

Coalition for Derivatives End-Users

January 16, 2024

Chief Counsel's Office
Attention: Comment Processing
Office of the Comptroller of the Currency
400 7th Street SW, Suite 3E-218
Washington, DC 20219

Ms. Ann E. Misback
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551

Mr. James P. Sheesley
Assistant Executive Secretary
Attention: Comments/Legal OES (RIN 3064-AF29)
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

Via Agency Website

Re: *Comment Letter on Proposed Rules: "Large Banking Organizations and Banking Organizations with Significant Trading Activity" (OCC Docket Number OCC-2023-0008 (RIN 1557-1557-AE78); Board Docket No. R-1813 (RIN 7100-AG64); FDIC RIN 3064-AF29); and "Risk-Based Capital Surcharges for Global Systemically Important Bank Holding Companies; Systemic Risk Report (FR Y-15)" (Board Docket No. R-1814 (RIN 7100-AG65))*

The Coalition for Derivatives End-Users (the "Coalition") is pleased to respond to the requests for comments by:

1. The Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System (the "Federal Reserve") and the Federal Deposit Insurance Corporation (collectively, the "Federal Banking Agencies") in connection with the notice of proposed rulemaking titled "Regulatory Capital Rule: Large Banking Organizations and Banking Organizations with Significant Trading Activity" (the "Basel III Endgame Proposal"); and
2. The Federal Reserve in connection with the notice of proposed rulemaking titled "Regulatory Capital Rule: Risk-Based Capital Surcharges for Global Systemically Important Bank Holding Companies; Systemic Risk Report (FR Y-15)" (the "GSIB Surcharge Proposal" and, together with the Basel III Endgame Proposal, the "Proposals").¹

¹ 88 Fed. Reg. 64028 (Sept. 18, 2023) (Basel III Endgame Proposal); 88 Fed. Reg. 60385 (Sept. 1, 2023) (GSIB Surcharge Proposal).

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To begin, the Coalition is extremely concerned with several aspects of the Proposals, which fail to consider the significant impacts on derivatives end-users and the broader U.S. economy. We raised concerns in a letter dated July 5, 2023 and addressed to the Federal Banking Agencies.² We hoped that, by sharing our thoughts prior to release of the Basel III Endgame Proposal, any proposal would avoid the principal concerns we raised. Unfortunately, that did not happen. Today, then, we share comments on behalf of the end-user community with the goal of ensuring that end-users continue to be able to efficiently and effectively manage their business risks and are not subjected to undue burdens in so doing.

I. Background

The Coalition represents hundreds of end-user companies across the U.S. that employ derivatives primarily to manage the commercial risks they face in connection with their day-to-day businesses. Our message is straightforward: financial regulatory reform measures should promote economic stability, transparency and resiliency without imposing undue burdens on derivatives end-users and the broader U.S. economy. Imposing unnecessary regulation directly on end-users or indirectly, through their counterparties as these Proposals do, will create more economic instability, restrict job growth, decrease productive investment and hamper U.S. competitiveness in the global economy—and may result in less hedging by end-users.

The use of derivatives to hedge commercial risk benefits the global economy by allowing a range of businesses—from manufacturing to healthcare to agriculture to energy to renewable power to technology—to improve their planning and forecasting and offer more stable prices to consumers and more significant contributions to economic growth. Large banking organizations that would be subject to the Proposals serve as critical counterparties to commercial end-users for their derivatives transactions. They also serve as capital markets intermediaries, sources of stable credit, underwriters of corporate debt and equity securities, and liquidity providers, and play other critical financial intermediary roles. The Proposals would significantly increase capital requirements for the largest U.S. banks that provide the bulk of derivatives-related products and services to corporations of all sizes and across the economy. Corporations use derivatives products to hedge and mitigate commercial risks associated with their businesses, including interest rate risk, foreign currency risk and commodities risks. Coalition members' ability to hedge and mitigate such commercial risks is crucial to their business operations and the broader U.S. economy. Yet, the availability and cost of and competition for the delivery of such products would be materially adversely affected in the wake of changes implemented under the Proposals.

The Coalition supports the Federal Banking Agencies' efforts to promote safety and soundness and resolvability and bolster financial stability. However, the Coalition has serious concerns with several major aspects of the Proposals. Commercial end-users face material increases in hedging costs, disincentivizing prudent risk-management by corporations and ultimately increasing risk and reducing investment in our economy. In that concern, we echo statements made by Federal Reserve Chair Powell who voiced concerns that "... raising capital requirements also increases the cost of, and reduces access to, credit. And the proposed very large increase in risk-weighted assets

² A copy of the Coalition's letter, dated July 5, 2023, is attached hereto. The Coalition requests that the letter be incorporated into the record of the Federal Banking Agencies' review and consideration of the Proposals.

