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July 11, 2011

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

Re: Capital Requirements of Swap Dealers and Major Swap Participants (RIN 3038-AD54) and Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants (RIN 3038-AC97)

Dear Mr. Stawick:

This letter constitutes comments on the Notice of Proposed Rulemakings[1] issued by the Commodity Futures Trading Commission ("Commission" or "CFTC") pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act[2] (the "Dodd-Frank Act"). These comments are submitted by Professor Michael Greenberger of the University of Maryland School of Law on behalf of Americans for Financial Reform. 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 prominent economists and other experts.

As part of the new regulatory framework, Section 731 of Dodd-Frank adds a new Section 4s to the Commodity Exchange Act ("CEA"),[3] which requires that the CFTC adopt rules

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[1] Capital Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 76 Fed. Reg. 27802 (proposed May 12, 2011) [hereinafter "Proposed Capital Rules"]; Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 76 Fed. Reg. 23732 (proposed April 28, 2011) [hereinafter "Proposed Margin Rules"].

[2] Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[3] Commodity Exchange Act, 7 U.S.C. 1 *et seq*.

establishing capital and margin requirements for non-bank Swap Dealers ("SDs") and Major Swap Participants ("MSPs"). In particular, Section 4s(e)(2)(B)(ii) of the CEA provides that the CFTC must impose "capital requirements and both initial and variation margin requirements on all [uncleared swaps]."[4] Congress intended those requirements to "help ensure the safety and soundness of the [SD] or [MSP]; and be appropriate for the risk associated with the non-cleared swaps."[5]

During the financial crisis, the overly leveraged, undercapitalized, under collateralized and opaque nature of unregulated swaps transactions among dealers and their counterparties led to defaults, threatened defaults and grave uncertainty in our financial markets. This was an important cause of the worst financial crisis since the Great Depression. (Indeed, as of the writing of this comment letter, potential sovereign defaults raise the specter of a new and more dangerous crisis related to this still unregulated multi-trillion dollar market.)

The prime, but by no means exclusive, example of these capital adequacy and opaqueness problems arises from the many financial institutions, which entered into credit derivatives transactions with AIG. When AIG could not meet its obligations because there was neither sufficient capital nor collateral, the U.S. taxpayers were asked to bail out AIG at the cost initial of $182.5 billion to make AIG and its big financial entity counterparties whole.

In her recent written testimony before the House Committee on Financial Services, FDIC Chairman Sheila Bair stated: "The exchange of initial margin would have placed some check on AIG's ability to present itself as a guarantor of an impossibly large volume of subprime collateralized debt obligations and would have discouraged institutions from relying unquestioningly on the AIG guarantee."[6] As Chairman Bair aptly noted, adequate margin requirements support a healthy and stable financial system as they limit unreasonable risk taking and provide a necessary cushion that can absorb losses in the event of default.

Furthermore, the recent global financial crisis revealed that OTC derivative positions were not supported by sufficient capital, constituting a major risk for participants. Manmohan Singh, an economist at the International Monetary Fund, calculated, for example: "[I]f market participants posted sufficient collateral to cover all OTC deals properly, they would need an

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[4] § 4s(e)(2)(B)(ii) of CEA

[5] §4s(e)(3)(A) of CEA

[6] Written Testimony of Sheila Bair, Chairman, Federal Deposit Insurance Corporation, *Financial Regulatory Reform: The International Context before the U.S. House Committee on Financial Services*, June 16, 2011.

extra $2,000bn (or about $100bn per big dealer)."[7] Therefore, the proposed capital rules for SDs and MSPs are not only necessary, but must be designed to help protect the swaps dealers from their own poor assessment of risk, as well as end-users, other market participants and, ultimately, the U.S. taxpayer by requiring that counterparties have sufficient high quality capital to satisfy their obligations.

In light of that, the CFTC's proposed rules on capital and margin requirements must be substantially strengthened. Specifically, the following areas warrant further clarification and enhanced regulatory oversight. These changes are consistent with Dodd-Frank's central tenets.

