about an end-user's eligibility for the end-user clearing exception would be reported, not each time an end-user entered a swap, but annually or on another periodic basis.**

2. **That affiliates and subsidiaries of an MSP parent entity should be treated as end-users, not as MSPs, if the affiliate or subsidiary would be classified as an end-user but for the fact of it being an affiliate or subsidiary of a parent entity that is an MSP.**

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[25] 156 CONG. REC. H 5244-45 (daily ed., June 30, 2010) (statement of Representative Gary Peters).

[26] 75 Fed. Reg. 80757 (Dec. 23, 2010).

[27] 156 CONG. REC. S 6192 (daily ed., July 22, 2010) (statement of Senators Christopher Dodd and Blanche Lincoln).

[28] 156 CONG. REC. S 6192 (daily ed., July 22, 2010) (statement of Senators Christopher Dodd and Blanche Lincoln).

3. **That parents of SD affiliates and subsidiaries should be treated as end-users, not as MSPs, if the parent would be classified as an end-user but for the fact of it having an affiliate or subsidiary entity that is an MSP.**

4. **That, when entering into a swap to hedge or mitigate commercial risk, an affiliate or subsidiary relying on credit support from an MSP parent entity should qualify as an end-user, regardless of its reliance on the parent entity for credit support.**

5. **That the definition of "hedging or mitigating commercial risk" should be interpreted broadly enough to encompass all possible types of end-user hedging, including, but not limited to the following: interest rate risk; currency risk; credit risk; equity price risk; risks arising from the purchase, ownership, production, storage, sale, financing, or transportation of commodities; and risk of changes to margins from input, processing, output, quality, and time differences**.

Cost-Benefit Analysis

Section 15(a) of the Commodity Exchange Act ("CEA")[29] requires the Commission to evaluate the costs and benefits of any new rule promulgated under the CEA. Specifically, that provision states that the Commission "*shall consider* the costs and benefits" and further directs that "[t]he costs and benefits of the proposed Commission action shall be *evaluated* in light of (A) considerations of protection of market participants and the public; (B) considerations of the efficiency, competitiveness, and financial integrity of futures markets; (C) considerations of price discovery; (D) considerations of sound risk management practices; and (E) other public interest considerations."[30]

In this and previous notices of proposed rulemaking implementing the Dodd-Frank Act, the Commission has taken the position that Section 15(a) "does not require the Commission to quantify the costs and benefits of a new regulation."[31] Instead, the Commission's cost-benefit analysis consists of a recitation of the new rule's requirements—in this case, the notification requirement—and an announcement that the cost of compliance will be "minimal." But the Commission has made no attempt to estimate or objectively value the costs imposed by this and other rulemakings under the Dodd-Frank Act.

We believe that the Commission's current approach does not satisfy the requirements of Section 15(a). Section 15(a) does not "simply require[] the Commission to 'consider the costs and benefits' of its action," as the Commission states. That section goes on to direct that "[t]he

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29 7 U.S.C. § 19(a).

30 7 U.S.C. § 19(a) (emphases added).

31 75 Fed. Reg. 80754; *see also, e.g.,* 76 Fed. Reg. 3698; 75 Fed. Reg. 81519; 75 Fed. Reg. 80638.

costs and benefits of the proposed Commission action shall be *evaluated* . . . ."[32] The plain and ordinary meaning of the term "evaluate" connotes a determination of value or worth.[33] This meaning becomes more clear in context, because the object of "evaluate[]" is "costs"—a monetary figure. Section 15(a) is best understood to require the Commission to formulate an estimate, particularly when (as here) compliance costs are susceptible to empirical measurement.

To be sure, agencies have discretion in choosing a method of cost-benefit analysis. But judicial deference "does not authorize [the reviewing court] to gloss over the critical steps of [the agency's] reasoning process."[34] Courts have not hesitated to vacate or remand agency rules founded on irrational or incomplete cost-benefit analyses.[35] And it is well-established that a reviewing court can "set aside agency action under the Administrative Procedure Act because of failure to adduce empirical data that can readily be obtained."[36] Here, the Commission concluded that "the incremental cost imposed by the proposed rules is outweighed by their expected benefit."[37] But the path of reasoning the Commission followed to reach that conclusion is not discernable, because it has made no attempt to calculate either the costs or the benefits.

