

UNITED STATES OF AMERICA  
COMMODITY FUTURES TRADING COMMISSION

OPEN MEETING ON THE SEVEN SERIES OF  
PROPOSED RULEMAKINGS UNDER THE DODD-FRANK ACT

Washington, D.C.

Thursday, December 9, 2010

## 1 PARTICIPANTS:

## 2 Commission Members:

3 GARY GENSLER, Chairman

4 BART CHILTON, Commissioner

5 MICHAEL V. DUNN, Commissioner

6 JILL SOMMERS, Commissioner

7 SCOTT D. O'MALIA, Commissioner

## 8 Presentations:

9 Governance Requirements for Derivatives Clearing  
10 Organizations, Designated Contract Markets and  
11 Swap Execution Facilities and Additional  
Requirements Regarding the Mitigation of Conflicts  
of Interest

12 ANANDA RADHAKRISHNAN

13 NANCY SCHNABEL

14 End-User Exception to Mandatory Clearing of Swaps

15 DAN BERKOVITZ

16 GEORGE WILDER

17 Business Conduct Standards with Counterparties  
PHYLLIS CELA

18 VINCE MCGONAGLE

19 PETER SANCHEZ

20 ANANDA RADHAKRISHNAN

21

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1 PARTICIPANTS (CONT'D):

2 Issuance of Interim Final Rule for Reporting  
3 Certain Post-Enactment Swap Transactions

4 SUSAN NATHAN

5 RICK SHILTS

6 DAN BERKOVITZ

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## P R O C E E D I N G S

(9:00 a.m.)

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3 CHAIRMAN GENSLER: Good morning. This  
4 meeting will come to order. This is a public  
5 meeting of the Commodity Futures Trading  
6 Commission to consider issuance of proposed  
7 rulemakings under the Dodd-Frank Wall Street  
8 Reform and Consumer Protection Act. Today we will  
9 be considering end user exception to mandatory  
10 clearing of swaps, business conduct standards with  
11 counterparties, governance requirements for  
12 derivatives clearing organizations, designated  
13 contract markets and swap execution facilities.  
14 In addition to those proposed rulemakings, the  
15 Commission will consider an interim final rule for  
16 reporting certain post-Dodd-Frank enactment swap  
17 transactions. The public might note that we had  
18 calendared for today discussions of swap execution  
19 facilities. I've also always said to the press  
20 that we're human so that as Chair I've decided  
21 this morning that we're going to take that one up  
22 next week. I think we'll have some good further

1 discussion among the Commission and staff on that  
2 one. This probably is not going to be the last  
3 time that we recalendar something and need an  
4 extra week to get our work done.

5 Before we hear from staff, I'd like to  
6 thank Commissions Mike Dunn, Jill Sommers, Bart  
7 Chilton and Scott O'Malia for all of their  
8 thoughtful work. I say this every week. As we  
9 get into the holiday period it is remarkable how  
10 much they are doing and their able legal  
11 assistants are doing to help us through all of  
12 this. I'd also like to welcome members of the  
13 public, market participants and members of the  
14 media today as well as to welcome those listening  
15 on the webcast.

16 This is our seventh public meeting to  
17 consider Dodd-Frank rulemakings. We will have  
18 another meeting on the 16th and we're planning two  
19 additional meetings on Dodd-Frank rulemakings in  
20 January and we'll continue to announce our  
21 proposed rulemakings and which topics we're taking  
22 up 1 week in advance, and this is 1 week in

1 advance so I'm going to do this. I think we're  
2 also going to put it on our website. But next  
3 week as I say, we're looking to take up swap  
4 execution facilities as I just mentioned. We're  
5 also going to hear in I think it's our third round  
6 about clearinghouse rules. These will be the  
7 risk- management rules on clearinghouses. At what  
8 I'll call our third round we will conduct  
9 discussions on internal business conduct with  
10 regard to confirmations, portfolio compression and  
11 portfolio reconciliation and also on position  
12 limits. And I wanted to make a few comments if I  
13 might on position limits. What I've asked staff  
14 to do is to pull together two components, it might  
15 be in one vote but I think it will probably two  
16 rulemakings, one on spot month and one on what we  
17 call other months or all months combined. We've  
18 had a long tradition at this agency or setting  
19 position limits. We have spot month limits right  
20 now on pretty much if I'm not mistaken all of the  
21 physical commodities and some financial  
22 commodities, we've put out proposals this past

1 January on energy products and we think that we  
2 can move more expeditiously with regard to the  
3 spot month period and it would be my hope that we  
4 could vote on something and then finalize  
5 something on the spot month area within the next  
6 few months. With regard to all months combined  
7 and other months as that is to data intensive,  
8 that too hopefully can be completed expeditiously  
9 but there is the challenge of doing it and the  
10 data that's so necessary for it so that I've asked  
11 staff to make a presentation and try to bring both  
12 rules up next week. I think that's what we're  
13 calendaring for next week. As of right now,  
14 Commissioner Chilton's staff has been very  
15 involved and I think very forthright publicly  
16 about our need to move forward on position limits.  
17 I share that view. Congress did set different  
18 dates for us on that, 180 and 270 days rather than  
19 360 days so that we're trying to work with that  
20 and we'll take more of that up and I'm sure our  
21 other Commissioners will have views on that and  
22 maybe share that even today at the end of our

1 presentations.

2 I want to thank staff for working on all  
3 the draft rulemakings. I thank them for their  
4 thoughtful recommendations. We look forward to  
5 receiving public comments on all that we're  
6 putting out today. There will be fact sheets and  
7 Q and A's put on our website. Before I turn to  
8 the presenters, I turn to fellow Commissioners.  
9 Commissioner Dunn?

10 COMMISSIONER DUNN: Thank you, Mister  
11 Chairman. You'll recognize that we all are  
12 talking funny. I don't know if that's because  
13 we've had so much discussion or if the Chairman is  
14 sharing a cold with all of us, but it isn't  
15 indicative of the hard work that staff has put in  
16 putting all of this together, but more  
17 importantly, the Commissioners working together to  
18 try to find some solutions to things.

19 CHAIRMAN GENSLER: We have been in close  
20 quarters.

21 COMMISSIONER DUNN: He's been in my face  
22 a lot. I want to thank you all for joining us

1       today in this important meeting regarding the  
2       implementation of the Dodd- Frank Act. The  
3       business conduct standards for swap dealers and  
4       major swap participants is of particular interest  
5       to me because I believe that strong standards for  
6       swap dealers and major swap participants are  
7       necessary to prevent another financial crisis. By  
8       implementing strong business conduct standards,  
9       the Commission can establish meaningful protection  
10      for counterparties and hopefully prevent the types  
11      of behavior that necessitated the passage of Dodd-  
12      Frank. To me, Mister Chairman, this is the heart  
13      of what we're supposed to be doing.

14                 An inherent conflict of interest exists  
15      when a swap dealer acts as both an adviser and a  
16      counterparty to his customers. The business  
17      conduct standard proposed today provides  
18      meaningful protection to counterparties and I  
19      support them, but I believe more can be done. I  
20      am particularly interested in public comment on  
21      this rulemaking, specifically, whether the  
22      proposed rules go far enough in protecting

1 counterparties.

2           Dodd-Frank requires the Commission to  
3 consider whether to exempt small banks, savings  
4 associations, farm credit institutions and credit  
5 unions from the definition of financial entities  
6 in its clearing requirements. I welcome public  
7 comment on whether any of these groups should be  
8 exempt and if so why. Specifically with regard to  
9 farm credit institutions I would like to know if  
10 the \$10 billion cap on total assets meets  
11 congressional intent. I am concerned, Mister  
12 Chairman, that a decade ago Congress told the CFTC  
13 not to look at swaps and over the counter. In  
14 that period that industry has developed and it's  
15 quite different from the futures industry. I am  
16 concerned that as we who know and understand the  
17 futures industry and our staff has been working on  
18 that and fully appreciate differences that have  
19 developed. I hope that we're not trying to take  
20 what has worked well in the futures industry and  
21 say that has to be in the swap industry without  
22 taking into account how the swap industry has

1 developed. When we get to that point I look  
2 forward to comments from the public on what we're  
3 doing if we are in fact going to achieve the  
4 purpose of Dodd-Frank and are we going about it  
5 right. I've said before that I think it's  
6 important that we get these rules out in time  
7 because Congress has mandated it, but it's not an  
8 easy task and what we get out, it's imperative  
9 that we get it right so that the public has got to  
10 give us comments in regard to these proposed rules  
11 so that we get that final rule right. But I think  
12 also inherent in that, Mister Chairman and my  
13 colleagues is a duty for us to follow-up to ensure  
14 the efficacy of those regulations that we pass,  
15 and I've said before that I think in 12 or 18  
16 months we need to review what we've done and what  
17 that impact has been. Again I want to thank staff  
18 for the great work that they've done on getting  
19 things together. I get changes in the middle of  
20 the night from staff so that I know somebody is up  
21 there working and I appreciate it.

22 CHAIRMAN GENSLER: Thank you,

1 Commissioner Dunn. Commissioner Sommers?

2 COMMISSIONER SOMMERS: Thank you, Mister  
3 Chairman. I too want to say thank you to all the  
4 rulemaking teams this morning for all the hard  
5 work and the rules that we have in front of us or  
6 thought we were going to have in front of this  
7 morning. A lot of these rules are complicated and  
8 we really do appreciate all the time that all the  
9 teams put in to making these rules be in a place  
10 for proposal stage where we feel comfortable  
11 getting public comment. So thank you all for all  
12 your hard work.

13 Last week I expressed concern about a  
14 number of the Commission's proposals that I felt  
15 were too broad or overreaching what I felt the  
16 statute directed us to do. This week my concerns  
17 go the other way. Even though we're not  
18 considering the SEF proposal, one of my concerns  
19 this week is that we were defining SEF too  
20 narrowly. It's also a concern that I have  
21 regarding the end user exemption proposal because  
22 I believe the statute directed us to consider

1       whether we should be exempting some of these small  
2       institutions.  And although we asked questions  
3       with regard to that subject, we don't propose a  
4       framework for how we would go about exempting  
5       these small institutions so that in that area I  
6       believe we have read the statute too narrowly.

7               My opening statement today is almost  
8       solely with regard to the definition of SEF so  
9       that I will forego subjecting you to my concerns  
10      about the SEF definition until next week, but just  
11      say that I hope in the 7 days that we have to  
12      reconsider this rule that we will address some of  
13      the concerns about looking at that definition too  
14      narrowly.  I will follow-up by saying on the end  
15      user exemption that I think that we need to  
16      consider whether or not the \$10 billion limit is  
17      appropriate and if there are other criteria that  
18      these institutions may have that would make them  
19      qualify for this exemption.  I think that this is  
20      something that we really do need to look at.  I  
21      would have preferred a framework be proposed in  
22      what we're doing today but since we did not do

1       that I would suggest that the public and all of  
2       those who are concerned about this really do give  
3       us suspect comment about how we could consider  
4       putting that kind of framework in a final rule.  
5       Again thank you to the teams today and I look  
6       forward to hearing about these proposals.

7                   CHAIRMAN GENSLER: Thank you,  
8       Commissioner Sommers. I look forward to that  
9       also. I think I know much of what's in your  
10      written statement, but we have 7 days and it might  
11      change by next week.

12                   COMMISSIONER SOMMERS: Many of these  
13      things you have heard before.

14                   CHAIRMAN GENSLER: Yes, I'm sure. On  
15      the end user side, I thank you that for once you  
16      want us to be more prescriptive.

17                   COMMISSIONER SOMMERS: I suppose there  
18      is another way of looking at that, maybe follow  
19      what the statute says.

20                   CHAIRMAN GENSLER: Commissioner Chilton?

21                   COMMISSIONER CHILTON: I'd like to if  
22      it's okay with the Chair defer to Commissioner

1 O'Malia first and then go.

2 CHAIRMAN GENSLER: Absolutely.

3 Commissioner O'Malia?

4 COMMISSIONER O'MALIA: Happy day. How  
5 often have I complained that I always have to go  
6 after Mr. Chilton, and now I get to go before him?

7 The holidays are upon us and as many of  
8 you know, I have three daughters which therefore  
9 means I have three wish lists. My youngest  
10 daughter Macie spent the weekend scouring the  
11 catalogues in search of the perfect gift to top  
12 her list. Do you know what she came up with? A  
13 towel warming rack. She had no idea why she  
14 wanted it, but it was in the catalogue and thus  
15 had an equal opportunity as many of the other  
16 items to make the list. I didn't think much of  
17 the towel rack until I read the proposal relating  
18 to the swap execution facility, namely, the part  
19 that aims to further define what a SEF is and I  
20 thought to myself that this SEF rule is very  
21 similar to the towel rack episode, no reason, just  
22 because. I'm not buying a 7-year- old a towel

1 warming rack and I'm not supporting the proposed  
2 rulemaking on SEFs as it was drafted today.  
3 Unlike Commissioner Sommers, I am going to expound  
4 a little bit on the SEF even though we haven't.  
5 This is an important issue and I think we're going  
6 to have a good robust debate about it and I'm just  
7 going to share my views on where this thing is  
8 going and my views on it.

