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H. R. 4726

To help end-users better utilize derivatives markets by refining the definition of financial entity, clarifying how affiliates can utilize the end-user exception, and harmonizing clearing and margin exemptions.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 17, 2019

Mr. MARSHALL introduced the following bill; which was referred to the
Committee on Agriculture

A BILL

To help end-users better utilize derivatives markets by refining the definition of financial entity, clarifying how affiliates can utilize the end-user exception, and harmonizing clearing and margin exemptions.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Certainty for End-
5 Users Act”.

6 **SEC. 2. CLARIFYING THE FINANCIAL ENTITY DEFINITION.**

7 (a) IN GENERAL.—Section 2(h) of the Commodity
8 Exchange Act (7 U.S.C. 2(h)) is amended—

(1) by striking paragraph (1)(A) and inserting the following:

“(A) STANDARD FOR CLEARING.—It shall be unlawful for a financial entity to engage in a swap with another financial entity, unless the swap is submitted for clearing to a derivatives clearing organization registered under this Act or a derivatives clearing organization exempt from registration under this Act if the swap is required to be cleared.”; and

(2) in paragraph (7)—

(A) in the paragraph heading, by striking “EXCEPTIONS” and inserting “APPLICATION OF CLEARING REQUIREMENT”;

(B) by striking subparagraphs (A) and (B) and redesignating subparagraph (C) as subparagraph (A);

(C) in subparagraph (A) (as so redesignated)—

(i) by striking clause (i) and inserting the following:

“(i) IN GENERAL.—In this subsection, the term ‘financial entity’ means the following:

1 “(I) INSTITUTIONS NOT STATU-
2 TORILY EXEMPTED.—

3 “(aa) A financial institution.

4 “(bb) A swap dealer.

5 “(cc) A security-based swap
6 dealer.

7 “(dd) A major swap partici-
8 pant.

9 “(ee) A major security-based
10 swap participant.

11 “(ff) A commodity pool that
12 is required to be operated by a
13 commodity pool operator reg-
14 istered with the Commission, or a
15 foreign person that would be
16 such a commodity pool if the for-
17 eign person were organized under
18 the laws of the United States or
19 any State.

20 “(gg) An investment com-
21 pany (as defined in section 3 of
22 the Investment Company Act of
23 1940 (15 U.S.C. 80a–3)), or a
24 foreign person that would be
25 such an investment company if

1 the foreign person were organized
2 under the laws of the United
3 States or any State.

4 “(II) PRIVATE FUNDS.—A pri-
5 vate fund as defined in section 202(a)
6 of the Investment Advisers Act of
7 1940 (15 U.S.C. 80–b–2(a)), or a for-
8 eign person that would be such a pri-
9 vate fund if the foreign person were
10 organized under the laws of the
11 United States or any State.

12 “(III) OTHER PERSONS.—Such
13 other persons the Commission deter-
14 mines by rule to be predominantly en-
15 gaged in activities that are financial
16 in nature. In making such a deter-
17 mination, the Commission may con-
18 sider section 4(k) of the Bank Hold-
19 ing Company Act of 1956. The Com-
20 mission shall promulgate regulations
21 to carry out this subclause.”;

22 (ii) in clause (iii), by striking “Such
23 definition” and inserting “The term”; and

24 (iii) by adding at the end the fol-
25 lowing:

1 “(iv) DE MINIMIS EXCLUSION.—

2 “(I) AMOUNTS.—A person de-
3 scribed in subclause (III), and not
4 subclause (I) or (II), of clause (i)
5 shall not be considered a financial en-
6 tity for purposes of this subsection if
7 the total swaps activity of the person,
8 when calculated with those of all other
9 affiliated persons who are so de-
10 scribed, amount to less than—

11 “(aa) \$1,000,000,000 in
12 gross notional swaps transactions
13 calculated on the basis of a roll-
14 ing 12-month period; or

15 “(bb) an alternative de mini-
16 mis amount of swaps activity, ex-
17 posure, transactions, or other
18 measurement, as determined by
19 the Commission. At least every 5
20 years, the Commission shall con-
21 sider modifying the alternative de
22 minimis amount due to inflation
23 or other market factors.

