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Chris Kirkpatrick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20581

Re: **Interim Final Rule on Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants (RIN 3038-AC97)**

Dear Mr. Kirkpatrick:

The Commodity Markets Council (“CMC”) appreciates the opportunity to submit the following comments to the Commodity Futures Trading Commission (the “CFTC” or “Commission”) as part of its comment period for its interim final rule on margin requirements for uncleared swaps for swap dealers (“SD”) and major swap participants (“MSP”) (the “interim final rule”).¹

I. Introduction

CMC is a trade association that brings together exchanges and their industry counterparts. Its members include commercial end-users that utilize the futures and swaps markets for agriculture, energy, metal, and soft commodities. Its industry member firms also include regular users and members of swap execution facilities (each, a “SEF”) as well as designated contract markets (each, a “DCM”), such as the Chicago Board of Trade, Chicago Mercantile Exchange, ICE Futures US, Minneapolis Grain Exchange, and the New York Mercantile Exchange. Along with these market participants, CMC members also include regulated derivatives exchanges. The businesses of all CMC members depend upon the efficient and competitive functioning of the risk management products traded on DCMs, SEFs, and over-the-counter (“OTC”) markets. As a result, CMC is well-positioned to provide a consensus view of commercial end-users on the impact of the Commission’s proposed regulations on derivatives markets. Its comments, however, represent the collective view of CMC’s members, including end-users, intermediaries, and exchanges.

II. Interim Final Rule on Margin Requirements for Uncleared Swaps

While CMC members recognize the risk reducing benefits of posting margin in certain uncleared swap transactions, CMC members also believe that the rule was not intended to capture commercial end-users and it is important that end-users not be saddled with additional,

¹ See Interim Final Rule on Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants (“Interim Final Rule”), 81 Fed. Reg. 636 (Jan. 6, 2016).

unnecessary costs. While end-users are excluded from the requirement to post cash margin for uncleared swaps, “Financial End-Users” are required to post cash margin.

If CMC member companies, which for the most part constitute commercial end-users, are captured by the definition of “Financial End-User” as set forth in Sec. 23.151, then they would be required to post margin for uncleared swap transactions. While the CFTC likely did not intend to capture commercial end-users in the definition of “Financial End-User,” ambiguity in the definition of “Financial End-User” will embolden SD counterparties, for the first time, to charge these commercial end-users cash margin in most instances. This would increase the cost of hedging and place a regulatory burden on end-users who do not contribute to the risks that Dodd-Frank and the interim final rule were intended to address. Moreover, many commercial end-users are not capitalized in a manner that would allow them to fund cash margin. Such a requirement could make certain hedging swaps cost prohibitive for commercial end-users and eviscerate one important benefit of the end-user exemption from clearing.

A. “Financial End-User” Definition

The primary concern for CMC members is the definition of “Financial End-User” set out in Section 23.151 (1) (xi), which states:

“An entity, person, or arrangement that is, or holds itself out as being, an entity, person, or arrangement that raises money from investors, accepts money from clients, or uses its own money *primarily* for investing or trading or facilitating the investing or trading in loans, securities, swaps, funds, or *other assets*,” (*emphasis added*).

CMC would recommend three minor changes to the rule text that would remove any ambiguity and provide commercial end-users with the certainty required to avoid the imposition of unnecessary and prohibitively expensive cash margin requirements by SD counter parties. Each of the three changes are described below.