9 CHAIRMAN GENSLER: Absolutely.

10 COMMISSIONER O'MALIA: We obviously had  
11 a lot of time and options before interpreting the  
12 statutory language with the goal of providing  
13 greater pretrade transparency and the Commission  
14 chose a limited two-tier approach that relies on a  
15 narrow reading of the statute and a broad reading  
16 of an aspiration that if adopted will actually  
17 diminish the overarching goal of promoting the  
18 trading of swaps on SEFs. The rulemaking mandates  
19 that SEFs either take the form of a central limit  
20 order book for any product that trades for more  
21 than 10 times a day or transparent requests for a  
22 quote or RFQ approach. The so-called transparent

1 RFQ approach will require all bids and offers to  
2 be firm and provide a first-in-bid, first-in-fill  
3 approach and that's it. Staff has interpreted a  
4 minimal statutory requirement that in a manner  
5 that entirely strips away the unique  
6 characteristics of swaps that has been bandied  
7 about by the Commission for the last 20 years and  
8 requires swaps to trade like futures in my  
9 opinion. Looking over the history of the  
10 Commission's treatment of swaps, it remains  
11 abundantly clear that while swaps contain some  
12 features similar to those of futures, they remain  
13 sufficiently different in their purpose, function  
14 and design. To limit swap trading to a central  
15 limit order book exchange might be unnecessary to  
16 mitigate systemic risk, protect the public  
17 interest and in fact may inappropriately burden  
18 commerce. That is, if swaps possess the same  
19 characteristics as futures, then Congress would  
20 not have needed to create a SEF definition to  
21 accommodate them. End users and buy-side  
22 participants are understandably wary about being

1 forced into unfamiliar and inhospitable  
2 environments where high-frequency traders can  
3 undermine their ability to trade sizable positions  
4 and nascent illiquid markets threaten to divulge  
5 the positions through bidding alone. Like a  
6 7-year-old wanting a towel warming rack, it just  
7 can't be the right, but at least buying a towel rack  
8 helps commerce. I can't say that for this  
9 proposal.

10 I want to be clear. I am in favor of  
11 increasing pretrade transparency as the Chairman  
12 is so passionate for and bring more transparency  
13 and bringing more swaps to swap execution  
14 facilities and relying less on block trades. To  
15 achieve this we must permit a broad range of  
16 venues to inspire market innovation, competition  
17 and improve transparent market pricing. Congress'  
18 open-ended language is clearly intended to permit  
19 flexibility across all trading venues. I ask that  
20 we interpret the statute broadly to permit the  
21 various RFQ and transparent voice broker systems  
22 already serving the industry to continue to

1 operate with at most minor alterations. This I  
2 believe I will allow market participants to  
3 ultimately determine what levels of pretrade  
4 transparency and liquidity they require to manage  
5 risk. I checked back with Macie this morning  
6 about her list. She admitted that it was a little  
7 long, she's being reasonable and she is cutting  
8 out the towel rack. I hope we can get comments  
9 and input necessary to cut out list as well.

10           Mister Chairman, I shared with you an  
11 amendment that I thought was appropriate to  
12 broaden the definition of SEFs. I appreciate your  
13 willingness to pull the proposal and reconsider  
14 and possibly give this amendment some  
15 consideration. I've talked with my colleagues  
16 about it. I think it's a great opportunity to  
17 expand the definition to give ourselves some  
18 optionality in what SEFs are going to be allowed  
19 and I appreciate your willingness to work with me  
20 on it and I hope that we can come to an acceptable  
21 solution because I think we all agree that the  
22 goal of this objective is pretrade transparency

1 and flexibility for trading in the SEF  
2 environment.

3           From my experience working in the  
4 Senate, I do know how it feels to be in the host  
5 seat and I would like to thank Reva although her  
6 rulemaking got pulled and her team for their  
7 efforts. They've worked long and hard. And I  
8 would also like to thank the other teams headed by  
9 Phyllis Cela, Nancy Schnabel, George Wilder and  
10 Susan Nathan. I appreciate their unwavering  
11 commitment to responding to my questions, comments  
12 and criticisms with thoughtful consideration.

13           Similar to my colleagues, I commend the  
14 end user exemption team for drafting what overall  
15 is a very thoughtful and well-written proposal.  
16 However, I'm concerned as to why we are failing to  
17 fully address the issue of excluding small banks,  
18 farm credit institutions and credit unions from  
19 the definition of financial entity. This is  
20 unreasonable. Section 2(h)(7)(C)(ii) directs the  
21 Commission with their ever-important word shall to  
22 consider whether to exempt these entities, and as

1 pointed out by House Agriculture Committee  
2 Chairman Collin Peterson, "The regulators will  
3 have maximum flexibility when evaluating the risk  
4 portfolios of these institutions for consideration  
5 of an exemption." All we're going to do today  
6 after almost 5 months with this language is punt  
7 it. While I can appreciate staff's decision to  
8 pose a series of questions aimed at further  
9 informing their consideration of the appropriate  
10 criteria for such an exemption, we are too far  
11 into these rulemakings to start from square one.  
12 As we move forward on the rulemaking I encourage  
13 staff to keep in mind that many of the affected  
14 institutions pay a critical role in economic  
15 development of small communities and rural areas.  
16 It is my hope that a final rule will ultimately  
17 permit the bulk of these institutions to avail  
18 themselves of an end user exemption. As for the  
19 proposal for business conduct standards for swap  
20 dealers and major swap participants in their  
21 dealings with counterparties and especially  
22 counterparties who are special entities, I believe

1 staff has demonstrated an extraordinary ability to  
2 effectuate the statutory mandates through  
3 consideration of congressional intent and in the  
4 manner in which market participants actually  
5 conduct their business. This proposal is  
6 especially timely as the Bank of America has just  
7 agreed to pay more than \$137 million in  
8 restitution to federal and state agencies for  
9 their participation in a conspiracy to rig bids in  
10 the municipal bond derivatives market. However,  
11 the rule strives to ensure that counterparties  
12 dealing with sophisticated swap dealers and major  
13 swap participants are fully informed and of course  
14 have recourse if they are not prior to entering  
15 into these complex instruments I support. I will  
16 say I am not entirely sold on the broader proposal  
17 to apply execution standards for all Commission  
18 registrants transacting swap available for trading  
19 on DCMs and SEFs. These standards are designed to  
20 ensure fair dealing and further protections  
21 against fraud and abusive practices and these are  
22 good things. However, the proposal in part

1 requires an execution ultimately to be in terms of  
2 a "reasonable relationship" to the "best terms  
3 available" for such a swap on a DCM or SEF. While  
4 it is better to require absolute best execution,  
5 the requirements of this proposal are somewhat  
6 vague and may ultimately become another rule in  
7 the book only relied on in the most egregious  
8 circumstances. I am keeping my mind open,  
  
9 however, and look forward to reviewing the  
10 comments from a diverse population of Commission  
11 registrants who may ultimately be affected by this  
12 proposal.

13 In closing I'd like to thank dedicated  
14 staff who have worked night and day to preserve  
15 and make these changes in these rulemakings, and  
16 by all means do not interpret my views to mean you  
17 should never request a towel warming rack.  
18 However, in making your wish list please consider  
19 whether these items you choose are reasonable for  
20 the markets. Thank you.

21 CHAIRMAN GENSLER: Before I turn to  
22 Commissioner Chilton, I want to mention that I

1 know we're spending a lot of time together and  
2 maybe there was an illusion that I was like your  
3 daughter Macie or something, but I'm going to take  
4 that as the glass is half-full because I know you  
5 love your daughter Macie.

6 COMMISSIONER O'MALIA: I love all three  
7 of my daughters.

8 CHAIRMAN GENSLER: If the Chairman is in  
9 any way being alluded to in having a wish list at  
10 least you're saying it in the context of your  
11 daughter Macie so that I'm feeling good about  
12 that.

13 COMMISSIONER O'MALIA: You should.  
14 Thank you.

15 CHAIRMAN GENSLER: Thank you. We do  
16 work well together even if we have a little bit  
17 different view on what the statute says about  
18 transparency and pretrade transparency. I'm going  
19 to save my thoughts on swap execution facilities  
20 until next week because I think that all of us are  
21 really working with this statute. It's a very  
22 detailed statute about swap execution facilities

1 and what it means to be made available for  
2 trading. In the proposal today because Commission  
3 O'Malia didn't mention it, when he mentioned these  
4 two tiers, there is a third tier in the proposal  
5 that anything that's a block trade, anything  
6 that's an end user out of those commercial end  
7 users, anything that's not made available for  
8 trading, would have been pretty much whatever the  
9 market wanted to use such as voice or limited  
10 requests for votes and things like that so that I  
11 as augmenting what you were saying. But I look  
12 forward to working with everybody throughout the  
13 next 7 days on it. Commissioner Chilton?

14 COMMISSIONER CHILTON: Thank you, Mister  
15 Chairman. For a couple of years I've been  
16 supporting position limits. We had the authority  
17 to impose those prior to Dodd-Frank but weren't  
18 able to get the support to do it and now we have  
19 the law, and we just had these new speculative  
20 data that I talked about yesterday in New York  
21 where we've seen more positions coming into  
22 markets than ever before and there is certainly

1       disagreement about the impact of speculators on  
2       prices, but any impact isn't acceptable. We've  
3       just seen gas prices raise 10 cents and crude is  
4       around \$90 and raised \$7 in 2 weeks. I read a  
5       quote in a local paper that said there's no reason  
6       that it's delinked from supply and demand. I'm  
7       not saying that it's speculators, but our job is  
8       to try and do what we can and now we have the law  
9       on our side on position limits and I'm pleased  
10      with that. All of us have seen it, and this is  
11      public information, large concentrations, we've  
12      seen more than 20 percent in the crude market at  
13      times, more than 20 percent concentration by  
14      single trader in gas, roughly 40 percent by an  
15      individual silver trader and these are issues that  
16      demand us to deal with. I had a proposal that I  
17      was going offer today as my colleagues know  
18      because I emailed them very late at night, but I  
19      really appreciate the Chairman's commitment to  
20      taking this up next week and looking at this in a  
21      slightly different way perhaps on the things that  
22      we can do expeditiously with regard to the spot

1 months swaps and then as soon as possible on the  
2 other months and on the aggregate months. It's an  
3 important proposal and I want to get it right. I  
4 appreciate some of the concerns that my colleagues  
5 have and quite frankly I have too about making a  
6 fulsome decision on what the levels are. A bad  
7 rule is not good. We want to have a good rule.  
8 So I appreciate the Chairman's commitment and I  
9 look forward to next week.

10 I did want to say just a brief thing on  
11 the SEFs. I was prepared to support the rule that  
12 we are considering. I did add some questions. I  
13 think Commissioner Dunn may have added some  
14 questions too. I want to make sure that we take  
15 into account both of the things that are in the  
16 law. One is promoting transparency as the  
17 Chairman has eloquently spoken about and I support  
18 it, but transparency isn't absolute and the other  
19 test, and it's not a secondary test, it's not a  
20 lesser test, but the other test in the law is to  
21 promote SEFs so I want to make sure that our  
22 proposal does that. I think the proposal as we

1 had it, the questions allowed us any flexibility  
2 that based on the comments that new could change  
3 it, but I look forward to taking it up next week  
4 and I think Reva and everybody else for their work  
5 on that and all the other rules today. Thanks  
6 very much again for your commitment, Mister  
7 Chairman.

8 CHAIRMAN GENSLER: Thank you to all my  
9 Commissioners and again for their commitment to  
10 getting this very important project for the market  
11 done and done well and done right. With that I'm  
12 going to hand it over to Ananda Radhakrishnan and  
13 Nancy Schnabel. Nancy, it's good to see you back  
14 here again. They're going to present an  
15 additional rule on governance and mostly it's  
16 regard to reporting on governance and there are  
17 some fitness standards provisions as well. Nancy  
18 and Ananda?

19 MS. SCHNABEL: Commissioners, Chairman,  
20 today staff is presenting the second rulemaking on  
21 governance and conflicts of interest which I  
22 really hope is not like a towel warming rack.

1 Before I start discussing the rulemaking, I wanted  
2 to thank you and the Commissioners and staff for  
3 very constructive comments. I would also like to  
4 thank my team members for working very hard on  
5 this rulemaking.

6 Back to the second rulemaking. The  
7 second rulemaking further the conflicts of  
8 interest core principles that each DCO, DCM and  
9 SEF have. Additionally, the second rulemaking  
10 implements core principles with respect to  
11 governance fitness standards as you said and the  
12 composition of governing boards for DCOs and DCMs,  
13 and also diversity with respect to publicly listed  
14 DCMs. On October 1, the Commission approved a  
15 proposal proposing certain structural governance  
16 requirements and certain limitations on ownership  
17 of voting equity and exercise of voting rights.  
18 These proposals were meant to implement Section  
19 726 of the Dodd-Frank Act which requires the  
20 Commission to promulgate certain rules to mitigate  
21 conflicts of interest. Staff believes that the  
22 notice of proposed rulemaking today will

1 complement any final rule that the Commission  
2 contemplates adopting with respect to Section 726  
3 of the Dodd-Frank Act.

4 First with respect to the conflicts of  
5 interest core principles, these core principles  
6 require a DCO, DCM or SEF to establish and enforce  
7 rules to minimize conflicts of interest and to  
8 establish a process for resolving conflicts of  
9 interest. To further implement such core  
10 principles, staff is proposing requirements on  
11 reporting, maintenance of a regulatory program,  
12 transparency and limitations on use of nonpublic  
13 information. With respect to reporting, staff is  
14 proposing to mandate that each DCO file a report  
15 with the Commission whenever its board of  
16 directors rejects a recommendation or supersedes  
17 an action of its risk-management committee or  
18 whenever its risk- management committee rejects a  
19 recommendation or supersedes an action of its  
20 risk-management subcommittee. And also staff is  
21 recommending that each DCM or SEF file a report  
22 with the Commission whenever its board of

1 directors rejects a recommendation or supersedes  
2 an action of its regulatory oversight committee or  
3 its membership or participation committee.  
4 Further under reporting staff is proposing that  
5 each DCM, DCO or SEF provide certain reporting on  
6 the composition of its board of directors within  
7 30 days after the election of its board of  
8 directors, and also staff is proposing to require  
9 that the regulatory oversight committee of each  
10 DCM or SEF prepare an annual report assessing the  
11 various components of the DCM or SEF regulatory  
12 program and such a requirement generally parallels  
13 current acceptable practices under DCM Core  
14 Principle 15.