1 “(II) CALCULATION.—The cal-
2 culation under subclause (I) shall not
3 include—

4 “(aa) swaps used to hedge
5 or mitigate risk associated with
6 an asset owned or liability in-
7 curred or reasonably likely to be
8 owned or incurred by an entity in
9 the conduct of such entity’s busi-
10 ness; or

11 “(bb) swaps used by an in-
12 surance company for asset rep-
13 lication if they are expressly per-
14 mitted by State insurance regu-
15 lators to be entered into in con-
16 junction with other investments
17 in order to replicate the invest-
18 ment characteristics of otherwise
19 permissible investments.

20 “(III) REQUIREMENTS OF ENTI-
21 TIES RELYING ON THE DE MINIMIS
22 EXCLUSION.—An entity that relies on
23 the de minimis exception in this
24 clause to avoid clearing swaps trans-
25 actions that the Commission requires

1 a financial entity to clear pursuant to
 2 paragraph (1)(A) and Commission
 3 regulations shall, with respect to the
 4 swaps, report or cause to be reported,
 5 to a registered swap data repository
 6 the reliance of the entity on the de
 7 minimis exclusion.”; and

8 (D) by inserting after subparagraph (A)
 9 (as amended by the preceding provisions of this
 10 paragraph) the following:

11 “(B) ADDITIONAL DEFINITIONS.—In this
 12 subsection:

13 “(i) AFFILIATE STATUS.—2 entities
 14 are affiliated if—

15 “(I) 1 of the entities, directly or
 16 indirectly, holds a majority ownership
 17 interest in the other entity; or

18 “(II) a third party, directly or in-
 19 directly, holds a majority ownership
 20 interest in both entities.

21 “(ii) NON-FINANCIAL ENTITY.—The
 22 term ‘non-financial entity’ means—

23 “(I) a person not described in
 24 subparagraph (A)(i); or

1 “(II) a person described in clause
2 (ii), (iii), or (iv) of subparagraph (A).

3 “(C) REQUIREMENTS OF NON-FINANCIAL
4 ENTITIES.—A non-financial entity that engages
5 in swaps transactions that the Commission re-
6 quires a financial entity to clear pursuant to
7 paragraph (1)(A) and Commission regulations
8 shall, with respect to the swaps, report or cause
9 to be reported, to a registered swap data reposi-
10 tory their status as a non-financial entity.”.

11 **SEC. 3. SIMPLIFYING THE END-USER AFFILIATE PROCESS.**

12 Section 2(h)(7) of the Commodity Exchange Act (7
13 U.S.C. 2(h)(7)), as amended by section 2 of this Act, is
14 amended—

15 (1) by striking subparagraph (D) and inserting
16 the following:

17 “(D) RISK MANAGEMENT THROUGH AF-
18 FILIATES.—

19 “(i) EXCEPTION.—The requirements
20 of paragraph (1)(A) shall not apply to a
21 swap entered into by a risk management
22 entity if the swap is—

23 “(I) used to hedge or mitigate el-
24 igible risk originating from one or

1 more affiliated non-financial entities;
2 and

3 “(II) not netted, combined, or
4 consolidated with any other swap to
5 which the requirements of paragraph
6 (1)(A) apply.

7 “(ii) RISK MANAGEMENT ENTITY DE-
8 FINED.—In this subparagraph, the term
9 ‘risk management entity’ means—

10 “(I) an entity described in sub-
11 clause (II), and not subclause (I), of
12 subparagraph (A)(i), that enters only
13 into transactions related to the man-
14 agement of eligible risk;

15 “(II) an entity described in only
16 subclause (III) of subparagraph
17 (A)(i); or

18 “(III) a non-financial entity.

19 “(iii) ELIGIBLE RISK DEFINED.—In
20 this subparagraph, the term ‘eligible risk’
21 means risk that—

22 “(I) originates from a non-finan-
23 cial entity;

24 “(II) is associated with an asset
25 owned or liability incurred or reason-

ably likely to be owned or incurred by
the non-financial entity in the conduct
of the business of the non-financial
entity;

“(III) is not netted, combined, or
consolidated with risk originating
from any affiliated financial entity;
and

“(IV) if transferred, is trans-
ferred only to or through one or more
affiliated risk management entities.