1. “Primarily” should be replaced with “Predominantly”

CMC members believe that the word “primarily” in the definition of “Financial End-User” should be replaced with the word “predominantly.” While the term “primarily” is not defined and could be open to interpretation, the term “predominantly” has been previously defined in other, related contexts.² To avoid market place confusion and to make it clear that an entity will

² See, e.g. Title I of Dodd Frank Section 102(a)(6), “a company is predominantly engaged in financial activities... if the annual gross revenues derived by the company and all of its subsidiaries from activities that are financial in nature ... represents 85 percent or more of the consolidated annual gross revenues of the company...” See also, Section 2(h)(7)(C) of the Commodity Exchange Act (“CEA”). That definition pertains to which entities may or may not be eligible for an exemption from the Act’s mandatory clearing requirement. The first clause of that paragraph refers to a financial entity as including: “(VIII) a person predominantly engaged in activities that are in the business of banking, or in activities that are financial in nature, as defined in section 1843(k) of title 12.” Subsection (n) of 12 USC 1843 defines “predominantly” for these purposes as: “(2) Predominantly financial. For purposes of this subsection, a company is predominantly engaged in financial activities if the annual gross revenues derived by the holding company and all subsidiaries of the holding company (excluding revenues derived from subsidiary depository institutions), on a consolidated basis, from engaging in activities that are financial in nature or are incidental to a financial activity under subsection (k) represent at least 85 percent of the consolidated annual gross

not be deemed to be a “Financial End-User” unless 85% of the entity’s revenue is derived from the conduct described in Section 23.151 (1) (xi), the rule should be amended to substitute “primarily” with “predominantly.” This would make the rule text consistent with the preamble language concerning this section and remove any ambiguity that currently exists.³

2. “Financial” should be inserted before “Assets”

CMC believes that the reference to “Assets” in the definition of “Financial End-User” set out in Section 23.151 (1) (xi) is not intended to refer to all assets. Such an interpretation would capture a broad swath of companies that “primarily” (or “predominantly”) invest in any number of asset types — real estate, commercial goods, physical commodities, intellectual property, farm equipment, etc. A wide range of commercial enterprises will be unintentionally captured by the definition of “Financial End-User”. This ambiguity can be avoided by inserting the word “financial” before “assets” to make the rule clear that only financial assets are contemplated in this definition.

3. Use of “Financial Assets” for hedging should not be regarded as trading.

When using financial assets to hedge commercial risk, such hedging should not be regarded as “trading.” While CMC members recognize the importance of capturing trading and investing in swaps and other financial assets to determine who should be deemed a “Financial End-User,” commercial end-users that utilize financial assets to hedge or mitigate commercial risk should not be deemed a “Financial End-User” on this basis alone. CMC would suggest inserting “(other than for hedging or mitigating an entities own commercial risk);” after the word “assets” at the end of Section 23.151 (1) (xi) to address this concern and provide certainty to end-users.

III. Conclusion

As stated in the preamble to the interim final rule, the CFTC seeks to “capture all financial counterparties without being overly broad and capturing commercial firms.”⁴ CMC respectfully submits that the changes to the rule text set forth above are necessary to accomplish this goal and to provide commercial end-users the clarity and certainty needed to avoid unnecessary and cost prohibitive cash margin requirements.

To implement the suggested rule changes described above, the CFTC would need to make only modest changes to the current rule text by substituting current Section 23.151 (1) (xi), with the following language:

“An entity, person, or arrangement that is, or holds itself out as being, an entity, person, or

revenues of the company.” CMC submits that, for purposes of this test, revenue derived from profitable hedges should not be included in the 85% calculation given that profitable hedging is off set by losses in the underlying, hedged position.

³ See Interim Final Rule, 81 Fed. Reg. at 640, “an entity or person would be a financial entity if it raises money from investors, uses its own funds, or accepts money from clients or customers to *predominantly engage* in investing, dealing, or trading in loans, securities, or swaps.” (*emphasis added*).

⁴ Id.

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arrangement that raises money from investors, accepts money from clients, or uses its own money ***predominantly*** ~~primarily~~ for investing or trading or facilitating the investing or trading in loans, securities, swaps, funds, or other ***financial*** assets (***other than for hedging or mitigating an entities own commercial risk***);” (***emphasis added***).

Thank you for the opportunity to provide comments on the commercial impacts of this interim final rule. If you have any questions or concerns, please do not hesitate to contact Kevin Batteh at Kevin.Batteh@Commoditymkts.org.

Sincerely,



Kevin K. Batteh

General Counsel

Commodity Markets Council