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for market risk overall requires us to assess the risk that large U.S. banks could reduce their activities in this area, threatening a decline in liquidity in critical markets and a movement of some of these activities into the shadow banking sector.”³ Fellow Board Member Governor Bowman conveyed similar concerns when she urged the Federal Banking Agencies to “carefully weigh the trade-offs of increased safety from higher capital levels, and the costs to banks, consumers, businesses, and the broader economy” and “factor in the broader regulatory landscape, and how changes to capital regulations may complement, overlap, or conflict with other regulatory requirements.”⁴

In the current economic and geopolitical environment, the Coalition has serious concerns that increased transaction costs associated with prudent risk-management hedging practices by derivatives end-users will result in two materially adverse impacts: (i) even further increased costs will flow through to consumers for goods, services and everyday necessities; and (ii) reduced capacity for derivatives end-users to hedge their commercial risks because the costs to hedge those risks could become prohibitively expensive, which would lead to greater price volatility. These results would be bad for consumers and bad for economic stability and neither result decreases risk to the broader U.S. economy—a flawed and detrimental result of the Proposals.

Specifically, the Coalition is concerned with the following aspects of the Proposals:

Proposal of Amendments Applicable to Large Banking Organizations and to Banking Organizations with Significant Trading Activity

1. **Credit Valuation Adjustment (“CVA”)**: With respect to CVA risk, the Basel III Endgame Proposal would require all large banking organizations (instead of Category I and II banking organizations under the current capital rules) to raise additional capital for CVA on derivatives transactions with all counterparties. This is completely additive and overlaps with capital that is already held by large U.S. banking organizations as a result of CVA’s inclusion in the Global Market Shock (“GMS”) component of the Federal Reserve’s Comprehensive Capital Analysis and Review (“CCAR”). Further, the Basel III Endgame Proposal would not include a tailored approach to commercial end-users, resulting in the inclusion of derivatives transactions with corporates, pension funds and certain other counterparties in the calculation of CVA risk capital, regardless of their status as counterparties who use derivatives to reduce inherent risk in their business, rather than to speculate. These derivatives transactions tend to be long term and directional and thus attract higher CVA risk capital, which would translate into significantly higher costs and reduced availability of these products, leading to significantly adverse outcomes for those end-users.

³ Jerome H. Powell, *Opening Statement on the Large Bank Capital Requirement Proposal* by Chair Jerome H. Powell (July 27, 2023), available at: <https://www.federalreserve.gov/aboutthefed/boardmeetings/powell-statement-20230727.pdf>.

⁴ Michelle W. Bowman, *Statement by Federal Reserve Governor Michelle W. Bowman At the Board Meeting considering proposed rules to implement the Basel III endgame agreement for large banks and adjustments to the surcharge for U.S. global systemically important banks* (July 27, 2023), available at: <https://www.federalreserve.gov/aboutthefed/boardmeetings/bowman-statement-20230727.pdf>.

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- a. *Requested Revision:* The Coalition urges the Federal Banking Agencies to exempt from CVA-risk-capital requirements: (i) uncleared derivatives transactions with commercial end-users and their associated hedges (a) because of the undue burden imposed on commercial end-users, (b) because increased CVA-risk-capital requirements would be in contravention of public policy objectives designed to support the ability of commercial end-users to engage in derivative transactions for risk-management purposes and (c) to align U.S. capital requirements with those implemented by other jurisdictions; and (ii) client cleared derivatives transactions because there is no CVA risk to large banks in client clearing.
2. **Fundamental Review of the Trading Book:** The Coalition has significant concerns with the calibration of the market risk component of the Basel III Endgame Proposal – known as the Fundamental Review of the Trading Book (“FRTB”), principally the lack of diversification and hedge recognition, as well as concerns that—similar to CVA—FRTB is duplicative of and redundant with aspects of the GMS component of CCAR, which is designed to capture risks similar to those captured by FRTB.
 - a. *Requested Revision:* The Coalition urges the Federal Banking Agencies to make substantive changes to FRTB to avoid the double counting of market risks under the Basel III Endgame Proposal and the GMS component of CCAR or, failing that, to delay the implementation of FRTB until a holistic review has been performed across FRTB and the GMS component of CCAR. In the absence of such substantive changes or a delay in its implementation, the Coalition urges that derivatives with commercial end-users and their associated hedges should be exempt from FRTB’s non-modellable risk factor (“NMRF”) requirements to avoid undue burden on derivatives end-users.
3. **Determination of “Investment Grade” for Unlisted Corporate Exposures (the “Public Listing Requirement”):** The Basel III Endgame Proposal would provide a preferential 65% risk weight for investment grade corporate exposures based on a large banking organization’s internal assessment of creditworthiness. The Basel III Endgame Proposal would require, however, that the preferential 65% risk weight can only be applied if the counterparty or its parent has outstanding shares that are publicly traded on a national securities exchange or foreign equivalent—a requirement that in and of itself is not a sole leading indicator of creditworthiness or default risk.
 - a. *Requested Revision:* The Coalition urges the Federal Banking Agencies to remove the Public Listing Requirement because it is likely to negatively affect highly creditworthy corporations, agriculture and food processing entities, energy producers, corporate pensions, mutual funds and small and mid-sized businesses, among others, that are not publicly listed, with no corresponding benefit to large banking organizations, and diverges—materially—from the capital requirements implemented by the EU and the UK.