“(iv) REQUIREMENTS OF RISK MAN-
AGEMENT ENTITIES.—A risk management
entity that engages in swaps which utilize
the exception in this subparagraph shall—

“(I) notify the Commission, in a
manner prescribed by the Commis-
sion, how the risk management entity
generally meets the financial obliga-
tions of the risk management entity
associated with entering into non-
cleared swaps;

“(II) identify those swaps used to
hedge or mitigate eligible risk origi-

1 nating from one or more affiliated
2 non-financial entities; and

3 “(III) maintain books and
4 records of the swaps which utilize the
5 exception in this subparagraph and
6 the related eligible risk in such form
7 and manner and for such period as
8 may be required by the Commission.

9 “(v) NO EFFECT ON NON-FINANCIAL
10 ENTITIES.—Nothing in this subparagraph
11 shall be interpreted to limit the ability of
12 any non-financial entity to engage in a
13 swap to which the requirements of para-
14 graph (1)(A) do not apply.”; and

15 (2) by striking subparagraph (F) and inserting
16 the following:

17 “(F) ABUSE OF EXCEPTION.—The Com-
18 mission may prescribe such rules or issue such
19 interpretations of the rules as the Commission
20 determines to be necessary to prevent abuse of
21 the exceptions described in this paragraph. The
22 Commission may request information from a
23 person claiming to be a non-financial entity as
24 necessary to prevent evasion of the rules or

1 abuse of the exceptions described in this para-
 2 graph.”.

3 **SEC. 4. ALIGNMENT OF MARGIN REQUIREMENTS.**

4 Section 4s(e)(4) of the Commodity Exchange Act (7
 5 U.S.C. 6s(e)(4)) is amended to read as follows:

6 “(4) EXCEPTIONS TO MARGIN REQUIRE-
 7 MENTS.—

8 “(A) IN GENERAL.—Paragraphs (2)(A)(ii)
 9 and (2)(B)(ii), including the initial and vari-
 10 ation margin requirements imposed under such
 11 paragraphs, shall not apply to a swap—

12 “(i) in which a counterparty is a non-
 13 financial entity (as defined in section
 14 2(h)(7)(B)(ii)), regardless of whether the
 15 swap is required to be cleared;

16 “(ii) that qualifies for the exception
 17 provided in subparagraph (D) of section
 18 2(h)(7), or that would so qualify if the
 19 swap were required to be cleared; or

20 “(iii) that qualifies for an exception or
 21 exemption from the requirements of section
 22 2(h)(1)(A) pursuant to any Commission
 23 rule, regulation, or order.

24 “(B) PRESERVATION OF VARIATION MAR-
 25 GIN EXCHANGE REQUIREMENT APPLICABLE TO

1 CERTAIN INSURANCE COMPANIES.—Notwith-
 2 standing subparagraph (A) of this paragraph, if
 3 an insurance company would be a financial en-
 4 tity for purposes of section 2(h) if the swaps
 5 described in section 2(h)(7)(A)(iv)(II)(bb) of
 6 the insurance company were not excluded from
 7 the de minimis calculation under section
 8 2(h)(7)(A)(iv), then all swaps of the insurance
 9 company shall be subject to the variation mar-
 10 gin requirements of paragraphs (2)(A)(ii) and
 11 (2)(B)(ii) of this subsection.”.

12 **SEC. 5. MODIFICATION OF DEFINITION OF MAJOR SWAP**
 13 **PARTICIPANT.**

14 Section 1a(33)(A)(iii)(I) of the Commodity Exchange
 15 Act (7 U.S.C. 1a(33)(A)(iii)(I)) is amended by inserting
 16 “, or a non-financial entity that would be considered to
 17 be a financial entity for purposes of section 2(h) but for
 18 the application of the de minimis exclusion provided for
 19 in section 2(h)(7)(A)(iv),” before “that is highly”.

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