15           Moving on to the regulatory program  
16 staff is proposing to require that as part of its  
17 regulatory program each DCO, DCM or SEF establish,  
18 maintain and enforce written procedures to  
19 identify on an ongoing basis existing and  
20 potential conflicts of interest and to make fair  
21 and nonbiased decisions in the event of such a  
22 conflict of interest. With respect to

1 transparency, staff is proposing to establish  
2 minimum standards for transparency of the  
3 governance arrangements of relevant DCOs, DCMs and  
4 SEFs, and transparency would be transparent to the  
5 public as well as to the Commission; that the  
6 minimum standards require each DCO, DCM or SEF to  
7 make available certain information to the public  
8 and relevant authorities with respect to  
9 governance such as charters, nominations process  
10 descriptions, identities of public directors, et  
11 cetera, and also ensure that the information that  
12 they make available is current, accurate, clear  
13 and readily accessible; finally, to disclose  
14 summaries of significant decisions. Significant  
15 decisions involve those areas in which conflicts  
16 of interest may be most manifest. With respect to  
17 a DCO or a SEF, significant decisions will relate  
18 to access, membership and disciplinary procedures.  
19 With respect to a DCO, significant decisions will  
20 relate to open access, membership and the finding  
21 of products acceptable or nonacceptable for  
22 clearing, and staff wants to make very clear that

1 they do not recommend and they do not require that  
2 DCOs, DCMs or SEFs make public any nonpublic  
3 information as that is defined within this  
4 rulemaking.

5 We move to limitations on use of  
6 nonpublic information so that each DCO, DCM or SEF  
7 staff is recommending to establish and maintain  
8 written policies and procedures on safeguarding  
9 nonpublic information. These procedures and  
10 policies must at a minimum preclude each  
11 registered entities' members, directors, certain  
12 officers and certain affiliates and also members  
13 of the disciplinary committee and disciplinary  
14 panel if there are not also members of the board  
15 of directors to not disclose any nonpublic  
16 information absent prior written consent.  
17 Finally, staff believes that these written  
18 policies and procedures are important because they  
19 would prohibit those in positions of power at a  
20 DCO, DCM or SEF from leveraging such power to  
21 benefit themselves or to the detriment of their  
22 competitors.

1                   Second, in addition to implementing the  
2                   conflicts of interest core principles, the  
3                   rulemaking today implements certain core  
4                   principles with respect to DCO or DCM governance  
5                   fitness standards and composition of boards of  
6                   directors or other governing bodies and the DCM  
7                   core principle on diversity of certain boards of  
8                   directors. With respect to governance fitness  
9                   staff is proposing to require each DCO or DCM to  
10                  specify and enforce fitness standards for its  
11                  members, directors, members of any disciplinary  
12                  panel or disciplinary committee, persons with  
13                  direct access with certain affiliates and these  
14                  proposals generally codify that acceptable  
15                  practices under current DCM Core Principle 14 and  
16                  extends such practices to DCOs. And with respect  
17                  to composition of boards of directors or other  
18                  governing bodies, staff is proposing to require  
19                  each DCM to design and institute a process for  
20                  considering the range of opinions that market  
21                  participants hold with respect to functioning of  
22                  an existing market as well as new rules or rule

1 amendments. For DCOs staff is proposing two  
2 alternatives, alternatives that the Commission  
3 will adopt in its entirety rather than an  
4 alternative that a DCO can choose in and of  
5 itself. The first alternative is that the DCO  
6 would be deemed in compliance with the core  
7 principle on composition of the board of directors  
8 or other governing bodies if it has 10-percent  
9 customer representation on its risk-management  
10 committee which is what staff had recommended on  
11 October 1, 2010. The second alternative is they  
12 would be deemed in compliance if they had  
13 10-percent customer representation on their board  
14 of directors. We are seeking public comment on  
15 this proposal because this proposal would keep the  
16 question open with respect to customer  
17 representation until after the 180-day  
18 implementation period for the first rulemaking.

19 CHAIRMAN GENSLER: Is there a motion on  
20 the staff recommendation?

21 COMMISSIONER DUNN: Move to adopt the  
22 recommendation.

1 COMMISSIONER SOMMERS: Second.

2 CHAIRMAN GENSLER: I support the  
3 proposed rulemaking. I will have one question on  
4 the last thing that you said. I think it builds  
5 upon a proposal that's out there and we're looking  
6 to try to finalizing that 180- day period of time.  
7 And importantly, it builds on reporting to  
8 regulators and a little of reporting to the public  
9 related to fitness standards. I had a question on  
10 the last point you just went through, Nancy,  
11 keeping the comment period past the 180 days.  
12 Could you walk through that again?

13 MS. SCHNABEL: We're definitely going to  
14 adopt rules to implement Section 726 or I guess we  
15 hope to adopt rules.

16 CHAIRMAN GENSLER: You mean staff would  
17 be recommending.

18 MS. SCHNABEL: Exactly. What's what I  
19 meant. Those rules will have certain board  
20 compositions or staff will recommend perhaps that  
21 those rules will address board composition or  
22 other governing body composition. But with

1       respect to customer representation because we have  
2       received opposing comments, we're seeking more  
3       public input on this one specific issue and we  
4       intend to implement customer representation  
5       requirements if you all agree with the final  
6       rulemaking on the second rulemaking, so the final  
7       second governance rulemaking.

8                   CHAIRMAN GENSLER:  So that you're saying  
9       public please keep telling us about the customer  
10      representation piece, that the piece is in essence  
11      being cabined off a little bit?

12                   MS. SCHNABEL:  That's right.

13                   CHAIRMAN GENSLER:  I think I now  
14      understand it.  Commissioner Dunn?

15                   COMMISSIONER DUNN:  I'm in agreement  
16      with this proposed regulation.  I think staff has  
17      done a very good job on it.  But I want to  
18      follow-up, and I know there is news out about  
19      appropriations and what we might be getting in  
20      that area and I thank you, Mister Chairman, for  
21      going to the Hill yesterday or was it the day  
22      before?

1                   CHAIRMAN GENSLER: I seemed to be there  
2 many days. I can't remember all of them. I do  
3 thank the House of Representatives and what  
4 they've done, but we're not there yet,  
5 Commissioner Dunn.

6                   COMMISSIONER DUNN: But it does bring me  
7 down to the fact that what we're asking is for  
8 DCOs to write a report on what they're doing on  
9 conflicts of interest concerns and I would like to  
10 know how the division is going to review that and  
11 what types of actions are going to be taken when  
12 we get these types of decisions.

13                  MR. RADHAKRISHNAN: If all goes well and  
14 the Commission does get the appropriation that it  
15 seeks and if the hiring process goes as smoothly  
16 as we hope it does and we would be in a position  
17 to hire sufficient staff to look at these reports,  
18 and if we find that there are certain things  
19 wanting we'll of course go back to the DCOs to  
20 find out why it is they weren't able to comply  
21 fully with the aspects of the law. So I guess the  
22 answer is if we do get staff that we had asked for

1       then we'd be in a much better position to review  
2       these reports.

3                   COMMISSIONER DUNN:  Do you have a  
4       timeline in mind in which the division would  
5       review these reports as they've come in?

6                   MR. RADHAKRISHNAN:  The report is  
7       supposed to be annual?

8                   MS. SCHNABEL:  This one is whenever  
9       there is a conflict.

10                  MR. RADHAKRISHNAN:  Whenever there's a  
11       conflict.  I can't predict when we'll get these  
12       reports because it's event specific if I'm not  
13       mistaken.  But if you're asking how long it is we  
14       will take, it depends on the length of the report.  
15       Hopefully we can review reports I'd say within a  
16       week, but again it depends on what it is we get.

17                  COMMISSIONER DUNN:  It's too late.  You  
18       said 1 week.

19                  MR. RADHAKRISHNAN:  I beg your pardon?

20                  COMMISSIONER DUNN:  I said it's too  
21       late.  You said 1 week.  I think it's very  
22       frustrating for somebody who says that they think

1       there has been an injustice and they go through  
2       the internal process and then they look at us as  
3       the court of last review on this and I think we  
4       owe it to them to try to get out and say we're  
5       going to respond in such a such a time and I think  
6       with a week you're shooting from the hip, but I do  
7       want to make sure that we have a mechanism set up  
8       within the division to review those in a timely  
9       manner.

10               MR. RADHAKRISHNAN:  You're right.  I'm  
11       shooting from the hip because I don't know what  
12       I'm going to get so that that is the issue.

13               CHAIRMAN GENSLER:  You're estimating?

14               MR. RADHAKRISHNAN:  I am estimating.  
15       I'm always conservative because I don't like to  
16       overpromise things to the Commission.

17               CHAIRMAN GENSLER:  Commissioner Sommers?

18               COMMISSIONER SOMMERS:  Thank you, Mister  
19       Chairman.  Nancy, I have a couple of questions  
20       with regard to our coordination with other  
21       regulators not just domestically but  
22       internationally.  In the preamble you talk about

1 certain elements that we have included from both  
2 the European Commission proposal and CPSS-IOSCO  
3 and if you could walk us through that.

4 MS. SCHNABEL: With respect to the  
5 European Commission proposal, we took various  
6 elements. One element would be the reporting  
7 requirement that we just discussed which is  
8 whenever there is an overrule by the board of the  
9 risk-management committee then the CCP which is  
10 the terminology that they use for DCOs under the  
11 European Commission proposal would have to file a  
12 report so that that is definitely one place. With  
13 respect to CPSS-IOSCO, there are two different  
14 CPSS-IOSCO principles. There are the ones that  
15 are currently in effect and then there are the  
16 ones that will hopefully become in effect next  
17 year. The ones that are currently in effect with  
18 respect to governance arrangements not require, I  
19 would say suggest or recommend, greater  
20 transparency and also clear organizational  
21 structure so that we took some of those proposals  
22 from CPSS-IOSCO with respect to transparency to

1 both the public and to the Commission.

2 COMMISSIONER SOMMERS: I want to clarify  
3 because I think I heard this when we were talking  
4 with the European Commission with regard to their  
5 proposals on this that conflicts of interest may  
6 be one area where we are not fully on the same  
7 page.

8 MS. SCHNABEL: That's correct.

9 COMMISSIONER SOMMERS: What about the  
10 SEC? Have they already proposed their entire  
11 conflicts-of-interest rules?

12 MS. SCHNABEL: They've proposed some of  
13 their conflicts-of-interest rules. I think that  
14 they have some requirements that may be coming up  
15 in their entity rulemaking such as the SEC  
16 rulemaking or their swap-based SEF rulemaking so  
17 that they're nearly done but not completely done.

18 COMMISSIONER SOMMERS: Are we consistent  
19 with what the SEC is doing?

20 MS. SCHNABEL: We are mainly consistent.  
21 There will be differences here and there, but we  
22 are consistent.

1                   COMMISSIONER SOMMERS: Can you highlight  
2 any of the differences that you think are  
3 meaningful?

4                   MS. SCHNABEL: I don't necessarily want  
5 to speak on behalf of the SEC and I'm not sure  
6 what part of our discussion is necessarily public.  
7 For instance, with this rulemaking some of the  
8 provisions here the SEC does not have similar core  
9 principles so that whether or not they're going to  
10 implement some other provisions this rulemaking in  
11 its entirety is unclear. But I really can't speak  
12 for them so that I think that those might be the  
13 areas where there would be some discrepancy.

14                   COMMISSIONER SOMMERS: Thank you.

15                   CHAIRMAN GENSLER: Thank you,  
16 Commissioner Sommers. Commissioner Chilton?

17                   COMMISSIONER CHILTON: I don't have any  
18 questions. Thank you, Mister Chairman.

19                   CHAIRMAN GENSLER: Commissioner O'Malia?

20                   COMMISSIONER O'MALIA: It's a beautiful  
21 day. Nancy, I just have one question. The  
22 proposal requires that summaries of significant

1 decisions implicating the public interest, things  
2 like membership access and discipline which would  
3 include a rationale for the decisions and the  
4 process for reaching these decisions would be made  
5 available to the public. How are we going to  
6 protect appropriate business confidential or other  
7 items that should be held privately?

8 MS. SCHNABEL: I thought I took those  
9 two provisions out of the proposal because of  
10 questions that were raised with respect to  
11 protection of nonpublic information, but if  
12 somehow they were not taken out I will now take  
13 them out. We've inserted a provision that states  
14 that the requirement does not extend to nonpublic  
15 information that a DCO, DCM or SEF has.

16 CHAIRMAN GENSLER: I'd help out there to  
17 ask by unanimous consent if they're not out yet  
18 that they be taken out. Are there any objections?  
19 I'm not hearing any objection by U.C. just to make  
20 sure that you have the authority to take them out  
21 in case you hadn't.

22 COMMISSIONER O'MALIA: Thank you, Mister

1 Chairman, and thank you, Nancy, for your  
2 sensitivity to these issues.

3 CHAIRMAN GENSLER: Not hearing any  
4 further questions, I want to call the roll on the  
5 staff recommendation as possibly amended by the  
6 U.C., but you may have already done that. Dave  
7 Stawik?

8 MR. STAWIK: Commissioner O'Malia?

9 COMMISSIONER O'MALIA: Aye.

10 MR. STAWIK: Commissioner O'Malia, aye.  
11 Commissioner Chilton?

12 COMMISSIONER CHILTON: Aye.

13 MR. STAWIK: Commissioner Chilton, aye.  
14 Commissioner Sommers?

15 COMMISSIONER SOMMERS: Aye.

16 MR. STAWIK: Commissioner Sommers, aye.  
17 Commissioner Dunn?

18 COMMISSIONER DUNN: Aye.

19 MR. STAWIK: Commissioner Dunn, aye.  
20 Mister Chairman?

21 CHAIRMAN GENSLER: Aye.

22 MR. STAWIK: Mister Chairman, on this

1 question the ayes are five and nays are zero.

2 CHAIRMAN GENSLER: Thank you. Thank you  
3 again Nancy and Ananda for your excellent work and  
4 we'll see you back in January when you're  
5 proposing something on the first final rule. Now  
6 we're moving on to the end user proposed rule and  
7 George Wilder from the Office of General Counsel.  
8 I don't know if somebody is coming up to the desk  
9 with you. Dan Berkovitz as well maybe. They will  
10 present rules related to end user exemption for  
11 mandatory clearing of swaps. As they're getting  
12 situated, Congress said that nonfinancial end  
13 users hedging or mitigating commercial risk would  
14 have a choice in that they get to decide whether  
15 to use a clearinghouse, and what we're hearing  
16 from staff on today is that proposal as well as  
17 Congress says we shall consider exemptions for  
18 smaller financial institutions of those less than  
19 \$10 billion, farm credit institutions, credit  
20 unions and insured depository institutions with a  
21 list of questions to help us do that. George and  
22 Dan.