Proposal to Revise the Calculation of the GSIB Risk-Based Capital Surcharge

The GSIB Surcharge Proposal will significantly increase capital requirements for the over-the-counter (“OTC”) client clearing activities of the U.S. GSIBs. Since the inception of the GSIB surcharge in the U.S., OTC derivatives clearing under the agency model have been excluded from the GSIB surcharge’s complexity and interconnectedness indicators. The GSIB Surcharge Proposal would add OTC derivatives clearing under the agency model to the complexity and interconnectedness indicators of the GSIB surcharge.

As it relates to the complexity indicator, the inclusion of OTC derivatives clearing under the agency model would not align with the policies underlying the GSIB framework. Clearing improves standardization and transparency which, in turn, reduce both complexity and systemic risk. Thus, including OTC derivatives clearing under the agency model would be distinctly at odds with the policy objectives of the overall GSIB framework. It should be noted that international regulators, including the EU and the UK, continue to view that client clearing under the agency model does not add to the complexity indicator.

Raising capital requirements for OTC derivatives clearing would introduce barriers for end-users in accessing cleared OTC derivatives services, by increasing costs for end-users and decreasing capacity of clearing by the U.S. GSIBs. This runs counter to the G20 and the Dodd-Frank Act reforms, which encouraged central clearing of derivatives, and would increase systemic risk by reducing the capacity of prudentially regulated banks from providing client clearing.⁵ In addition, many OTC derivatives traded by Coalition members are mandated for clearing and the increase in costs may mean end-users are unable to hedge those mandated products.

- a. *Requested Revision:* The Coalition urges the Federal Reserve not to add OTC derivatives clearing under the agency model to the complexity and interconnectedness indicators of the GSIB surcharge.

⁵ A November 19, 2018 Financial Stability Board (“FSB”) titled “*Incentives to centrally cleared over-the-counter (OTC) derivatives: A post-implementation evaluation of the effects of the G20 financial regulatory reforms – final report,*” available at: <https://www.bis.org/publ/othp29.pdf>, contained the following findings:

- “OTC derivatives contracts have in general become more standardised and more likely to be centrally cleared. As a result, complexity has declined in these markets, and consequently the likelihood this activity is a source of contagion following bank failure has reduced. These are intended consequences which reduce systemic risk. *An assessment whether the GSIB methodology provides appropriate incentives for central clearing and whether it provides any unwarranted disincentives for banks to provide client clearing services may be merited.*” (FSB report, at 70 (emphasis supplied)).
- “The equivalent treatment of the same notional whether centrally cleared or uncleared in the complexity measure was seen as failing to recognise the benefits of central clearing in reducing complexity in the financial system. Trade standardisation, robust margining practices and other aspects of CCP financial resources, and predictable default management and porting processes are all viewed as significant here.” (FSB report, at 69).

Request for a More Holistic Approach

Although we provide specific recommendations to improve the framework for securities, derivatives, market risk and corporate exposures, we want to highlight that the Proposals' structural deficiencies and lack of publicly available impact analyses would prevent discrete or targeted changes alone from resulting in an appropriately calibrated capital framework, and that a more holistic approach is necessary in order to avoid disruptions to our members' ability to access critical services. We therefore urge the Federal Banking Agencies to re-propose the Basel III Endgame Proposal and the Federal Reserve to re-propose the GSIB Surcharge Proposal in a manner that better substantiates the benefits of these changes and allows the public to understand the Federal Banking Agencies' impact analyses of these Proposals.