Minimum Capital Requirements

The proposed minimum capital requirements for an SD or MSP that is not part of a U.S. bank holding company or registered as a Futures Commission Merchant ("FCM") would require the maintenance of a minimum of $20 million of "tangible net equity," plus the amount of the SD's or MSP's market risk exposure and OTC counterparty credit risk exposure.[8] While the Commission presents this concept as an acknowledgement of the fact that non-financial, non-bank affiliated SDs or MSPs have fundamentally different capital structures from financial companies and those entities that have previously been subject to regulatory capital requirements, the "tangible net equity" method should only be adopted with caution.

Under the tangible net equity method, which is based on net equity as determined under U.S. Generally Accepted Accounting Principles minus intangibles such as goodwill, almost any assets that are under the physical possession or control of the swap dealer could be included in the calculation. For example, tangible net equity would include balance sheet assets such as land, buildings, equipment, machinery, natural resources such as oil and gas reserves or a power plant owned by an SD or MSP. These assets tend to be highly illiquid.

All capital is not equal in liquidity or marketability. During a period of financial stress, it is imperative that the capital be marketable and able to provide liquidity. While Dodd-Frank specifically permits the use of noncash collateral, so long as they would preserve financial integrity of markets and the stability of the financial system,[9] the CFTC must not sacrifice the

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[7] Yves Smith, *More Evidence of Undercapitalization/Insolvency of Major Banks*, NAKED CAPITALISM (January 21, 2011), *available at* http://www.nakedcapitalism.com/2011/01/more-evidence-of-undercapitalizationinsolvency-of-major-banks.html (citing Manmohan Singh, *Collateral, Netting and Systemic Risk in the OTC Derivatives Market*, IMF Working Paper (April 2010), *available at* http://www.imf.org/external/pubs/ft/wp/2010/wp1099.pdf).

[8] *See* Proposed Capital Rules at 27806, *supra* note 1.

[9] *See* §§731 and 764 of the Dodd-Frank Act, *supra* note 2.

quality of capital, which would completely undercut the very purpose that this proposal is designed to achieve.

Considering that a significant portion of certain SDs and MSPs' equity may be comprised of physical and other non-current assets, permitting only cash, cash equivalent, or government guaranteed notes would impose an unreasonable burden on those SDs and MSPs. On the other hand, poorly capitalized (i.e., illiquid assets) companies represent higher risks to their counterparties and the financial system if the overall economy weakens and they cannot save capital for running operations.

As one of the largest accounting firms states, the recent financial crisis has "highlighted significant uncertainty and opacity in valuation, particularly in markets that are not resiliently liquid."[10] For example, during the subprime mortgage crisis, the value of mortgage-related assets (also known as, "toxic assets") was not readily determinable despite being secured by real property.

The Commission in its rulemakings must confront this practical dilemma. In doing so, the CFTC should adopt the proposed approach within the Request for Comment section in the proposed rules, which is to "require an SD or MSP to hold unencumbered liquid assets equal to the sum of the total amount of initial margin that the SD or MSP would have to post with a counterparty for all uncleared swap transactions and the total amount of any unpaid variation margin that the SD or MSP owes to any counterparty."[11] Under this approach, assets that are deemed to be highly liquid should be allowed: cash, cash equivalents, and obligations of government sponsored entities. The qualifying liquid assets should be subject to market value haircuts. A haircut refers to the percentage discount on the value of assets.[12] These assets would be reasonably liquid and marketable and would not sacrifice the quality of capital which might result in another financial crisis arising from poorly capitalized entities.