1                   MR. WILDER: Let me begin by thanking  
2 each of you and your staffs, each of my teammates  
3 and each of our SEC staff colleagues. Everybody  
4 has been very helpful and I am very grateful.

5                   I will address three topics, credit  
6 risk, commercial risk and financial entities.  
7 These three topics are key to understanding our  
8 proposal. First is credit risk. As you know,  
9 credit risk is handled differently for cleared and  
10 noncleared swap so that for noncleared swaps, 10  
11 disclosures about meeting credit risk will be  
12 required. These are not burdensome disclosures  
13 under our proposal. We propose an easy-to-use  
14 system that uses a check-the-box approach that  
15 covers 10 items or boxes to check. These boxes  
16 ask whether a written credit support agreement is  
17 involved; whether pledged or segregate assets are  
18 involved; whether written third-party guarantee is  
19 involved; whether the end user will rely on its  
20 own resources; and whether other means of meeting  
21 credit risk are involved. There are also four  
22 identity questions, the identity of the electing

1       counterparty under the rule; whether a financial  
2       entity is involved; whether a captive finance  
3       affiliate is involved; and whether an SEC filer is  
4       involved and if so whether the board approval  
5       requirement has been met. There is also a tenth  
6       question, whether the swap is being used to hedge  
7       or mitigate commercial risk, and this leads me to  
8       my second topic. Not all swaps are eligible for  
9       the end user exception. Only swaps used to hedge  
10      or mitigate commercial risk qualify. How does an  
11      end user know whether its swaps qualify? We  
12      provide guidance in our proposal. There are three  
13      ways to qualify. If the swap is eligible for  
14      hedge accounting treatment, it qualifies; if the  
15      swap is eligible for a hedge exemption from  
16      position limits it qualifies; and if the swap  
17      reduces risk relating to the end users assets,  
18      liabilities or services it qualifies.

19                In our proposal we also provide guidance  
20      about which swaps do not qualify. Swaps used for  
21      speculation, investing or trading do not qualify  
22      for this exception. Nor do swaps used to hedge

1 another swap unless that first swap itself is used  
2 as a hedge. This leads me to my third and final  
3 topic, financial entities. As a general rule,  
4 financial entities cannot use the end user  
5 exception, but the Dodd-Frank Act permits the CFTC  
6 to consider whether to allow small financial  
7 institutions to use the end user exception.  
8 Accordingly, we propose that the Commission invite  
9 comment on its options here and how it should  
10 proceed.

11 Before closing, there is one more topic  
12 that I'd like to discuss. With what we propose  
13 here, our system uses reporting to SDRs as the end  
14 user's way to comply with the Dodd-Frank Act's  
15 requirement for notice regarding noncleared swaps  
16 so that the Commission's oversight and enforcement  
17 effort for end users will depend upon this SDR  
18 database. Thank you. That's all I have.

19 CHAIRMAN GENSLER: Thank you, George.  
20 Do I hear a motion on the staff recommendation?

21 COMMISSIONER DUNN: So moved.

22 COMMISSIONER SOMMERS: Second.

1                   CHAIRMAN GENSLER: I support this  
2 proposed rulemaking on the end user exception.  
3 Congress decided that nonfinancial entities  
4 mitigating or hedging commercial risk will have a  
5 choice whether to submit their transactions  
6 through a clearinghouse. If they want to they  
7 can, if they don't want to they're out. The  
8 reason I support the rule is in essence this  
9 proposal says that if a company, a nonfinancial  
10 company, is using a swap to hedge an asset, a  
11 liability and input a service that it currently  
12 has or uses or even if it just anticipates having  
13 the asset, the liability of the input of the  
14 service and it's hedging that, it would qualify  
15 for the end user exception. It also says very  
16 specifically that this could be a currency risk,  
17 an interest rate risk or a physical commodity risk  
18 and so forth. In addition, if that wasn't clear  
19 enough, it does say that if the swap meets  
20 generally accepted accounting principles as a  
21 hedge or is used as a bona fide hedging which is  
22 under the Commodities and Exchange Act another

1       concept of hedging, the transaction would qualify  
2       for the end user exception but it's not reliant on  
3       a generally accepted accounting principle or a  
4       bona fide hedger, it's much more expansive again  
5       hedging an asset, liability input or service  
6       current or anticipated. Thus I think that it  
7       complies with congressional intent in terms of the  
8       nonfinancial entities. George also went through  
9       as he said 10 questions on credit risk and we're  
10      only doing that because Congress mandated that  
11      there had to be notification. Many people don't  
12      focus on that so that we've tried to make that a  
13      check-the-box approach to make it very  
14      straightforward for end users and that those could  
15      be just sent off to the swap data repository as I  
16      understand it.

17                I think these are very good. We do have  
18      in this proposal also something with regard to  
19      financial entities because Congress said we shall  
20      consider for those insured depository  
21      institutions, farm credit institutions and credit  
22      unions that are less than \$10 billion exceptions

1 from the generalized rule that financials come in  
2 and I know that some of my fellow Commissioners  
3 had hoped that we would be very explicit and have  
4 a proposal on that today, and if anybody is at  
5 fault it's probably me where today I think we'll  
6 be up to 36 rules. I suggested some time ago a  
7 little bit more process to ask the public for some  
8 help on this very important thing. I think  
9 Congress was specific where they said we shall  
10 consider it and we have a series of questions to  
11 help us do that but it would be full anticipation  
12 that sometime over the next I guess we have about  
13 7 months to go here that we would be learning from  
14 the public and taking that up as well. With that  
15 I don't have any questions. Commissioner Dunn?

16 COMMISSIONER DUNN: Thank you, Mister  
17 Chairman. This has been probably one issue in  
18 Dodd-Frank that we've heard more from folks lining  
19 up to be exempted as an end user. We've had a lot  
20 of them in our offices, we've received a lot of  
21 information from them but not it really counts.  
22 So for those folks who are concerned about the end

1 user exception, now is the time to get comments  
2 in. What happens in the next 30 days on this is  
3 extremely important.

4 I'd like to recognize George for the  
5 important work that he did on the Hill in getting  
6 this legislation out and I'm going to quote from  
7 the Congressional Record of June 30, 2010, House  
8 5246 page, and it's Mr. Holden from Pennsylvania  
9 who engaged with a colloquy with Chairman Peterson  
10 from the Agricultural Committee, and you'll  
11 indulge me, Mister Chairman, I'd like to read that  
12 colloquy and what led up to it. Mr. Holden says,  
13 Over 20 years ago the Agricultural Committee put  
14 in place a revised legislation and regulatory  
15 regime for the Farm Credit System that has  
16 successfully stood the test of time in ensuring  
17 that these institutions operate safe and sound.  
18 I'm very proud of that because I worked for  
19 Chairman Leahy on that particular legislation, Bob  
20 Cashdollar and my staff was my counterparty for  
21 Mr. Jones over on the House side and it did work  
22 well and I'm glad Mr. Holden recognized that. The

1 farm credit institutions are regulated and  
2 examined by a fully empowered independent  
3 regulatory agency, the Farm Credit Administration,  
4 which has the authority to shut down and liquidate  
5 a system or institution that is not financially  
6 viable. In addition, the Farm Credit System is  
7 the only GSE that has a self- funded insurance  
8 program in place that was established to not only  
9 protect investors and farm credit debt securities  
10 against loss of principal and interest but also to  
11 protect taxpayers. These are just a few of the  
12 reasons why the Agricultural Committee insisted  
13 that the institution of the Farm Credit System not  
14 be subject to a number of provisions of this  
15 legislation. They were not the cause of the  
16 problem, did not utilize TARP funds and did not  
17 engage in abusive subprime lending. We have  
18 believed that this legislation should not do  
19 anything to disrupt this record of success.  
20 Mister Speaker, I would now like to enter into a  
21 colloquy with the Chairman of the Agriculture  
22 Committee. The conference report includes

1       comprise language that requires the Commodity  
2       Futures Trading Commission to consider exempting  
3       small banks, farm credit systems and credit unions  
4       from provisions requiring that all swaps be  
5       cleared. We understand that community banks, farm  
6       credit institutions and credit unions did not  
7       cause the financial crisis institution that  
8       precipitated this legislation. While the  
9       legislation places a special emphasis on  
10      institutions with less than \$10 billion in assets,  
11      my reading of the language is that they should not  
12      in any way be viewed by the Commodity Futures  
13      Trading Commission as a limit on the size of the  
14      institution that should be considered for an  
15      exemption. Mister Chairman, would you concur with  
16      that? Mr. Peterson, yes, I full agree that the  
17      language says that institutions to be considered  
18      for exemption shall be included and include those  
19      with \$10 billion or less in assets. It is not a  
20      firm standard. Some firms with larger assets  
21      could qualify while some with smaller assets may  
22      not. Regulators will have maximum flexibility

1 when looking at the risk portfolios of these  
2 institutions for consideration of an exemption.

3 We all know that legislative history and  
4 colloquy are not part of the statute per se, but  
5 we're driven by that because that's the intent of  
6 the Congress and that's what we ought to be  
7 looking at here. As I read that, that tells me  
8 that Congress thought that for small banks, for  
9 credit unions and farm credit institutions that  
10 \$10 billion is not an absolute threshold and it  
11 confers upon us as regulators when making those  
12 decisions to talk to the NCUA for credit unions,  
13 to talk to the Farm Credit Administration for the  
14 farm credit systems, to find out exactly what is  
15 at stake and what risk these institutions have as  
16 we make these considerations. I would like to ask  
17 if that's the intent of what we have in this  
18 regulation and how we're going to be doing that.

19 MR. WILDER: Thank you, Commissioner.  
20 Yes, it is. We have been in contact with the Farm  
21 Credit Administration, we've been in contact with  
22 the NCUA and other regulators around town so that

1       you're absolutely right that that's what Congress  
2       had in mind and we're hoping to hear what industry  
3       has to say and help us through this because there  
4       are some issues as you know among the different  
5       categories of financial institutions that are  
6       going to be challenging. That's why we've taken a  
7       cautious approach here and are looking forward to  
8       hearing more.

9                   CHAIRMAN GENSLER: Thank you,  
10       Commissioner Dunn. I fully hope and even expect  
11       that we will hear from the public and I think it  
12       will help inform this Commission so that, yes, it  
13       may be a cautious view but I think it will be very  
14       helpful to hear from the public on this set of  
15       questions. Commissioner Sommers?

16                   COMMISSIONER SOMMERS: Thank you, Mister  
17       Chairman. I want to follow-up with some specific  
18       questions on this same area and clarify that in  
19       the statute although there is this \$10 billion or  
20       less, that the statute says including institutions  
21       that are \$10 billion or less. In the colloquy Mr.  
22       Holden points out that he though that that gave us

1 the flexibility to include institutions that were  
2 above \$10 billion. Where do you believe or what  
3 criteria should be in a risk profile that we look  
4 at to decide whether or not an institution that  
5 has more than \$10 billion that would qualify and  
6 an institution that has less would not?

7 MR. WILDER: There is probably going to  
8 have to be some consideration of credit risk, risk  
9 to capital, a percentage of capital perhaps that  
10 is related to the exposure that the institution  
11 has to its swaps. Some of these institutions are  
12 large asset-wise but they're really not that big  
13 in terms of their swap activity so that it means  
14 that the asset test may not be the best way to go.  
15 We also have to be somewhat concerned I think  
16 about having some measure of parity amongst the  
17 four categories of institutions that are covered  
18 by this rule. Congress did say it not once, not  
19 twice but three times that they were suggesting  
20 the asset-based test for each category so that  
21 there may be a message there. But you're right on  
22 target that Congress recognized this problem and

1       they've directed us to solve it and there are  
2       solutions there. We just need to be able to build  
3       a record to support what we do.

4                COMMISSIONER SOMMERS: What do you think  
5       are the challenges in us figuring out what the  
6       solutions are?

7                MR. WILDER: I think that we need to  
8       recognize that the four categories compete with  
9       each other particularly say for ag lending so that  
10       we need to be careful about not being perceived as  
11       tipping a balance for those markets. We need to  
12       take into consideration antitrust concerns here on  
13       the Commodity Exchange Act. That's not an  
14       insurmountable problem. I think that actually  
15       there is probably a good solution to this but it's  
16       going to require us to build a record, an  
17       administrative record, that will support what we  
18       do.

19               COMMISSIONER SOMMERS: Because all we do  
20       in this proposal is ask questions and we don't set  
21       up a proposed framework for how we would have a  
22       solution to this, does that preclude us from being

1 able to include a framework for exemptions in a  
2 final rule because this seems to be more like an  
3 ANPR to me on this particular issue, so then are  
4 we going to have to go out with another proposal  
5 with regard to this?

6 MR. WILDER: That's a good observation  
7 and you're right, there is a problem if the  
8 Commission feels that it wants to go to a final  
9 rule that it won't be able to do that at this  
10 point. But there are options. The Commission has  
11 options here. There is the possibility of issuing  
12 an order and there are several ways the Commission  
13 could issue an order here. The Commission may  
14 very well issue an order without taking further  
15 comments in the Federal Register. That's a  
16 possibility. It's not like we're foreclosing.  
17 You're not foreclosing yourself by just asking for  
18 comments at this point. There's flexibility.

19 COMMISSIONER SOMMERS: I would say that  
20 I think this is a good rule and I think you've  
21 done a great job except for these provisions and I  
22 fear that by delaying getting comment on a

1 particular solution for this delaying going final  
2 with a process for exemption may have a lot of  
3 unintended consequences and may actually go against  
4 congressional intent. Thanks, George.

