

116TH CONGRESS  
1ST SESSION

# 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.

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## IN THE HOUSE OF REPRESENTATIVES

OCTOBER 17, 2019

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

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

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

11 (2) in paragraph (7)—

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

15 (B) by striking subparagraphs (A) and (B)  
16 and redesignating subparagraph (C) as sub-  
17 paragraph (A);

18 (C) in subparagraph (A) (as so redesign-  
19 dated)—

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

22 “(i) IN GENERAL.—In this subsection,  
23 the term ‘financial entity’ means the fol-  
24 lowing:

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”;

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                         FILATES.—

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-

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

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

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

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

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

23 “(II) identify those swaps used to  
24 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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