Quality of Collateral for Margin

Similar to the discussion regarding the minimum capital requirements as discussed above, the quality of collateral for the proposed margin requirements is also important. The proposed margin rules §§ 23.157(a)(3) and (b)(3) state that to the extent a non-financial entity and a dealer

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[10] *See* Catherine Stretton, Partner, Financial Services Team, Deloitte, *Accounting values during the crisis*, (Valuations and illiquidity, January 2011), *available at* http://www.deloitte.com/assets/Dcom-SouthAfrica/Local%20Assets/Documents/9.%20Basel%20flyer%20-%20Valuation.pdf.

[11] *See* Proposed Capital Rules at 27817, *supra* note 1.

[12] Nadja Kamhi, *Procyclicality and Margin Requirements*, Bank of Canada, (Financial System Review, June 2009), *available at* http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.151.264&rep=rep1&type=pdf#page=60.

have agreed that the non-financial entity will post initial and variation margin, the dealer may accept "any asset" the value of which is reasonably ascertainable. This completely and totally undercuts the very purpose of the margin requirements, which is to provide a financial cushion in cases of default. The CFTC should follow the prudential regulators' proposal and require dealers to collect only highly liquid and marketable assets. Therefore, only the following collateral should be accepted: cash and cash equivalents and any obligation which is a direct obligation of the United State and any senior debt obligations of the government sponsored entities subject to an appropriate haircut.

Even though Section 4s(e)(3)(C) provides that the Commission may allow dealers to accept non-cash collateral, the statute specifically imposes limits as to the quality of collateral. Particularly, the Commission, in determining the quality of assets, must consider whether it would preserve the financial integrity of the markets and the stability of the U.S. and worldwide financial systems. Allowing CSEs to accept virtually any assets as collateral is a very dangerous proposal, especially in light of Dodd-Frank's central mission to prevent defaults that, in this multi-trillion dollar market, can cascade into worldwide calamity.

Collecting Margin vs. Posting Margins for Positions between Dealers and Financial Entities

One-way margin in trades between covered swap entities ("CSEs" or "dealers") and financial entities is not consistent with the requirements under Section 4s(3) that margin requirements help ensure the safety and soundness of SDs and MSPs. In other words, the proposed rules' initial and variation margin requirements generally apply only to the *collection* of margin by a covered swap entity from its counterparties with an exception for transactions between two covered swap entities.

In its rulemaking, the Commission states that in order to promulgate "comparable [margin rules] to those of the prudential regulators to the maximum extent practicable,"[13] the Commission admittedly *follows* the prudential regulators' proposed rules. However, the Commission raises a number of concerns with this one-way margin approach:

> (i) Two-way variation margin has been a keystone of the ability of derivatives clearing organizations ["DCOs"] to manage risk;
> (ii) If two-way variation margin were not required for uncleared swaps between CSEs and financial entities, the CSE's exposures may be allowed to accumulate…. Unchecked accumulation of such exposures was one of the characteristics of the financial crisis;

[13] *See* Proposed Margin Rules at 23736, *supra* note 1.

> (iii) Daily payment [of margin by a CSE to its counterparty] helps safety and soundness by preventing the CSE from building up exposures that it cannot fulfill; and
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> (iv) Two-way variation would address the risk associated with the non-cleared swaps held as a swap dealer or major swap participant."[14]

The Commission correctly stated that "well-designed margin systems protect *both parties* to a trade as well as the *overall financial system*. They serve both as a check on risk-taking that might exceed a party's financial capacity and as a resource that can limit losses when there is a failure."[15] As one of the largest market participants has stated: "Perhaps most significantly, the ability of small entities to impose two-way margin agreements with bigger counterparties all affects the effectiveness of margin agreements in practice."[16]

However, from the proposed one-way margin it can be inferred that the prudential regulators are willing to prioritize the financial health of covered swap entities over the stability of the financial market as a whole. Any rule that is designed to only protect one side of the transaction, *i.e.*, covered swap entities, warrants substantial rethinking and revision. As the recent financial crisis revealed, large dealers can and, indeed, did fail. In the case of the Lehman bankruptcy, Lehman, one of the largest derivatives dealers, was a counterparty or guarantor of over 930,000 OTC derivatives.[17] The Lehman liquidators are now embroiled in a huge battle with Lehman's OTC derivative counterparties. This demonstrates that regulators must protect counterparties from covered swap entities in order to ensure financial stability, rather than focus primarily on the financial health of dealers.