II. The Proposals' Impacts on Hedging

As noted above, corporations use derivatives to efficiently manage their price risks, allowing those companies to more consistently forecast their earnings and focus on growing their core businesses to the benefit of the U.S. economy. Utilities, airlines and manufacturers use commodity derivatives to hedge against volatility in input costs; farmers and the agricultural industry use commodity derivatives to lock in prices so they can confidently grow; corporations with international operations must hedge the risk of currency fluctuations arising from operating on a global stage; renewable power producers use electricity derivatives to insulate their earnings from future swings in commodities markets and raise construction funding; corporations that have issued debt hedge against changes in interest rates; and corporate pensions use derivatives to ensure a safe stream of income for American retirees. The benefits of these risk mitigation transactions feed through to the American public through reduced costs, greater investment in innovation and job creation, broader market discipline and economic and financial stability.

To help facilitate the efficient access to the derivatives hedging market, Congress deliberately exempted end-users that are hedging business risks from having to post margin on uncleared derivatives transactions and from having to clear derivatives transactions.⁶ In alignment with those policy objectives designed to support the ability of commercial end-users to engage in derivative transactions for risk-management purposes and in recognition of the same concerns raised in this letter, the Standardized Approach for Counterparty Credit Risk ("SA-CCR") rule finalized by the Federal Banking Agencies in 2020 removed the alpha factor of 1.4 from the exposure amount

⁶ See, e.g., The Commodity Exchange Act and the Securities Exchange Act of 1934, as amended by sections 731 and 764, respectively, of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), require the agencies to, in establishing capital and margin requirements for non-cleared swaps, provide an exemption for certain types of counterparties (e.g., counterparties that are not financial entities and are using swaps to hedge or mitigate commercial risks) from the mandatory clearing requirement. See 7 U.S.C. § 6s(e)(3)(C); 15 U.S.C. § 78o-10(e)(3)(C); see also 12 CFR Part 45 (OCC); 12 CFR Part 237 (Federal Reserve); and 12 CFR Part 349 (FDIC) (swap margin rule); Business Risk Mitigation Price Stabilization Act of 2015. "Forcing businesses to post margin not only ties up capital, but also makes it more expensive for firms to utilize the risk management tools that they need to protect their businesses from uncertainty. Today's bill clarifies in statute that Congress meant what it said when it exempted end users from margin and clearing requirements. Specifically, it ensures that those businesses which are exempt from clearing their hedges are also exempt from margining those hedges." 114th Congr. Rec. H-67-68 (Jan. 7, 2015) (statement of Rep. Mike Conaway).

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calculation for derivative contracts with commercial end-user counterparties, thus mitigating some of the impacts of higher capital requirements that otherwise would have resulted from the SA-CCR.⁷

The significant increase in CVA-risk-capital requirements in the Basel III Endgame Proposal would effectively undo the benefits afforded to derivatives end-users by the lower multiplier under the final SA-CCR rule by adding an additional and entirely new driver of capital, and would be in contravention of public policy objectives specifically designed to support the ability of commercial end-users to engage in derivatives transactions for risk-management purposes. Such increases would have wide-ranging impacts beyond large banking organizations subject to the Proposals and beyond even their immediate counterparties.⁸

When considering the impacts of the Proposals on end-users—and, ultimately, consumers—the Coalition is reminded of the testimony of Craig Reiners, the then-Director of Risk Management for MillerCoors LLC, testifying on behalf of the Coalition, before the House Committee on Financial Services at the hearing titled “Assessing the Regulatory, Economic and Market Implications of the Dodd-Frank Derivatives Title.”⁹ Mr. Reiners’ testimony from 2011 about the importance of hedging to end-users and the impact of increases in the cost of hedging is equally apt today:

I believe the use of derivatives offers end users of physical commodities the risk management tools to provide a necessary degree of predictability to our earnings. Our single largest risk is aluminum. Our agricultural risks, of course, include malt and barley, corn and hops. Our energy risk portfolio includes coal, natural gas, deregulated electricity, and diesel fuel. As I mentioned before, our Board-approved commodity risk policy clearly forbids any and all speculation. The policy allows us to use over-the-counter swaps to precisely match the timing and prices of our complex manufacturing and distribution process. For example, we match our OTC swaps for aluminum with the actual use of cans over the same exact timeframe. This risk management technique allows us to manage costs, reduce price volatility, and manage cash flow within a reasonable parameter. In fact, we would create significantly more price volatility in our business by not hedging. We believe that end users generally share the concern that if the cost of hedging our risks rises significantly, entry into swaps may no longer be economical. The result would be a reduction in risk mitigation through hedging, which, ironically, could increase risk and exposure to market volatility.¹⁰

⁷ “Standardized Approach for Calculating the Exposure Amount of Derivative Contracts” 85 Fed. Reg. 4362, at 4365 (Jan. 24, 2020).