5 MR. WILDER: Thank you.

6 CHAIRMAN GENSLER: Commissioner Chilton?

7 COMMISSIONER CHILTON: I just have a  
8 quick comment. George, I think you and your team  
9 have done a really good job and I thank you. I've  
10 talked a little bit about this before generically  
11 when I've said that a lot of people who have come  
12 in and have met with us want the line for  
13 regulation to begin right after them. In this  
14 case if they want to be included the line is long  
15 and in some cases it's sort of laughable who's  
16 requested this. I don't want to make light of it  
17 saying it's laughable, but we've had hedge funds  
18 in here that have said their end users -- I even  
19 had somebody suggest that in ETFs since they are  
20 the natural counterparty to some of the end users  
21 needed to be included in this. So some of these  
22 requests while you want to take them seriously

1 quite frankly don't pass the smirk test. I think  
2 that you've done a really good job here to strike  
3 a reasonable balance. I'm not suggesting that it  
4 can't be improved, that we won't get some  
5 additional comments that will be helpful, but I  
6 thank you and your team for your good work.

7 MR. WILDER: Thank you.

8 CHAIRMAN GENSLER: Thank you,  
9 Commissioner Chilton. Commissioner O'Malia?

10 COMMISSIONER O'MALIA: George, let me  
11 add to the chorus. This is a great rule except  
12 for one item.

13 MR. WILDER: One little thing.

14 COMMISSIONER O'MALIA: Yes.  
15 Unfortunately with regard to the farm credit  
16 system I think we've missed it by a country mile.

17 MR. WILDER: You're right.

18 COMMISSIONER O'MALIA: I think every  
19 Commissioner has mentioned it, the \$10 billion.  
20 Commissioner Dunn obviously raised it and  
21 Commission Sommers as well. Last night at 7  
22 o'clock which may be late for dinner when you sent

1 around a new question on this issue, it really  
2 isn't late in terms of rulemaking. This is early  
3 for a 7 o'clock change. But I think in the  
4 question though you left out three important  
5 words. It says in Section 2(h)(7)(ii), Congress  
6 directed the Commission to consider exempting  
7 depository institutions, farm credit institutions  
8 and credit unions with total assets less than \$10  
9 billion. But when you go to the Act it says  
10 including such entities. That makes a big  
11 difference obviously in who we're considering in  
12 this question or who should respond in the nature  
13 of the question. Can we put in including such  
14 entities back into the question so that it's more  
15 consistent with the statute?

16 MR. WILDER: We are asking this question  
17 whether there are measures other than \$10 billion  
18 in assets so that we're not only asking here in  
19 terms of perhaps going above \$10 billion, but  
20 we're also asking are there different tests that  
21 we could use so that I think this question is  
22 consistent with what Congress intended.

1                   COMMISSIONER O'MALIA: Why don't we put  
2 their words back in our question?

3                   MR. WILDER: I'd be happy to do that.

4                   CHAIRMAN GENSLER: What are the words?

5                   COMMISSIONER O'MALIA: Including such  
6 entities, straight from the statute.

7                   CHAIRMAN GENSLER: Including such  
8 entities. Will we get closer to your country mile  
9 then, Commissioner O'Malia?

10                  COMMISSIONER O'MALIA: We're within a  
11 country mile then.

12                  CHAIRMAN GENSLER: What is the wording?

13                  COMMISSIONER O'MALIA: Including such  
14 entities.

15                  CHAIRMAN GENSLER: I'm asking for  
16 unanimous consent to include those three words in  
17 the question that came around at 7 o'clock last  
18 night. Was it three words?

19                  COMMISSIONER O'MALIA: Yes.

20                  CHAIRMAN GENSLER: Not hearing any  
21 objections, we've included those three words.

22                  COMMISSIONER O'MALIA: Thank you.

1 Obviously my colleagues have covered the ground on  
2 this one and I appreciate the great rulemaking.  
3 I'm not proposing it, but what do you think about  
4 maybe a staff roundtable on this issue since we're  
5 starting from scratch would be a good idea?

6 MR. WILDER: You're asking me?

7 COMMISSIONER O'MALIA: I was just kind  
8 of putting it out there.

9 MR. WILDER: Sure. That's a  
10 possibility.

11 CHAIRMAN GENSLER: At the end of the day  
12 there are going to be rules that come out on this  
13 small bank, small farm credit, small credit union  
14 provision. I don't think we should necessarily  
15 delay. I think actually we are building a  
16 constructive administrative record. I think as  
17 the Commission we owe that to the rulemaking  
18 process. And as Commissioner Chilton has said,  
19 there has been a long list of people who have come  
20 in and said we're really not what Congress  
21 intended when they wrote that and then you can  
22 fill in swap execution facility, swap dealer,

1 major swap participant, almost anything in there.  
2 And you can look on our website because we  
3 publicly posted the 500 meetings, but it's a good  
4 assumption that a large percentage of those are  
5 coming in to say we're not what Congress intended  
6 so that this area where Congress actually said we  
7 shall consider exempting these financial  
8 institutions from an otherwise financial  
9 institution definition, and I will own up and I am  
10 proud of this decision to build an administrative  
11 record. This may be a bit more cautious than  
12 Commissioner Sommers would want, but I think it is  
13 something that's incumbent upon this Commission to  
14 do well and do something that's sustainable in the  
15 courts after we do it.

16 MR. BERKOVITZ: Mister Chairman, if I  
17 could add a clarification. The language in the  
18 proposal was a slight paraphrasing of the  
19 statutory language, but if you put in institutions  
20 including, we also had taken out the description  
21 of the banks as small banks and small institutions  
22 so that we may want to parallel the exact phrasing

1 in the statute.

2 CHAIRMAN GENSLER: Is that all right  
3 with you, Commissioner O'Malia? So that we'll  
4 consider that a technical cleanup.

5 MR. BERKOVITZ: Correct.

6 CHAIRMAN GENSLER: Thanks. If there are  
7 no further questions, Dave Stawik, please call the  
8 roll.

9 MR. STAWIK: Commissioner O'Malia?

10 COMMISSIONER O'MALIA: No.

11 MR. STAWIK: Commissioner O'Malia, no.  
12 Commissioner Chilton?

13 COMMISSIONER CHILTON: Aye.

14 MR. STAWIK: Commissioner Chilton, aye.  
15 Commissioner Sommers?

16 COMMISSIONER SOMMERS: No.

17 MR. STAWIK: Commissioner Sommers, no.  
18 Commissioner Dunn?

19 COMMISSIONER DUNN: Aye.

20 MR. STAWIK: Commissioner Dunn, aye.  
21 Mister Chairman?

22 CHAIRMAN GENSLER: Aye.

1                   MR. STAWIK: Mister Chairman, aye.  
2           Mister Chairman, on this question the ayes are  
3           three and the nays are two.

4                   CHAIRMAN GENSLER: Thank you, George and  
5           thank you, Dan. We'll see you back. Now we're  
6           moving to the notice of proposed rule making and  
7           staff's presentation on business conduct standards  
8           for counterparties or what we have sometimes  
9           called on our website and elsewhere external  
10          business conduct standards which are very  
11          important to protect the public. I'm filling a  
12          little time here for the public as people are  
13          coming in. The Congress clearly gave the SEC and  
14          the CFTC authority to set business conduct  
15          standards to protect against fraud, manipulation  
16          and other potential abuses, to promote market  
17          integrity and importantly promote a system of  
18          sales practices to protect counterparties. We're  
19          going to hear from Phyllis Cela who is the team  
20          lead and is also our Deputy Director of the  
21          Division of Enforcement, Vince McGonagle who is  
22          our Acting Head of Enforcement, Peter Sanchez who

1 is ever present on the team and then Ananda  
2 Radhakrishnan who heads up our Division of  
3 Clearing and Intermediary Oversight is also back  
4 for yet another cameo. Phyllis?

5 MS. CELA: Thank you very much. Good  
6 morning, Mister Chairman and Commissioners.  
7 Before presenting an overview of the proposed  
8 rules, I really would like to thank the Commission  
9 and its staff for your support and guidance during  
10 the rulemaking process, and in particular Tim  
11 Karpoff for his wise counsel. I also would like  
12 to thank my team.

13 CHAIRMAN GENSLER: Here's Tim. Do you  
14 want to tell him in person again?

15 MS. CELA: Your wise counsel. You  
16 missed it. I want to thank my team, Pete Sanchez,  
17 Katie Driscoll, Ted Neller, Barry McCardy, Michael  
18 Salinski, Russ Petalia, Vivette Jane, John Doland,  
19 Todd Pronost and Stephanie Horn. We have worked  
20 closely with our counterparts at the SEC and I  
21 would like to acknowledge Lordes Gonzalez, the  
22 team leader there and her team.

1           In the course of preparing the proposed  
2 rules we received very helpful advice from  
3 numerous stakeholders through letters and  
4 consultations and also from staff and fellow  
5 regulators at the OCC, Fed, the Department of  
6 Labor, the European Commission and the U.K. FSA.  
7 This has been truly a collaborative effort which  
8 has resulted in the recommendations that we are  
9 making today.

10           Section 731 of the Dodd-Frank Act adds  
11 Section 4(s)(H) to the Commodity Exchange Act and  
12 requires the Commission to promulgate rules to  
13 establish business conduct standards for swap  
14 dealers and major swap participants dealing with  
15 counterparties generally. In addition, Dodd-Frank  
16 empowers the Commission to promulgate rules to  
17 implement specific protections for special  
18 entities like state and municipal governments.  
19 The proposed rules will principally apply to swap  
20 dealers and major swap participants when they know  
21 their counterparty before entering into a swap.  
22 Often there will be uncleared bilateral swaps.

1 The disclosure and due diligence requirements will  
2 not apply to swaps initiated on a designated  
3 contract market or swap execution facility where  
4 the swap dealer or major swap participant does not  
5 know the identity of the counterparty prior to  
6 execution. In addition, where both counterparties  
7 or swap dealers, major swap participants,  
8 security-based swap dealers or major  
9 security-based swap participants, the disclosure  
10 and due diligence obligations will not apply.

11 Generally speaking there are three  
12 groups of proposed rules, the general provisions,  
13 the duties that relate to dealings with all types  
14 of counterparties, and conduct rules that apply to  
15 dealings with special entities. The general  
16 provisions include requirements to have policies  
17 and procedures, diligence supervision and record  
18 retention related to the business conduct  
19 standards. They also address acceptable means of  
20 complying with the new requirements. The general  
21 provisions contain prohibitions against fraud,  
22 manipulation and abusive practices. The antifraud

1 provision incorporates the statutory text from new  
2 Section 4(s)(H)(iv) which applies to swap dealers  
3 and major swap participants and prohibits  
4 fraudulent, deceptive and manipulative practices.  
5 These proposed rules also prohibit disclosure of  
6 material, confidential counterparty information  
7 and trading ahead and front running of  
8 counterparty swap transactions. Coupled with the  
9 proposed internal business conduct rules requiring  
10 codes of ethics and information barriers, these  
11 rules are intended to protect counterparties from  
12 abuse by swap dealers and major swap participants  
13 including undermining the interests of  
14 counterparties by misappropriating their trading  
15 opportunities.

16           The second group contains disclosure and  
17 due diligence requirements for dealings with  
18 counterparties generally. It begins with the duty  
19 to verify that the counterparty is an eligible  
20 contract participant and to determine whether a  
21 counterparty is a special entity. It continues  
22 with the duty to disclose the material risks and

1 characteristics of the swap and the material  
2 incentives and conflicts of interest of the  
3 participant dealer or major swap participant in  
4 connection with the swap. As part of the duty to  
5 disclose material risks, SDs and MSPs would be  
6 required to provide a scenario analysis for all  
7 high-risk, complex bilateral swaps. For bilateral  
8 swaps that are not available for trading on a swap  
9 execution facility or a designated contract  
10 market, counterparties would be able to opt in to  
11 require a scenario analysis from the SD or MSP.

12 For uncleared swaps, there is the duty  
13 to disclose the daily mark which is defined as the  
14 mid-market value of the swap, and the duty to  
15 notify a counterparty of the right to clear, that  
16 is, a swap that is exempt from mandatory clearing,  
17 and to select the DCO. Under the proposed rules,  
18 SDs and MSPs would also have a duty of fair  
19 dealing and good faith and would be required to  
20 communicate in a fair and balanced manner. In  
21 this regard there is also an institutional  
22 suitability obligation when swap dealers or major

1 swap participants make recommendations to  
2 counterparties.

3           The third group of rules applies to  
4 dealings with special entities. The statute  
5 requires that swap dealers that act as advisers to  
6 special entities must act in the best interests of  
7 the special entity and make reasonable efforts to  
8 obtain information necessary to ensure that their  
9 recommendations are in the special entity's best  
10 interests. The proposed rules adopt the statutory  
11 text and clarify that acts as an adviser to a  
12 special entity includes recommending a swap. The  
13 legislative history of Sections 4(s)(H)(iv) and  
14 (v) indicates that swap dealers should be able to  
15 continue to recommend a swap to a special entity  
16 and then enter into the same swap as a  
17 counterparty. For the statute and proposed rule  
18 to operate this way, the best interest duty would  
19 have to be interpreted to allow principal  
20 transactions between an adviser and its  
21 counterparty. Looking to case law, the best  
22 interest standard would require the adviser to put

1 the client's interests first by acting in good  
2 faith and making full and fair disclosure of all  
3 material facts and conflicts of interest and  
4 employing reasonable care that any recommendation  
5 is designed to further the purposes of the special  
6 entity. It would not bar principal transactions  
7 per se where the conflicts are properly disclosed  
8 and the counterparty consents.

9           When acting as a counterparty to a  
10 special entity, swap dealers and major swap  
11 participants will have the duty to ensure that the  
12 special entity has a representative either  
13 in-house or external who is independent of the  
14 swap dealer or major swap participant and who  
15 satisfied certain other criteria including that  
16 the representative acts in the best interests of  
17 the special entity. When dealing with ERISA plans  
18 there will be an additional duty to verify that  
19 the plan has a representative that is an ERISA  
20 fiduciary, and when dealing with a municipal  
21 entity that there will be an additional duty to  
22 verify that the municipality has a representative

1       that is subject to restrictions on certain  
2       political contributions or pay-to-play  
3       restrictions. Swap dealers and major participants  
4       also would be subject to pay-to-play restrictions  
5       when dealing with municipal entities. This rule  
6       is similar to existing rules for investment  
7       advisers and municipal securities dealers.