One of the central aims of Dodd-Frank derivatives reform is to reduce systemic risk in the United States – indeed, the worldwide – financial system. The margin provision itself states that margin requirements are designed to guard against "financial risk."[18] Margin requirements cannot offset the greater risk to the uncleared swaps, unless the margin requirements are applied directly to the covered swap entities and they are compelled to *post margin* to and *collect margin* from their counterparties.

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[14] *Id*.

[15] *See* Proposed Margin Rules at 23733, *supra* note 1 (emphasis added).

[16] Barclay Capital, *Counterparty risk in credit markets* (Quantitative Credit Strategy, February 20, 2008), *available at* http://www.noelwatson.com/blog/content/binary/BarCapCounterparty.pdf.

[17] GuyLaine Charles, *OTC Derivative Contracts in Bankruptcy: The Lehman Experience*, N.Y. BUS. L. J. §1:14 (Spring 2009), *available at* http://www.nysba.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=30052.

[18] *See* §731 of the Dodd-Frank Act, *supra* note 2.

This requirement, otherwise known as a "two-way margin requirement" enables clearinghouses to manage risk successfully and prudentially for cleared swaps. There is no reason why the same approach cannot be appropriately applied in the context of uncleared swaps. Through the payment and collection of margin from both dealers and their counterparties, *all parties* can be protected against any counterparty risk. In addition, all parties can benefit from the risk management discipline of forecasting potential exposures from derivatives contracts and setting aside resources against these exposures.

Moreover, as uncleared swaps are more customized, they generally require more time than cleared swaps to be liquidated. This is particularly the case in distressed market conditions. Therefore, the failure to account for counterparty risk for uncleared swaps will certainly increase the potential for devastating and cascading losses in the event of default.

A plain reading of the Act makes clear that swap entities that enter into uncleared swap transactions are subject to margin requirements. In particular, the margin requirements of Section 731 apply to "swap dealers and major swap participants, *with respect to their activities as a swap dealer or major swap participant*." Dodd-Frank therefore requires that covered swap entities post margin on their dealings in uncleared swaps. The drafters of Dodd-Frank made it clear that the statute requires this very approach: "In cases where a Swap Dealer enters into an uncleared swap with an end user, *margin on the dealer side of the transaction* should reflect the counterparty risk of the transaction."[19]

Positions between CSEs and Non-Financial Entities

The CFTC's proposal does not impose margin requirements on positions between CSEs and non-financial entities. Here, the CFTC should adopt the well-reasoned approach of the safety and soundness regulators and require a covered swap entity to calculate a credit exposure limit for a non-financial entity and collect initial margin and variation margin from a non-financial entity when the credit exposure exceeds the calculated limit.[20] Such requirements are designed to adjust to a commercial end user's risk profile. For example, if a nonfinancial end user has a strong credit profile, a derivatives dealer would not require margin. Indeed, some

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[19] Letter from Senator Christopher Dodd, Chairman, Senate Committee on Banking, Housing, and Urban Affairs, and Senator Blanche Lincoln, Chairman, Senate Committee on Agriculture, Nutrition, and Forestry, to Representative Barney Frank, Chairman, Financial Services Committee, and Representative Colin Peterson, Chairman, Committee on Agriculture (June 30, 2010), *available at* http://online.wsj.com/public/resources/documents/dodd-lincoln-letter070110.pdf (emphasis added).