⁸ *See, supra*, note 6.

⁹ *See* “Assessing the Regulatory, Economic and Market Implications of the Dodd-Frank Derivatives Title,” U.S. House Committee on Financial Services, 112th Cong., 1st sess. (Feb. 15, 2011), *available at*: <https://financialservices.house.gov/uploadedfiles/112-5.pdf>.

¹⁰ *Id.*, Testimony of Mr. Craig Reiners, at 52.

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In short, then, as now, the unintended consequences of policies that increase the cost of hedging would be experienced by end-users and the broader U.S. economy because of the critical role that large U.S. banking organizations play as financial intermediaries in the markets. The bottom line is, “add[ing] additional cost to the regulatory system ... does translate right in to [the] cost of goods sold.”¹¹ We fear that the impacts would be far-reaching; from a gallon of gas to a six-pack of beer, consumers would not be spared.

The significant costs of the Proposals are clear. First, the Federal Banking Agencies note that the aggregate capital levels are expected to increase by nearly 20% across banks that provide these services and 70% for market risk specifically.¹² Second, not only will the Basel III Endgame Proposal result in materially higher aggregate levels of capital, but the implementation of the Basel III Endgame Proposal in the U.S. will begin at higher levels than the rest of the world will end after a substantial transition period afforded outside the United States.¹³ But even these significant capital increases do not hit all business sectors proportionately. Projected increases in capital for derivatives activities in particular are materially higher than these blended totals, and the impact will be felt disproportionately in the derivatives markets.

The Coalition respectfully submits that the benefits to the broader markets are substantially less clear. In fact, among the more than 1,000 pages of the Proposals, there is very little that describes overall benefits of the Proposals aside from citing selected academic research on the costs of the financial crisis; further, there is virtually no discussion or data that provides estimates of the costs and benefits to derivatives end-users.

Significantly increased costs of capital would force large banking organizations to pass on those higher capital costs to end-users and their customers or require derivatives end-users to post margin on those derivatives transactions—in either case undermining Congressional and Federal Banking Agency exemptions specifically designed to mitigate those risks in furtherance of sound public policy. Alternatively, the resulting higher costs of capital may require large banks to simply withdraw from some capital markets activities altogether, which would either force corporations to stop utilizing risk-reducing derivatives entirely, or would drive derivatives activity into the unregulated, opaque shadow banking system. Increased transaction costs may also force corporations to hedge less or not to hedge their derivatives transactions altogether. This, of course, would result in increased systemic risk to the financial markets more broadly, particularly during times of stress. Material increases in cost, coupled with the potential decrease in large bank participation in these markets, would hinder end-users’ abilities to effectively hedge and reduce business risks. This, in turn, would discourage capital investment, economic growth and job creation and reduce the resiliency and innovation of U.S. companies who may reinvest less in growth to offset those increased costs. Finally, increased transaction and hedging costs will undoubtedly flow through to consumers who are already experiencing dramatic increases in costs for their goods, services and everyday necessities.

¹¹ *Id.* at 67.

¹² *See* Basel III Endgame Proposal, 88 Fed. Reg. 64028, at 64168-64170.

¹³ *Id.* at 64166; *compare with* the transition provisions provided under the EU and UK proposals, for example.

III. CVA

Under the Basel III Endgame Proposal, CVA capital must be calculated for all counterparties with CVA-covered positions with no exemptions, resulting in the inclusion of derivatives transactions with corporates, pension funds and certain other counterparties in large banking organizations' CVA-risk-capital requirements. For derivatives transactions with commercial end-users, CVA will be entirely additive to existing capital already required to be held by large banking organizations on derivatives transactions, with no corresponding benefit to those banking organizations or the broader financial system generally as described below.

- ***The Coalition urges the Federal Banking Agencies to exempt derivatives transactions with corporates, pension funds, insurance companies and other commercial end-users (and their associated hedges) from CVA-risk-capital requirements.***

The application of CVA-risk-capital requirements to derivatives transactions with commercial end-users would undermine legislative and regulatory relief afforded to commercial end-users under the final SA-CCR rule and through margin and clearing exemptions. Application to such transactions would be especially impactful to commercial end-users, which are exempt from margin requirements. As Congress has recognized, derivatives transactions with commercial end-users are risk-reducing to the broader financial system and, therefore, exempting such transactions from the CVA-risk-capital requirements would not contribute to systemic risk. Indeed, the Basel III Endgame Proposal could increase risks to the broader financial system by reducing large bank offerings of hedging transactions. This could leave end-users unable to hedge their risks or forced to go to unregulated, riskier counterparties to hedge their risks.