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[32] 7 U.S.C. § 19(a)(1).

[33] This is the primary dictionary definition. *See, e.g.,* Webster's Third New International Dictionary 786 (1986) (defining evaluate as "1. a. to set down or express the mathematical value of: express numerically. b. to estimate or ascertain the monetary worth of: value."); The American Heritage Dictionary (2d ed.) (defining evaluate as "1. To ascertain or fix the value or worth of."); *see also Hoppe v. Great Western Business Services, LLC*, 536 F.Supp.2d 888, 894 (N.D. Ill. 2008) ("Evaluation means 'to determine the significance, worth or condition of, usually by careful appraisal and study.'") (quoting Merriam Webster's Collegiate Dictionary (11th ed. 2003)).

[34] *Gas Appliance Mfrs. Ass'n, Inc. v. Dep't of Energy*, 998 F.2d 1041, 1046 (D.C. Cir. 1993).

[35] *See, e.g., Public Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1218-19 (D.C. Cir. 2004) (vacating agency rule based in part on faulty cost-benefit analysis conducted by the agency); *Advocates for Highway and Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1146 (D.C. Cir. 2005) (remanding agency rule based in part on the agency's irrational application of cost-benefit analysis); *Gas Appliance Mfrs. Ass'n, Inc.*, 998 F.2d at 1046 (remanding agency rule based in part on the agency's flawed and irrational to cost-benefit model).

[36] *F.C.C. v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1813 (2009) (citing *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 46-56 (1983)).

[37] 75 Fed. Reg. 80755 (Dec. 23, 2010).

The Commission's approach to cost-benefit analysis also stands in contrast to the SEC's approach in its parallel rulemaking for security-based swaps.[38] In evaluating the cost of clearing notification, for example, the SEC calculated the aggregate annual cost per end-user based on its estimates of the number of security-based swap transactions, the percentage of those transaction in which parties will be eligible to invoke the end-user exception, and the annual "burden hours" for that class of regulated entities.[39] The Commission should adopt a cost-benefit model at least as thorough as that employed by the SEC.

Even if a cursory approach to Section 15(a) cost-benefit analysis were sufficient in other contexts, it fall shorts of the evaluation that the Commission should undertake in the implementation of the Dodd-Frank Act. This series of rulemakings will impose unprecedented new compliance costs on participants in the OTC derivatives market, and those costs should be thoroughly evaluated as the Commission moves forward.

Timing

Finally, the Coalition believes strongly that the deadline for the implementation of the Dodd-Frank Act must be extended. Given the complexity and sheer number of rules that must be written, the Coalition is concerned that the rulemaking process will not benefit from the attention that it deserves from stakeholders and the Commission. The Dodd-Frank Act prescribes an entirely new regulatory system for derivatives transactions that ninety-seven percent of end-user companies rely on to manage risk.[40] More time is needed to allow regulators and the public to fully understand the implications of each proposed rule—including through a cost-benefit analysis process that is commensurate with burdens that the rule could impose, to offer meaningful comment, and to write rules that will provide clarity and stability to the financial system and, at the same time, promote economic growth and innovation.

Conclusion

We thank the Commission for the opportunity to comment on these important issues. We also want to express our appreciation for the willingness of Commission officials to meet with us in order to share perspectives on implementation of the derivatives title. The Coalition looks forward to working with the Commission to help implement rules that serve to strengthen the

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[38] *See* SEC, End-User Exception to Mandatory Clearing of Security-Based Swaps, 75 Fed. Reg. 79992 (2010).

[39] *Id.* at 80007.

[40] Keybridge Research, *An analysis of the Coalition for Derivatives End-Users' Survey on Over-the-Counter Derivatives* at 3, Feb. 11, 2011, available at http://www.centerforcapitalmarkets.com/wp-content/uploads/2010/04/Coalition-for-Derivatives-End-Users-OTC-Derivatives-Survey_Final-Version-2-11-11.pdf.

derivatives market without unduly burdening business end-users and the economy at large. We are available to meet with the Commission to discuss these issues in more detail.

Sincerely,

Agricultural Retailers Association
Business Roundtable
Financial Executives International
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