From: David, Teresa <TDavid@CFTC.gov>
Sent: Friday, October 22, 2010 10:02 AM
To: JointSEC <JointSEC@CFTC.gov>

**Subject:** FW: Credit default swaps

Teresa David
Business Manager
Office of the General Counsel
U.S. Commodity Futures Trading Commission
1155 21<sup>st</sup> Street, NW | Washington, DC 20581 | Tel. 202.418.5579 | Office. 8076

From: Berkovitz, Dan M

Sent: Thursday, October 21, 2010 7:49 PM

To: David, Teresa

Subject: FW: Credit default swaps

Teresa—
For posting.
Thanks,
Dan

**From:** Johnson, Philip McBride [mailto:PhilipMcBride.Johnson@skadden.com]

Sent: Tuesday, October 19, 2010 6:52 AM

To: Berkovitz, Dan M

Subject: Credit default swaps

Dan, what follows is an entirely personal thought.

When the Commission and the SEC meet on October 22 to discuss credit default swaps, I hope that attention will be devoted to the question of jurisdiction.

- 1) A credit default swap related to a security should fall within the SEC's jurisdiction if its pay-out **tracks** changes in the value of the underlying security. Such an instrument is economically indistinguishable from a security option assigned to the SEC under Commodity Exchange Act §2(a) (1)(C).
- 2) A credit default swap related to a security where pay-out **does not track** changes in the value of the underlying security should fall within the CFTC's jurisdiction. Such an instrument is economically indistinguishable from an *event option* within the meaning of Commodity Exchange Act §1a(19)(iv).

| To categorize the second type of swap as a "security" | would be like treating the purchase of |
|---|--|
| nomeowners' insurance as a real estate transaction.   |  |

| ****** | ****** | k***** | k***** | ***** | ***** |
|--------|--------|--------|--------|-------|-------|

To ensure compliance with Treasury Department regulations, we advise you that, unless otherwise expressly

indicated, any federal tax advice contained in this message was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding tax-related penalties under the Internal Revenue Code or applicable state or local tax law provisions or (ii) promoting, marketing or recommending to another party any tax-related matters addressed herein.

This email (and any attachments thereto) is intended only for use by the addressee(s) named herein and may contain legally privileged and/or confidential information. If you are not the intended recipient of this email, you are hereby notified that any dissemination, distribution or copying of this email (and any attachments thereto) is strictly prohibited. If you receive this email in error please immediately notify me at (212) 735-3000 and permanently delete the original email (and any copy of any email) and any printout thereof.

Further information about the firm, a list of the Partners and their professional qualifications will be provided upon request.

\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*