8                 Finally, the proposed rules would  
9       require registered Commission intermediaries that  
10       handle customer orders for swaps that are  
11       available for trading on a swap execution facility  
12       or designated contract market to execute such  
13       orders on terms that are reasonably related to the  
14       best terms available. Thank you and I look  
15       forward to your comments and questions.

16                CHAIRMAN GENSLER: The Chair will  
17       entertain a motion on the staff recommendation on  
18       external business conduct standards.

19                COMMISSIONER DUNN: So moved.

20                COMMISSIONER SOMMERS: Second.

21                CHAIRMAN GENSLER: Thank you so much,  
22       Phyllis and everybody on the team. I know there

1 has been a lot of work that's gone in over the  
2 last number of months and a lot of consultation  
3 and I'm glad that you listed it. We shared as I  
4 understand it drafts of this as it was coming  
5 through with the SEC and the federal banking  
6 regulators. Is that correct?

7 MS. CELA: All of them, yes.

8 CHAIRMAN GENSLER: You incorporated as  
9 best you could their comments?

10 MS. CELA: We did. It was very helpful  
11 and we did.

12 CHAIRMAN GENSLER: Also my thanks to  
13 fellow regulators across this town, and you said  
14 internationally, that you got comments from London  
15 and Brussels.

16 MS. CELA: Absolutely. We sent term  
17 sheets abroad and had very detailed exchanges.

18 CHAIRMAN GENSLER: I support the  
19 proposed rulemaking to establish business conduct  
20 standards for swap dealers and major swap  
21 participants in their dealings with  
22 counterparties. I think this is one of the

1 critical features of what Congress did in the  
2 statute, that there would be the promotion of the  
3 integrity of the markets in this way. Today's  
4 proposal implements those authorities that  
5 Congress asked us to do, to enforce robust sales  
6 practices in the swap markets and the rules will  
7 level the playing field and bring I think some  
8 needed transparency. There is even one  
9 transparency piece here, it's like the towel rack,  
10 but Congress did this one, which in the form of a  
11 question but I want to make sure I understand it,  
12 that if you're in a bilateral relationship because  
13 it's a customized swap or you're an end user that  
14 happens to decide not to use a clearinghouse, you  
15 can get a daily mid- market mark to market on  
16 valuation. Is that correct?

17 MS. CELA: That is correct.

18 CHAIRMAN GENSLER: That I think is a  
19 very positive thing to end users that Congress did  
20 and that we're incorporating in this rule that  
21 every day you get a chance to have that valuation  
22 directly and it's supposed to be mid-market. I

1 think it will strengthen the confidence in the  
2 markets. The proposed rules also prohibit fraud  
3 and certain other abusive practices. It would  
4 implement requirements for swap dealers to deal  
5 fairly with customers providing balanced  
6 communications and disclose conflicts of interest  
7 and material incentives before entering into the  
8 swaps. And the rule also would implement the  
9 Dodd-Frank heightened duties on the dealers when  
10 they deal with certain entities, what are called  
11 special entities. Am I correct that that's  
12 largely municipalities and pension plans?

13 MS. CELA: And endowments.

14 CHAIRMAN GENSLER: And endowments.

15 Thank you. With regard to these entities, the  
16 municipalities, pension plans and endowments, the  
17 proposed rules include higher standards than  
18 Congress wanted and as Phyllis said also it has a  
19 restriction on certain political contributions to  
20 municipal officers by the dealers, similar to the  
21 pay-to-play restrictions that the SEC has and  
22 you've tailored off of those restrictions. Is

1 that right?

2 MS. CELA: We did. We copied.

3 CHAIRMAN GENSLER: Plagiarism was  
4 allowed for now. It might not be plagiarized once  
5 the public comments and we may decide to change  
6 it.

7 MS. CELA: That's always possible.

8 CHAIRMAN GENSLER: The proposed rule is  
9 intended to ensure that swaps customers get fair  
10 treatment in the execution of their transactions  
11 and would require dealers to disclose what access  
12 they have to swap execution facilities so that as  
13 I understand it whether it's an end user like the  
14 commercial end users we talked about or  
15 financials, that the dealer would have to tell  
16 them there are these things called trading  
17 platforms and SEFs and so forth. Is that correct?

18 MS. CELA: That's correct. It's a  
19 two-piece disclosure so that you disclose where  
20 the swap is trading and which markets you have  
21 access to as a dealer.

22 CHAIRMAN GENSLER: So that if it's a

1 commercial end user that has a choice whether to  
2 use a swap execution facility, they keep that  
3 choice but they at least get some disclosure. Is  
4 that correct?

5 MS. CELA: That is correct.

6 CHAIRMAN GENSLER: Then the rules  
7 prohibit the dealers from defrauding a customer by  
8 executing a transaction on terms that have no  
9 reasonable relationship to the market. This may  
10 be something that's very important to hear from  
11 the public on, it may be something that doesn't  
12 happen often, but at least as I understand it  
13 includes that as well.

14 MR. CELA: It does. It's grounded in  
15 concepts of fair dealing and antifraud and it  
16 derives from the principal agent relationship in  
17 the case law and has been articulated as a  
18 reasonable relationship test.

19 CHAIRMAN GENSLER: I also think the  
20 proposal asked a series of very important  
21 questions. I commend Commissioner Dunn who worked  
22 on a lot of these in terms of the counterparty

1 relationship and the adviser relationship and how  
2 the two square in this bilateral world. Is that  
3 right?

4 MS. CELA: That is correct. It is a  
5 complicated situation that Congress has addressed  
6 in a way through a disclosure regime. That  
7 disclosure regime actually derives from case law  
8 beginning with the Supreme Court case in the  
9 capital gains are in the mid-1960s which talks  
10 about when you have an adviser relationship with a  
11 client, disclosure and consent to disclosure is  
12 very material and particular disclosures is the  
13 way to put sunshine on the situation and try to  
14 mitigate the situation.

15 CHAIRMAN GENSLER: Can you, Phyllis,  
16 tell us how this proposal defines adviser?

17 MS. CELA: Adviser here would have its  
18 meaning as adviser under the CTA definition, but  
19 what we've done here is to particularly say that  
20 when you make a recommendation as you would if you  
21 were a commodity trading adviser, if you make a  
22 particularized recommendation to a special entity

1       that would put you in the adviser box and obligate  
2       you to operate on a best interest standard of  
3       care.

4                   CHAIRMAN GENSLER:   So that if you make  
5       as you call it a particularized recommendation as  
6       opposed to a general the markets are going up.  
7       It's not like that.

8                   MS. CELA:   There is a carve-out.   We  
9       thought it was important not to interfere where  
10      interference was unhelpful and not necessary.   We  
11      were told that when there is general market  
12      information provided to a counterparty, that  
13      should certainly not be considered advising, or  
14      when a counterparty comes to receive terms on a  
15      request basis for a transaction from a swap  
16      dealer, whatever terms that the swap dealer would  
17      provide shouldn't be considered to be advice to  
18      that counterparty.

19                   CHAIRMAN GENSLER:   But where they're  
20      actually structuring a deal and so many of these  
21      dealers have structuring desks and they're working  
22      to structure something over days or maybe weeks,

1       then that would be particular advice?

2                   MS. CELA: That would certainly seem to  
3       be particular advice. This isn't the first time  
4       that the law has considered what constitutes  
5       making a recommendation. Our own CTA case law,  
6       the CTS decision one and of course on the  
7       investment adviser side on for the SEC as well as  
8       under FINRA case law, there is a fairly  
9       substantial body of law to provide guidance on  
10      what does constitute a recommendation in the  
11      circumstance. The circumstance that you just  
12      described seems to me to be one that would fall  
13      cleanly within.

14                   CHAIRMAN GENSLER: I thank you again and  
15      I very much look forward to the public's comments  
16      in this area. It's a very important area.  
17      Commissioner Dunn?

18                   COMMISSIONER DUNN: Thank you, Mister  
19      Chairman, and I thank staff for indulging me and I  
20      thank my fellow Commissioners. I know I've been  
21      the lefty here on this one. But in my mind I  
22      think this falls within a fiduciary responsibility

1 and at one point that was in the proposed statute.  
2 It wasn't in the final statute although in reading  
3 it I think Congress gives us the authority to  
4 require that if possible, but that may be just one  
5 of five opinions here.

6           Having said all that, I feel that there  
7 is an inherent conflict of interest from somebody  
8 who is both an adviser and a counterpart and it  
9 goes against logic to say, no, there's not. Are  
10 you satisfied that what we're doing here will  
11 mitigate that conflicts of interest?

12           MS. CELA: Yes. I feel like what the  
13 proposed rule does and what Dodd-Frank does is  
14 acknowledge the conflict. It doesn't ignore the  
15 conflict or hide it or somehow put it under the  
16 rug. It says there is an issue here that needs to  
17 be addressed and the way the Congress addresses it  
18 is to impose this higher duty of care, this best  
19 interest standard for the adviser in dealing with  
20 certainly the special entity. What helps in this  
21 regard I believe is in order to enter into a  
22 transaction with a counterparty, that special

1       entity counterparty will have to have its own  
2       independent representative and it too will have to  
3       operate in the best interests of that special  
4       entity. So I think it is certainly possible for  
5       the special entity to be looking to its own  
6       independent representative for reliance purposes  
7       and to evaluate the recommendation that's coming  
8       from the swap dealer who would be acting both as  
9       the adviser and the counterparty. With that  
10      additional protection in that circumstance,  
11      Commissioner, I appreciate very much your concern.  
12      We have it as well. Particularly as an  
13      enforcement person I worry about things like that.  
14      I think we've gone a fair distance to mitigating  
15      as you say. You can't eliminate the conflict.  
16      You can shed light on it and bring it to the open  
17      and the parties can make judgments.

18                   COMMISSIONER DUNN: You indicated and  
19      the Chairman just elaborated on the fact that  
20      we're looking at the current body of law as we go  
21      through here and that suggests to me that this is  
22      not static, that it's dynamic and that as case law

1 changes, this may change as well. My question to  
2 you as an enforcer, how do we enforce this and how  
3 do we push the boundaries of case law as we're  
4 going through this to come down on the side of the  
5 individuals?

6 MS. CELA: I think we were given some  
7 tools we didn't have before. We certainly have a  
8 lot of tools. We had no tools before with respect  
9 to this particular relationship between a swap  
10 dealer and the counterparty. It was on the bus.  
11 What Congress did was impose very particular due  
12 diligence requirements around certification of the  
13 appropriateness of counterparty in the first  
14 instance and then a very robust disclosure regime.  
15 What we've done here is really incorporating the  
16 very robust language from the statute so that from  
17 an enforcement standpoint it's the tripwire to  
18 fraud. If you haven't made the disclosures the  
19 risk is with respect to fraud, but making the  
20 disclosures or failing to make the disclosures  
21 themselves would be effective enforcement so that  
22 in that context robust compliance and an audit

1 program would be very helpful in ensuring that the  
2 business is going on in a way that would mitigate  
3 those conflicts that you're concerned about and we  
4 are too.

5 COMMISSIONER DUNN: Is the division  
6 contemplating developing that type of audit group  
7 to go out and look at this?

8 MS. CELA: That's why I invited Mr.  
9 Radhakrishnan to the table today.

10 MR. RADHAKRISHNAN: In fact, depending  
11 on how the Commission structures the agency, staff  
12 is contemplating structuring an audit group to  
13 look at swap dealers. Of course, everything is a  
14 function of resources so if we get what we ask for  
15 and we get it in time, then we can do it. Notice  
16 I said get it in time as well because getting  
17 money 2 to 3 years from now is going to help us.

18 COMMISSIONER DUNN: Is the entity that  
19 the dealers register with going to have a duty  
20 here as well?

21 MR. RADHAKRISHNAN: Commissioner, as the  
22 Commission asked the question in the registration

1 rulemaking, the issue is always should we do it or  
2 should the NFA do it because I think in that  
3 rulemaking the Commission proposed that all swap  
4 dealers and MSPs have to register with the NFA. I  
5 don't know the answer to that. The answer would  
6 be a balance between us. I don't speak for the  
7 NFA, but I'm not sure that they will members and  
8 not look at them. But as to whether we do it I  
9 think is a function of resources and also of  
10 course what the Commission decides we should do.

11 COMMISSIONER DUNN: I would hate to  
12 think that the public thinks we're doing a  
13 regulation out here with no follow-up or with no  
14 police on the job.

15 MR. RADHAKRISHNAN: I agree with you.  
16 And I'm just guessing in that if the Commission  
17 doesn't get the resources I suspect that the NFA  
18 will do it, but I hope that we get the resources  
19 just so that the Commission's staff and the  
20 Commission itself gets a familiarity with how we  
21 implement these regulations.

22 COMMISSIONER DUNN: Phyllis, you had

1 indicated that you had talked with other agencies.  
2 How do our rules here compare with what the SEC  
3 does? Is there a difference and why?

4 MS. CELA: Let me say that my  
5 counterpart team at the SEC got a reprieve. They  
6 were supposed to be considered yesterday but won't  
7 be heard until next week.

8 CHAIRMAN GENSLER: A little like the SEF  
9 team. We're not the only ones who are human.

10 MS. CELA: I really can't tell you what  
11 will come of it. What I can say is that in the  
12 course of staff consultation and give and take,  
13 the rules are very close. There are some things  
14 that they are taking up in different work streams.  
15 There are some things that they already have in  
16 some ways that we don't have. An execution  
17 standard is something a little bit like that.  
18 Their antifraud rules may or may not be included  
19 for example in this rulemaking, more likely if at  
20 all in a subsequent rulemaking. But I would say  
21 that with respect to the disclosures, we are  
22 virtually the same and the due diligence

1 requirements and our treatment of special entities  
2 is very, very close or at least to be recommended  
3 to be very close. What makes it through on both  
4 sides is of course up to you.