Such an exemption also would be entirely consistent with the proposal adopted by the EU, which expressly exempts commercial end-users from CVA in recognition of the reduced risk associated with such transactions. Absent a corresponding exemption under the Basel III Endgame Proposal, U.S. commercial end-users engaged in derivatives transactions with large banking organizations would be placed at a material disadvantage vis-à-vis their non-U.S. competitors. Additionally, exempting CVA hedges associated with client-facing derivatives activities would ensure that large banking organizations are not penalized for prudently managing their counterparty risk positions where it is possible, via a variety of market hedging instruments.

Finally, CVA risk for derivatives transactions with commercial end-users are already capitalized for—and risk-managed by—large banking organizations through the application of the GMS component of CCAR; thus, including these transactions in CVA-risk-capital requirements is only additive to existing capital requirements, with no corresponding benefit to large banking organizations, their counterparties or the broader financial system.

- ***The Coalition also urges the Federal Banking Agencies to exempt client cleared derivatives transactions from CVA-risk-capital requirements.***

Simply put, there is no CVA risk for large banks associated with client cleared derivatives transaction activity. In fact, the Coalition respectfully submits that the Federal Banking Agencies should be incentivizing this very type of transaction, given the significant broader financial stability benefits of clearing. Indeed, the UK's Prudential Regulation Authority ("PRA")

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highlighted these points in its decision to retain the exemption from CVA-risk-capital requirements for client clearing transactions: “The PRA proposes to retain the existing CRR exemption from CVA capital requirements for client clearing transactions, given that the PRA considers their risk to be low due to high levels of collateralisation, and the broader systemic benefits of clearing.”¹⁴

As alluded to immediately above, such an exemption also would be consistent with the proposals set forth in the EU and the UK. Absent an exemption, U.S. commercial end-users hedging their risks with large banking organizations would be placed at a material disadvantage vis-à-vis their non-U.S. competitors engaging in the same activity with an EU or UK bank, a seemingly bad result (with very real adverse consequences) given the immaterial risk of such transactions to large banking organizations and the broader financial stability benefits from hedging transactions.

Finally, it is worth noting that U.S.-based corporations of all sizes clear their trades through large U.S. banking organizations because they are unable to become members of clearing organizations themselves. Reducing the capacity of prudentially regulated banks from providing client clearing activities, therefore, would decrease availability of clearing activities and increase pricing and systemic risk overall, causing harm to various industries in the U.S., particularly pension funds and the U.S. farming and agriculture industry, who are the biggest users of clearing services from large U.S. banking organizations.

IV. FRTB

- ***The Coalition urges the Federal Banking Agencies to make substantive changes to FRTB to avoid the double counting of market risks under the Basel III Endgame Proposal and the GMS component of CCAR or, failing that, to delay the implementation of FRTB until a holistic review has been performed across FRTB and the GMS component of CCAR.***

The new market risk component of the Basel III Endgame Proposal, known as FRTB, has been calibrated to require large banking organizations to capitalize for market risk assuming a period of market stress. The global market shock component of CCAR also requires large banking organizations to capitalize for market risk assuming a period of market stress. FRTB was calibrated and finalized by the Basel Committee without regard for the U.S. CCAR stress tests. The Federal Banking Agencies have not made meaningful modifications to FRTB in the Basel III Endgame Proposal. Therefore, FRTB is completely additive with the GMS component of CCAR. This leads to capital requirements significantly higher than appropriate given the underlying risk, resulting in redundancy, overlap and inefficiency in the broader capital framework. Federal Reserve Governor Bowman urged such consideration in her statement in dissent of the Basel III Endgame Proposal:

Rather than considering piecemeal changes to risk-based capital rules, in my view, regulators should review the entirety of these rules, and where possible, find ways to rationalize requirements. ... [The Basel III Endgame Proposal] is intended to improve risk capture, but in some circumstances, leaves in place and even

¹⁴ Bank of England, *Consultation Paper 16/22 – Implementation of the Basel 3.1 standards*, § 7.12 (November 30, 2022), available at: <https://www.bankofengland.co.uk/prudential-regulation/publication/2022/november/implementation-of-the-basel-3-1-standards>.