[20] *See* Baking Proposed Rules at 27587, 27590-91, *supra* note 1.

derivative transactions "already require collateral. But even for those that do not, [dealer] banks adjust the cost based on the credit profile of the buyer."[21]

Such rules should provide more guidance about how to implement this threshold-based approach. In particular, the CFTC should promulgate rules to review, monitor and approve covered swap entities' policies and procedures for determining appropriate thresholds and collecting margin when such limits are exceeded. There should also be a requirement that dealers internally validate the threshold model periodically. Furthermore, such policies and procedures should be well documented including all material aspects of the threshold model and should be presented to the Board or an appropriate committee of the Board for review and approval upon adoption and whenever significant changes are made, but no less frequently than annually. This would be consistent with the proposed end-user board approval programs.[22]

Initial and Variation Margin Calculation

The proposed rules would allow an SD and MSP to use a third-party model to calculate initial margin. While it is true that the Commission faces significant budget constraints to review individual entities' proprietary models, the Commission, for compliance purposes, should establish a strict set of rules and procedures for all third-party models.

Furthermore, it is critically important that any third-party model is at least as strict as the DCOs' model for the same or similar products. Because a DCO must continually monitor the risk associated with the derivatives product, DCOs are in the best position to calculate the margin amount.

The proposed alternative method in the case where models are unavailable warrants support. Under the proposal, a covered swap entity would identify in the agreements "the swap cleared by a DCO in the same asset class as the uncleared swap for which the terms and conditions most closely approximate the terms and conditions of the uncleared swap."[23] Then, the covered swap entity would multiply the required margin amount for a similar cleared swap by a specific multiplier that is calculated by comparing the anticipated liquidation time horizon for the cleared products with the uncleared swap, then applying other add-ons to address the characteristics of customized swaps for uncleared swaps.[24] Under this approach, the risks

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[21] Francesco Guerrera, *In the post-crisis world, risk must be sensibly priced*, FINANCIAL TIMES (April 25, 2011).

[22] *See* End-User exception to Mandatory Clearing of Swaps, 75 Fed. Reg. 80747, 80750 (proposed December 23, 2010).

[23] *See* CFTC's Margin Proposal at 23737, *supra* note 1.

[24] *See* CFTC's Margin Proposal at 23737-8, *supra* note 1.

associated with uncleared swaps are adequately addressed by the multiplier, which in turn provides the necessary collateral cushion on both parties to the swaps.

Proposed § 23.504(b)(4), which would require the parties to agree upon a swap trading documentation that includes methods, procedures, rules and inputs for determining the variation margin, warrants strong support. This documentation would be required to constitute a complete and independently verifiable methodology for valuing each swap. This will ensure the timely and effective resolution of any dispute that may arise from the posting and collecting of variation margin.

Thank you for the opportunity to comment on these Proposed Rules. If you have any further questions, please contact Michael Greenberger, Professor at the University of Maryland School of Law, at mgreenberger@law.umaryland.edu or (410) 706-3846, Jung Lee, Law and Policy Analyst, University of Maryland Center for Health and Homeland Security, at jlee@law.umaryland.edu or (410) 706-3503, or Marcus Stanley, Policy Director of Americans for Financial Reform, at marcus@ourfinancialsecurity.org or (202) 466-3672.

Sincerely,

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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
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- 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 People's Action
- National Training and Information Center/National People's Action
- National Council of Women's Organizations
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- Opportunity Finance Network
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- PICO
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- Poverty and Race Research Action Council
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- Sargent Shriver Center on Poverty Law
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- The Seminal
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- United States Student Association
- USAction
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- 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)
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- Fitness and Praise Youth Development, Inc., Baton Rouge LA
- Florida Consumer Action Network
- Florida PIRG
- Funding Partners for Housing Solutions, Ft. Collins CO
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- Grow Iowa Foundation, Greenfield IA
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- Idaho Nevada CDFI, Pocatello ID
- Idaho Chapter, National Association of Social Workers
- Illinois PIRG
- Impact Capital, Seattle WA
- Indiana PIRG
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- Iowa Citizens for Community Improvement
- JobStart Chautauqua, Inc., Mayville NY
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- Low Income Investment Fund, San Francisco CA
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- 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
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