5 COMMISSIONER DUNN: To echo the  
6 Chairman, I think this is one of the key  
7 components of Dodd-Frank to ensure that we don't  
8 have a financial meltdown in the future and that  
9 people aren't taken advantage of. This is a point  
10 in time where we need to have in my opinion very,  
11 very strong conduct standards, we need to have  
12 standards that are fair to everyone, but they also  
13 have to be workable for the industry out there so  
14 that I am really am looking forward to see the  
15 types of comments that we get on this particular  
16 concept of standards. I also note that some of  
17 the things that you took in here are based on best  
18 practices within the industry and that connotes to  
19 me that that also is a dynamic thing that may  
20 transpire in the future and so this is something  
21 that I think staff and the Commission ought to  
22 look at based on what happened in case law, what

1 happens in industry standards and best practices  
2 out there, that we on an ongoing basis review this  
3 so that we can be in front and not behind.

4 CHAIRMAN GENSLER: Thank you,  
5 Commissioner Dunn. Before I turn to Commissioner  
6 Sommers, on the resource question and this might  
7 be for Dan Berkovitz or Phyllis, I can't find the  
8 provision, is it not also the case that if a swap  
9 dealer is regulated as a bank or regulated by  
10 others, it could be a registered broker dealer,  
11 that the Federal Reserve and the bank regulators  
12 or the SEC also can examine this and the  
13 relationship as to show they can refer cases if  
14 there is an issue? Do I have that correct?

15 MS. CELA: The short answer is they are  
16 frontline regulators for the same entities and can  
17 look at practices by those entities.

18 CHAIRMAN GENSLER: If for some reason we  
19 don't get the resources as Ananda said, there are  
20 still the bank regulators or somebody else who can  
21 examine this and be as you call it the frontline  
22 regulators statutorily and they might have to

1 refer a case?

2 MR. BERKOVITZ: Correct. They could  
3 refer the case to us. We still be the primary  
4 enforcement authority, but they could refer it to  
5 us and provide us with information certainly.

6 CHAIRMAN GENSLER: It's another avenue.  
7 I'm thinking about this resource issue.

8 MS. CELA: What I wanted to say is  
9 keeping that in mind, we made the books and  
10 records that would be kept with respect to  
11 compliance with these rules available to  
12 appropriate prudential regulators so that there  
13 should be no artificial barrier to their access to  
14 the information.

15 CHAIRMAN GENSLER: Thank you. I'm  
16 sorry. Commissioner Sommers?

17 COMMISSIONER SOMMERS: Thank you, Mister  
18 Chairman. I want to commend Phyllis and Peter and  
19 your whole team. I think that this really has  
20 turned out to be a reasonable rule and based on a  
21 lot of what Commissioner Dunn said, best practices  
22 that are in the industry and I appreciate your

1 tolerance for numerous comments from myself and  
2 from my office and the challenges that you had  
3 because a lot of the rule was not very flexible so  
4 you were working with what you had with words on  
5 the paper. I want to make a comment on one of my  
6 concerns in the rule that started as best  
7 execution and has ended up as an execution  
8 standard that ensures that the swap is executed on  
9 terms that have a reasonable relationship to the  
10 best terms available. I would suggest that there  
11 seems to be or my fear is that there seems to be  
12 this impression that counterparties have no idea  
13 what the fair price in the market is. If there  
14 are dealers out there who are executing swaps that  
15 have no relationship to a reasonable price in the  
16 market, that their customers are not going to be  
17 their customers for very long so I think that this  
18 provision may be a solution to a problem that  
19 doesn't exist. I would ask like Commissioner Dunn  
20 that I think this is one provision in this rule  
21 that I would specifically ask for comment on  
22 whether it's necessary and whether or not we are

1       overreaching in this area. Thank you.

2                   CHAIRMAN GENSLER: Thank you,  
3       Commissioner Sommers. Commissioner Chilton?

4                   COMMISSIONER CHILTON: Thank you, Mister  
5       Chairman. I wanted to thank Phyllis for the  
6       proposal with regard to alerting the best  
7       execution rule to ensure that there are reasonable  
8       executions. I thank you for that. I see that  
9       Mark Young is here and he brought in a group of  
10      pension funds a while back probably not with all  
11      of us but I found it very helpful to listen to  
12      them. I know that they had some concerns and that  
13      you had subsequently had some conversations with  
14      the Department of Labor. Could you share a little  
15      bit of those conversations with us to sort of  
16      elucidate folks?

17                  MS. CELA: I need to be careful. We had  
18      informal staff consultations so that the same way  
19      that if one of them had called me, nothing that I  
20      would say could bind Labor or you or anything  
21      else. We wanted to take up with them to get a  
22      better understanding of what the regulatory scheme

1 was. We were quite concerned based on what was  
2 being said to us that there was a concern about  
3 potential inconsistency with ERISA law or some  
4 duplication in Dodd- Frank with respect to what  
5 ERISA requires. Ultimately we had shared with  
6 Department of Labor staff the draft.

7 COMMISSIONER CHILTON: Phyllis quickly,  
8 the pension funds that ERISA requires this whole  
9 litany of things that they're already required to  
10 do, therefore maybe we didn't need to have a  
11 litany of things ourselves. Maybe it was  
12 duplicative perhaps so that was the issue.

13 MS. CELA: That was the issue, and so  
14 having gotten the very informal advice from the  
15 Department of Labor we felt that it was important  
16 that we go forward in the way that the Commission  
17 would interpret the provision to say that ERISA  
18 plans would be treated like other special entities  
19 but there were some changes to the specific  
20 statutory criteria to take account of concerns  
21 about particular compliance that they would have  
22 and we asked questions. We think it requires a

1 fuller record for us to make a judgment one way or  
2 another, and as I say on a very informal basis we  
3 were told that there were no concerns by staff  
4 about the approach that we were recommending to  
5 our Commission.

6 COMMISSIONER CHILTON: So that we are  
7 welcoming comments on this and we know Mr. Young  
8 is a prolific writer of letters and that others  
9 will write to us too.

10 MS. CELA: That's right. We expect to  
11 be pen pals.

12 COMMISSIONER CHILTON: Thank you.

13 CHAIRMAN GENSLER: Such a shout out.  
14 Commissioner O'Malia?

15 COMMISSIONER O'MALIA: Who is Mark  
16 Young?

17 CHAIRMAN GENSLER: I don't know. Do you  
18 want him to stand up?

19 COMMISSIONER O'MALIA: No. Phyllis, my  
20 compliments, Peter and the whole team. For  
21 everybody watching, this is the rule for the  
22 little guy and maybe they haven't paid attention

1 and gone through end user priorities and there are  
2 different provisions in the statute for the little  
3 guy, but this is something they need to look at  
4 and it's in Section 731(h), Business Conduct  
5 Standards. It's a balancing act and Commissioner  
6 Dunn's points are well taken that it has to be a  
7 workable rule, but this does provide a new  
8 authority protections for the little guy and it's  
9 an important rule.

10 I have a couple of questions. Part  
11 23.431 requires disclosure of material information  
12 including material incentives and conflicts of  
13 interest that a swap Dodd-Frank or an MSP may have  
14 in connection with a particular swap including  
15 incentives from any source other than a  
16 counterparty. My question is what kinds of  
17 incentives does staff think ought to be disclosed  
18 under this provision and would that include  
19 clearing incentives?

20 MS. CELA: I think as a general matter  
21 it's understood that when swap dealers enter into  
22 transactions they're earning a profit so that

1       that's not particularly helpful as a disclosure,  
2       but what would be more interesting I think is if  
3       the swap dealer is receiving some kind of  
4       compensation from a third party unknown to the  
5       counterparty. That might make a difference in the  
6       nature of the transaction that will take place so  
7       that we specifically indicate in there any  
8       compensation that's received from a third party  
9       would be the type we'd be thinking of in  
10      particular.

11                COMMISSIONER O'MALIA: Do you think this  
12      is a type of thing that will affect counterparty  
13      decision making?

14                MS. CELA: I hope so. I hope it's  
15      meaningful and I hope people where that would be  
16      meaningful disclosure to them, for whatever reason  
17      they would act on it.

18                COMMISSIONER O'MALIA: Will you  
19      elaborate on the differences between the proposed  
20      suitability requirements for swap dealers and MSPs  
21      and the NFA's know-your-customer duties?

22                MS. CELA: That's a very good question,

1 Commissioner, and it's a very close issue. Know  
2 your customer is the standard and actually I saw  
3 Dan Roth before so that if I get it wrong I'm sure  
4 he'll speak up.

5 CHAIRMAN GENSLER: For the public, Dan  
6 Roth is not Mark Young.

7 MS. CELA: No.

8 CHAIRMAN GENSLER: He runs the NFA which  
9 is the self-regulatory organization in the futures  
10 area.

11 MS. CELA: Right. Know your customer is  
12 a concept that comes out of the SRO world and is  
13 intended to take a look at if I understand it  
14 correctly the qualifications of a customer to  
15 trade generally. The futures market has looked at  
16 risk disclosure and has looked at qualification of  
17 customers in a fairly generic way because of the  
18 nature of our products. Our products have been  
19 generic and they've been traded on exchange in a  
20 customized fashion and so that know your customer  
21 has worked in that environment and I know that NFA  
22 has worked very hard to make sure that it's a

1       robust screening or evaluation standard. But when  
2       you get into the kinds of products that are  
3       possible in the swaps world that do have  
4       differences in risk-reward profiles, then it feels  
5       like a more transaction-based rule that could have  
6       some application and may be effective in providing  
7       some additional due diligence so that what a  
8       suitability rule would do is look at  
9       recommendations to counterparties and on a  
10      transaction basis you're looking at a type of swap  
11      or a particular swap and you'd have to assess  
12      suitable in that way, a small difference but a  
13      difference nevertheless from know your customer.

14                COMMISSIONER O'MALIA: With regard to  
15      the execution standard there's been discussed how  
16      will this requirement affect futures trading in  
17      contracts that trade side-by-side on NYMEX and  
18      Globex and the floor? How might that impact a  
19      best execution or trying to achieve that?

20                MS. CELA: We are viewing this to come  
21      out a fair-dealing antifraud world of analysis so  
22      that it would seem to use that we would be looking

1 at conduct that is really over the course of a  
2 relationship. If a swap dealer were routinely  
3 sending orders for a customer to a market that had  
4 consistently worse execution standards than  
5 another, I think we would have to ask the  
6 question, we would be right to ask the question,  
7 about whether that was done in a reasonable  
8 relationship to the market and therefore whether  
9 or not it was fair and reasonable and was the swap  
10 dealer acting in good faith. The two markets that  
11 you identified, it is market neutral in the sense  
12 that wherever you can trade, you then have to  
13 evaluate the terms and then send the trades  
14 through or execute in a way that would be  
15 reasonable related to the best terms available.

16 COMMISSIONER O'MALIA: Bank of America  
17 recently paid more than \$137 million in  
18 restitution to federal and state agencies for its  
19 participation in a conspiracy to rig bids in the  
20 muni bond market. Based on your knowledge of this  
21 matter, how would the proposal with regard to  
22 execution standards have protected the affected

1 federal and state agencies?

2 MS. CELA: I'm not at all qualified to  
3 comment on the particular case, but if I  
4 understand the kind of situation that was  
5 addressed there and I think it's really important  
6 as you consider these rules today to make sure  
7 that we've done our job that we have addressed the  
8 potential dangers in this area. There are a few  
9 things and Congress did most of them, frankly.  
10 There is this independent representative  
11 requirement. The independent representative has  
12 to be acting itself in the best interests of the  
13 special entity. If it's true that the  
14 representative firms were not acting in the best  
15 interests, that they didn't have the  
16 sophistication, that they were not independent of  
17 the swap dealer which is the bottom- line  
18 requirement for the independent representative  
19 provision that we have, if there is a relationship  
20 between that bid rigger and the dealer then that  
21 would it would seem me to be squarely within the  
22 prohibitions that we have. We also have added we

1 think very appropriately the pay-to-play  
2 restrictions which would go a long way I think to  
3 cleaning up the situation that has the potential,  
4 not commenting on this case, for wrong.

5 COMMISSIONER O'MALIA: One final  
6 question. Section 23.410 of the proposed rule  
7 among other things prohibits the employment of  
8 device, scheme or artifice to defraud any special  
9 entity. This language tracks with the language in  
10 the CEA's new antimanipulation provisions of  
11 Section 6(c). Would a violation of this  
12 business-conduct rule result in \$140,000 penalty  
13 or a million-dollar penalty? And because you are  
14 a swap dealer, would you have to be fined once  
15 under the regulation and then again under the  
16 statute for the same violation just by virtue of  
17 our registration status?

18 MS. CELA: I want to answer the second  
19 one and I'm going to give the first one to Vince.  
20 Are you ready, Vince?

21 MR. MCGONAGLE: Sure.

22 MS. CELA: With respect to

1 double-counting, I think the Commission has given  
2 pretty good guidance in case law that it has and  
3 certainly federal court judges have so that we're  
4 not inclined to be receiving double-counting  
5 penalties on the basis of the same exact statutory  
6 language in connection with the same conduct so  
7 that I think we're good there. On the other, I  
8 think this was a topic of discussion and question  
9 at the earlier disruptive-practices meeting and  
10 that's why it's Vince's question.

11 MR. MCGONAGLE: I will give no clarity  
12 because in evaluating an enforcement action we're  
13 going to evaluate all potential violations of the  
14 Act so that to the extent that we're dealing with  
15 something that is disruptive, a disruptive trading  
16 practice that is also say manipulative that gets  
17 clearly into the larger calculus for a million  
18 dollars per penalty then that's going to be part  
19 of the discussion that we have as a recommendation  
20 to the Commission or as part of the settlement.  
21 The question about whether fraudulent activity  
22 itself or how the disruptive trading standards are

1 set up that they might be different because  
2 they're talking more about fraud I think is still  
3 a question that's a little left open for the  
4 comment period for that particular rule. But in  
5 practical experience I'll go back to the first  
6 sentence is which is we would be looking at all  
7 potential violations of the Act and so it's likely  
8 that there would be a range of sanctions that  
9 would be discussed so that it wouldn't be one  
10 clear claim versus another.