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introduces new regulatory redundancies, as with changes to the market risk capital rule, credit valuation adjustments, and operational risk that overlap with stress testing requirements and the stress capital buffer. It is not clear whether or when we will revisit the broader set of capital rules to address redundancy and overlap, but doing so could significantly improve the efficiency of the capital framework.¹⁵

The Coalition urges the Federal Banking Agencies to make substantive changes to the Basel III Endgame Proposal to avoid the effective double counting of market risks under FRTB and the GMS component of CCAR. Absent such changes, the Coalition urges the Federal Banking Agencies to delay the implementation of FRTB until a more holistic review of its calibration with the GMS component of CCAR has been fully performed and analyzed.

Furthermore, the new “Non-Modellable Risk Factor,” or NMRF, component significantly increases capital on the types of bespoke and tailored derivative hedging transactions that commercial end-users, pension funds, mutual funds and insurance companies utilize to efficiently and safely manage their business risks. In the absence of substantive changes to the Proposal or delaying the implementation of FRTB, the Coalition urges that transactions with commercial end-users and associated hedges should be exempt from the FRTB’s NMRF.

V. Public Listing Requirement

- *The Coalition urges the Federal Banking Agencies to eliminate the Public Listing Requirement from the final rule.*

The Basel III Endgame Proposal’s inclusion of a reduced, 65% risk weight for derivatives with investment-grade counterparties is an important recognition of the fact that differences exist between corporations, and an exposure to an established, creditworthy counterparty need not be capitalized in the same way as an exposure to a newer, more growth-oriented company, even under the existing counterparty credit framework (*i.e.*, SA-CCR). However, under the Basel III Endgame Proposal, to be eligible for the reduced credit-risk-capital requirement for investment-grade corporate exposures, the company (or its parent) must have securities outstanding on a recognized national securities exchange or foreign equivalent.

In its current form, the Basel III Endgame Proposal would significantly penalize exposures to highly creditworthy corporations, agriculture and food processing entities, energy producers, corporate pensions, mutual funds and small and mid-sized businesses, among others, simply because they are not publicly listed. The requirement is misplaced and results in an improper allocation of capital because a public listing does not directly correspond to heightened creditworthiness nor does it reduce risk of default vis-à-vis an unlisted commercial end-user. Stock exchanges like the NASDAQ and New York Stock Exchange do not incorporate creditworthiness into their listing criteria. Relatedly, a privately held company does not have diminished “creditworthiness” or an increased risk of default simply because it is privately held. Moreover, small and mid-sized businesses, the engine of economic growth in the United States, generally do not list their securities. Finally, the EU and UK regulators’ implementation proposals do not include the Public Listing Requirement in recognition of those realities. Removing the Public

¹⁵ Statement by Federal Reserve Governor Michelle W. Bowman, *supra*, note 4.

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Listing Requirement from the final rule would ensure greater consistency between the Basel III Endgame Proposal, as implemented, and the EU and UK proposals, promote a level playing field among the jurisdictions and ensure that credit-risk-capital requirements are applied in a manner commensurate with a counterparty's actual credit risk and not assigned a higher or lower risk rating (and correspondingly lower or higher capital charge) based on a factor that is not solely determinative of creditworthiness.

VI. Inclusion of OTC Client Clearing in the Complexity and Interconnectedness Indicators of the GSIB Surcharge

- *The Coalition urges the Federal Reserve to continue to exclude OTC client cleared transactions from the complexity and interconnectedness indicators of the GSIB surcharge.*

The GSIB Surcharge Proposal would significantly increase the capital required for large banking organizations' derivatives clearing businesses, which will introduce barriers to end-users in accessing cleared OTC derivatives services, including reduced availability and higher costs. This runs contrary to the public policy objectives of the G20 and the Dodd-Frank Act clearing mandates, which were intended to reduce complexity and interconnectedness in the financial system—and have safely and effectively done so.¹⁶ If adopted in its current form, the GSIB Surcharge Proposal will exacerbate capacity challenges facing the clearing ecosystem today and make central clearing more expensive to end-users. If end-users must pay more to continue hedging their risks in a safe and prudent manner that contributes both to their own stability and the stability of the broader financial system and U.S. economy, the costs will ultimately be borne by U.S. consumers.

Moreover, the inclusion of OTC derivatives clearing under the agency model would not align with the policy rationales underlying the GSIB framework. Clearing improves standardization and transparency—each of which reduces complexity and systemic risk. Thus, the inclusion of OTC derivatives clearing under the agency model in the complexity indicator would be inconsistent with both (i) the objectives of the overall GSIB framework of reducing market complexity and overall systemic risk and (ii) international standards which continue to exclude client clearing under the agency model from the complexity indicator.