11 COMMISSIONER O'MALIA: Thanks for that  
12 clarity. I think I knew that going into the  
13 question.

14 MS. CELA: I'm sorry.

15 CHAIRMAN GENSLER: Did you get  
16 transparency too? I thank everyone. If there are  
17 no further questions, Mr. Stawik, if you can call  
18 the roll.

19 MR. STAWIK: Commissioner O'Malia?

20 COMMISSIONER O'MALIA: Aye.

21 MR. STAWIK: Commissioner O'Malia, aye.  
22 Commissioner Chilton?

1 COMMISSIONER CHILTON: Aye.

2 MR. STAWIK: Commissioner Chilton, aye.  
3 Commissioner Sommers?

4 COMMISSIONER SOMMERS: Aye.

5 MR. STAWIK: Commissioner Sommers, aye.  
6 Commissioner Dunn?

7 COMMISSIONER DUNN: Aye.

8 MR. STAWIK: Commissioner Dunn, aye.  
9 Mister Chairman?

10 CHAIRMAN GENSLER: Aye.

11 MR. STAWIK: Mister Chairman, aye.

12 CHAIRMAN GENSLER: Phyllis, aye. You  
13 heard it. Even Mark Young whoever he is heard it.

14 MR. STAWIK: On this question the ayes  
15 are five and nays are zero.

16 CHAIRMAN GENSLER: I thank the team for  
17 its excellent work. There is much more to do, but  
18 enjoy your holiday. We have now another group  
19 coming up. The final presentation is the  
20 Commission's consideration of the issuance of an  
21 interim final rule with regard to reporting of  
22 swaps. I would have done a break here but I think

1       this one is a little quicker. As they come in and  
2       I fill some time, we have already issued an  
3       interim final rule with regard to swaps that were  
4       in existence when the President signed the bill  
5       which is called the date of enactment. In essence  
6       what that interim final rule said was save the  
7       information. This consideration here is a  
8       proposal on swaps entered into after the President  
9       signed the bill or the date of enactment but prior  
10      to the effect date that some of our data rules and  
11      other things would be effective at the earliest in  
12      the late summer of next year or maybe those  
13      effective dates will be even into months later.  
14      With that, Susan Nathan who is our lead of a  
15      number of our data teams, the swap data repository  
16      team you share, but a number of our data teams,  
17      Rick Shilts who heads our Division of Market  
18      Oversight and Dan Berkovitz who is our General  
19      Counsel. I turn it over to the team to present  
20      this interim final rule on in essence saving data.

21                   MS. NATHAN: Good morning, Mister  
22      Chairman, good morning Commissioners. There is no

1 team to thank on this particular rulemaking but I  
2 would like to express appreciation to Dan and his  
3 staff for their guidance in developing the rule.

4 This morning staff is presenting for the  
5 Commission's consideration as the Chairman said an  
6 interim final rule under Part 44 of the  
7 Commission's regulations, it will be Part 44.03,  
8 to establish requirements related to the reporting  
9 of transition swaps to a registered SDR or to the  
10 Commission. Transition swaps are those swaps  
11 entered into on or before the date of enactment of  
12 the Dodd-Frank Act and prior to the effective date  
13 of permanent swap data reporting and rules that  
14 will shortly be promulgated by the Commission  
15 pursuant to new Section 2(h)(v) of the Act. That  
16 provision in turn was added by Section 723 of  
17 Dodd- Frank and requires that the Commission adopt  
18 rules for the reporting of data related to on the  
19 one hand preenactment swaps and on the other hand  
20 these transition swaps.

21 As the Chairman mentioned, in September  
22 the Commission adopted an interim final rule, Rule

1 44.02, addressing the reporting timetable for  
2 preenactment swaps. The purpose of that rule was  
3 to clarify that reporting obligations would attach  
4 to those swaps and to ensure that counterparties  
5 would preserve relevant information pending the  
6 Commission's implementation of permanent data  
7 reporting rules under Section 2(h)(v). The  
8 interim final rule before the Commission today is  
9 similar in both substance and purpose. It directs  
10 that counterparties to transition swaps report  
11 data to a registered swap data repository or to  
12 the Commission within a specified time period or  
13 by the compliance date to be established by the  
14 permanent rules under 2(h)(v)(B). The rule  
15 further advises potential counterparties to  
16 preserve data related to transition swaps until  
17 reporting can be affected and specifically states  
18 that no counterparties will be required to create  
19 or otherwise adjust the data that they have in  
20 order to comply, it's whatever they have in the  
21 format that they have it.

22 An interim final rulemaking is an

1 expedited process that permits an agency to adopt  
2 for good cause a rule that has not been subject to  
3 the Administrative Procedure Act's requirement  
4 that the public be given notice and an opportunity  
5 to comment on a proposed rule. In an IFR the  
6 agency publishes the rule as final but  
7 concurrently encourages public comment. To the  
8 extent appropriate, that comment will be addressed  
9 in the permanent rulemaking. Staff believes that  
10 an interim final rule is warranted here in order  
11 to timely clarify for counterparties the reporting  
12 obligations that will be imposed under 2(h)(v)(B)  
13 and thus to ensure that counterparties retain  
14 relevant data until these permanent recordkeeping  
15 and reporting rules are adopted. I welcome your  
16 questions.

17 CHAIRMAN GENSLER: Do I hear a motion on  
18 the staff recommendation on this interim final  
19 rule?

20 COMMISSIONER DUNN: So moved.

21 COMMISSIONER SOMMERS: Second.

22 CHAIRMAN GENSLER: Thank you. Susan, if

1 I might ask, I understand that this came up in  
2 reaction to questions from market participants as  
3 to we did an interim final rule for preenactment  
4 swaps and they were asking what do we do until you  
5 finalize it, and you might want to say why we are  
6 addressing this and how did the question come up.

7 MS. NATHAN: That is the primary way in  
8 which the question came up and on the whole, once  
9 we realized that there might be some  
10 misunderstanding it seemed prudent to come out  
11 with this interim rule to clarify obligations and  
12 eliminate to the extent we can any confusion over  
13 who needs to report and what they need to do.

14 CHAIRMAN GENSLER: Am I correct in  
15 understand that the main thing we're clarifying is  
16 what you need to do before the effective dates  
17 which could be up to a year from now? Is that the  
18 main question?

19 MS. NATHAN: That is the main thrust of  
20 this rulemaking. Stripped of its title, what this  
21 is is a heads-up. If you believe that you are a  
22 counterparty to a transition swap, preserve

1       whatever data you currently keep in the course of  
2       normal business practice so that it's available  
3       for reporting as necessary under the permanent  
4       rules when they're adopted.

5                   CHAIRMAN GENSLER:  I do support this.  
6       Why I really like it, but I'd like to know if I'm  
7       correct on this, is it's saying we're not going to  
8       be retroactive and say you have to create a  
9       different record than you currently have.

10                  MS. NATHAN:  Precisely.

11                  CHAIRMAN GENSLER:  So that until our  
12       data rules go effective, again this could be next  
13       fall or whenever, nobody needs to worry about  
14       going back and recreating records.

15                  MS. NATHAN:  No, and the rule's text  
16       itself is very clear.  It's what the counterparty  
17       has on the date of enactment.

18                  CHAIRMAN GENSLER:  Or even after the  
19       date of enactment.  Right?

20                  MS. NATHAN:  Or even after, yes.

21                  CHAIRMAN GENSLER:  So that if somebody  
22       enters into something today, December 9 or after

1 this gets into the Federal Register, it's whatever  
2 they are keeping now they keep and any regulatory  
3 obligations to have more data fields happens  
4 later.

5 MS. NATHAN: That's correct.

6 CHAIRMAN GENSLER: Thank you for  
7 clarifying that. I do support this. Commissioner  
8 Dunn?

9 COMMISSIONER DUNN: Thank you, Mister  
10 Chairman, and I was going to note that in the  
11 preamble it says it does not require any  
12 counterparties to a transition swap transaction to  
13 create new records and permits records to be  
14 retained in their existing format. Are we  
15 prepared to ask for these and if so where would  
16 they go to and how would we store this data and  
17 what would be doing with it?

18 MS. NATHAN: Are you asking whether  
19 there is an immediate reporting obligation imposed  
20 by this rule? No, there is not. The reporting  
21 obligations will be imposed under the permanent  
22 2(h)(v) rules.

1 COMMISSIONER DUNN: Thank you.

2 CHAIRMAN GENSLER: Commissioner Sommers?

3 COMMISSIONER SOMMERS: I don't have any  
4 questions. Thank you.

5 CHAIRMAN GENSLER: Commissioner Chilton?

6 COMMISSIONER CHILTON: I wasn't going to  
7 ask anything because I think you've done a really  
8 good job on this, Susan. But this talk of timing,  
9 I wanted to get a little bit of clarification.  
10 There were a couple of news articles recently. I  
11 think there was one yesterday and I don't want to  
12 ascribe exactly who it was because I'm not sure,  
13 but I believe there was somebody at Barclays who  
14 said it's going to take 3 years to implement this  
15 law. I don't see that happening. Congress gave  
16 us some discretion, Mr. Berkovitz, and the law,  
17 and I'm paraphrasing, says that the Commission  
18 once they promulgate a final rule shall implement  
19 it in not less than 60 days. What that means is  
20 that it could be more than 60 days but that it  
21 can't be less than 60 days unless otherwise  
22 prescribed in the Act. So unless there's a

1 different date, that minimum of 60 days before  
2 implementation, so theoretically it is open-ended.  
3 Theoretically at least you could wait 3 years.  
4 That's not wise and I don't think we'll end up  
5 there, but theoretically you could be there. I'm  
6 not going to get into a specific rule, but there  
7 are other places that have prescribed specific  
8 effective dates. There are just a handful. The  
9 Chairman said we've done 36 but there are going to  
10 be more than 40 of these and there's a handful of  
11 I think nine of them which had other times and on  
12 those the Commission doesn't have the sort of  
13 leeway that we have with regard to the section I  
14 tried to paraphrase there, the 60 days. Is that  
15 correct?

16 MR. BERKOVITZ: Generally, yes,  
17 Commissioner, I think that's generally a correct  
18 observation. The provision you referred to says  
19 unless otherwise specified in the Act, the  
20 provisions of this Act shall be effective on the  
21 later of 360 days or 60 days after the  
22 promulgation of the final rule that is required.

1                   COMMISSIONER CHILTON: I thought it was  
2 not less than 60 days.

3                   MR. BERKOVITZ: Right. Maybe I  
4 misspoke. Not less than 60 days after.

5                   COMMISSIONER CHILTON: Meaning it could  
6 be more unless it's otherwise prescribed.

7                   MR. BERKOVITZ: Correct.

8                   COMMISSIONER CHILTON: Thank you very  
9 much. I appreciate it.

10                  CHAIRMAN GENSLER: Thank you,  
11 Commissioner Chilton. Commissioner O'Malia?  
12 Nothing there? Mr. Stawik, do you want to call  
13 the roll?

14                  MR. STAWIK: Commissioner O'Malia?

15                  COMMISSIONER O'MALIA: Aye.

16                  MR. STAWIK: Commissioner O'Malia, aye.  
17 Commissioner Chilton?

18                  COMMISSIONER CHILTON: Aye.

19                  MR. STAWIK: Commissioner Chilton, aye.  
20 Commissioner Sommers?

21                  COMMISSIONER SOMMERS: Aye.

22                  MR. STAWIK: Commissioner Sommers, aye.

1 Commissioner Dunn?

2 COMMISSIONER DUNN: Aye.

3 MR. STAWIK: Commissioner Dunn, aye.

4 Mister Chairman?

5 CHAIRMAN GENSLER: Aye.

6 MR. STAWIK: Mister Chairman, aye.

7 Mister Chairman, on this vote the ayes are five  
8 and nays are zero.

9 CHAIRMAN GENSLER: Thank you very much  
10 and thank you, Susan, Rick and Dan. At this point  
11 I'd like to ask for unanimous consent to allow  
12 staff to make technical corrections to the  
13 documents voted on today prior to send them to the  
14 Federal Register. Do I hear any objection? Not  
15 hearing objections, so moved. Our next meeting of  
16 this Commission is on December 16 where we will  
17 review the topics that I outlined earlier and I  
18 think we will also vote at that meeting on two  
19 more meetings in January. Of course we'll be  
20 posting the various topics 7 days in advance on  
21 each of those. I also want to remind the public  
22 and the press that we have a very important

1 roundtable tomorrow, December 10. I think the  
2 venue is over at the Securities and Exchange  
3 Commission if I'm not mistaken, but it's going to  
4 be with the Federal Reserve and the other bank  
5 regulators, the SEC and CFTC staff hearing from  
6 important topics on capital margins and we no  
7 doubt going to have more roundtables, Commissioner  
8 O'Malia. I think it is a good think to have  
9 roundtables. I don't know which topics we'll  
10 have. If there is no further Commission business,  
11 I'd like to hear a motion to adjourn the meeting.

12 COMMISSIONER DUNN: So moved.

13 COMMISSIONER SOMMERS: Second.

14 CHAIRMAN GENSLER: We don't have to call  
15 the roll on this do we Mr. Stawik? All in favor?  
16 Aye.

17 (Chorus of ayes.)

18 CHAIRMAN GENSLER: Are there any  
19 opposed? No. Thank you.

20 (Whereupon, at 12:00 p.m., the

21 PROCEEDINGS were adjourned.)

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CERTIFICATE OF NOTARY PUBLIC

DISTRICT OF COLUMBIA

I, Christine Allen, notary public in and for the District of Columbia, do hereby certify that the forgoing PROCEEDING was duly recorded and thereafter reduced to print under my direction; that the witnesses were sworn to tell the truth under penalty of perjury; that said transcript is a true record of the testimony given by witnesses; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this proceeding was called; and, furthermore, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

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Notary Public, in and for the District of Columbia  
My Commission Expires: January 14, 2013