VII. Conclusion

Derivatives end-users would be materially adversely affected by the adoption of the CVA, FRTB and Public Listing Requirement as proposed, as well as the Federal Reserve's proposal to amend the GSIB surcharge framework. These aspects of the Proposals would lead to significant disruptions in the derivative markets, which would reduce market liquidity and efficiency, particularly during periods of stress, and increase transaction costs. Large banks would be required to either pass on those costs of higher capital to end-users and their customers or simply withdraw from some capital markets activities altogether which, in the latter case, could shift activity to the shadow banking system and away from the watchful eyes of U.S. regulators, which would increase risk to financial stability, particularly during times of stress. Finally, these aspects of the Proposals would create, if implemented substantially as proposed, an uneven playing field for large U.S.

¹⁶ See, *supra*, note 5.

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banking organizations vis-à-vis their U.S. non-bank competitors and their non-U.S., international bank competitors, thus impacting U.S. companies that rely on those U.S. banking organizations to manage their risks. This result dictates that the Federal Banking Agencies align with the sensible approaches that regulators in the EU, UK and other jurisdictions have proposed or implemented.

We therefore urge the Federal Banking Agencies to re-propose the Basel III Endgame Proposal and GSIB Surcharge Proposal with the recommendations and data cited above. Short of that, as described herein, we believe substantial modifications to the Proposals are critical.

* * *

Thank you in advance for your consideration of the Coalition's and the below listed end-users' and trade associations' comments in response to the Proposed Rule. Please contact Michael Bopp at 202.955.8256 or at mbopp@gibsondunn.com if you have any questions regarding our comments or require any additional information on any of the topics discussed herein.

As always, the Coalition stands ready to work with the Federal Banking Agencies to help implement capital rules that promote safety and soundness and resolvability, bolster financial stability, provide clarity to the markets and reduce complexity without unduly burdening business end-users and the broader U.S. economy.

Sincerely,

The Coalition for Derivatives End Users
AB InBev
Aisera Inc.
Alabama Municipal Electric Authority
American Farm Bureau Federation
American Honda Finance Corp.
American Public Gas Association
Apexon
Arena Energy
Ascent Resources
AT&T
Aukum Group LLC
Aviation Facilities Company Management
B&B Hotels
BASA Resources, Inc.
Basin Electric Power Cooperative
BayWa r.e.
Black Belt Energy
BPL Medical
Callon Petroleum Company
Carroll Electric Membership Cooperative
Chatham Financial Corp.
Chesapeake Energy Corporation
Clarke-Mobile Counties Gas District

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Commodity Markets Council
Comstock Resources
Conexa Saude
Constructel Visabeira S.A.
Cprime, Inc.
Cummins Inc.
Cyfirma
Cypress Creek Renewables
data.world
Digibee
Dow Inc.
Electric Power Supply Association
Energy Trading Institute
EQT Corporation
FirstMeridian Business Services Limited
Fortress Information Security
Fuelcomm Inc. d/b/a Stackline
GC Infrastructure Investors LLC
GridPoint, Inc.
Hertz
HES International B.V.
Hilton Worldwide Holdings Inc.
Honeywell International Inc.
Hydrostor Inc.
ILS Inc.
International Business Machines Corporation
IOG Resources
Kaiser Aluminum
Kinder Morgan Inc.
Liberty Global
Liberty Latin America Ltd.
Lower Alabama Gas
Madhive
Marriott International, Inc.
Metiri Group
MoEngage Inc.
Moody's
National Association of Manufacturers
National Cattlemen's Beef Association
National Rural Electric Cooperative Association
NNESP LLC
NNN REIT, Inc.
Norgine BV
Northeast Natural Energy LLC
Oglethorpe Power Corporation
Omega Healthcare

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Ovintiv Inc.
PayPal Holdings, Inc.
PBF Energy Inc.
People Corporation
Public Energy Authority of Kentucky
Recover Fiber
Rhythm Energy
RWE Supply & Trading Americas LLC
Sabinal Energy
Seneca Resources Company
Siemens USA
Slickdeals LLC
Snyder Brothers, Inc.
Southwest Airlines Co.
Striim
Sunin
Terra Energy Partners
The Association of Corporate Treasurers
Tienda Inglesa
Transcendia
Unico
U.S. Chamber of Commerce
U.S. Steel
Vistra Corp.
Visual Comfort & Co.
Vodafone
Volvo Group North America
Warner Bros. Discovery, Inc.
Western Farmers Electric Cooperative
Whirlpool Corporation
WildFire Energy
Xylem
Yum Brands
Zaxby's

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Attachment

- Letter from the Coalition to the Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, and Office of the Comptroller of the Current, dated July 5, 2023, re: “*Consideration of the Basel III Endgame Reforms and their Impact on the End-User Community*”