U.S. COMMODITY FUTURES TRADING COMMISSION (CFTC)

Wednesday, December 18, 2019

9:05 a.m.

Open Meeting

Three Lafayette Centre

CFTC Conference Center

1155 21st Street, N.W.

Washington, DC 20581

BEFORE:

Heath P. Tarbert, Chairman

Brian D. Quintenz, Commissioner

Rostin Behnam, Commissioner

Dawn DeBerry Stump, Commissioner

Dan M. Berkovitz, Commissioner

AGENDA

AGENDA (Continued)

P R O C E E D I N G S

CHAIRMAN TARBERT: Good morning. This meeting will come to order. This is a public meeting of the U.S. Commodity Futures Trading Commission. I would like to welcome members of the public and market participants as well as those on the phone or watching via webcast. I would also like to welcome my fellow commissioners: Commissioner Quintenz, Commissioner Behnam, Commissioner Stump, and Commissioner Berkovitz.

This is the last open Commission meeting of the year. And I just want to say that the holidays are a time to gather with friends and family and to recognize the year's successes. I think this Commission, in particular, has a number of things that all five of us can be proud of as well as the staff. It is also a time to remember family and friends we have lost.

I would like to call up Phil Raimondi of the Division of Market Oversight's Chief Counsel's Office. Phil's legal expertise, hard work, and enthusiasm have been an asset to this Commission. In recognition of

your contributions, Phil recently received the Chairman's Award for Staff Excellence.

I have asked Phil to lead us in the Pledge today in dedication to his father, Peter. Peter was devoted to the derivatives markets, made a career out of it. And he was one of the many couple of thousand people killed on 9/11. We must never forget all of those lost on that tragic day.

And I know right now, Phil, that your father is watching and very proud of you. So, Phil, if you could lead us in the Pledge of Allegiance?

[Pledge of Allegiance]

CHAIRMAN TARBERT: Thank you very much.

This morning, we have a pretty busy agenda. So we are going to dispense with opening statements to leave plenty of time for discussion.

On the agenda for today's open meeting are four items. First, there was going to be -- and I will talk a little bit about that in a second -- a request for comment on E.U. collateral in clearinghouses, a proposed rule on the cross-border application of our swap dealer registration thresholds

and certain regulatory requirements applicable to swap dealers. We know this in shorthand as the cross-border rule. And then we have next a proposed rule on name give-up, which would prohibit the practice of name give-up for swaps that are intended to be cleared on SEFs. And, then, finally, we have a final rule amending our clearinghouse general provisions as implementing the core principles. So we have a very busy agenda today.

The first item on the agenda that I mentioned was going to be a request for comment on whether clearinghouses should be allowed to accept sovereign debt from certain E.U. countries as collateral or the euro or other E.U. currencies for collateral and settlement.

And, as we have noted, the E.U. recently amended its clearinghouse rules to potentially designate non-E.U. CCPs in the wake of Brexit, but this law, EMIR 2.2, on its face is much broader than just addressing the issues arising from the U.K.'s withdrawal from the European Union. It could result in American clearinghouses being subject to

contradictory and duplicative requirements by the E.U., which, arguably, is a systemic risk to the United States.

And I have stated before and I know many of my colleagues, if not all of them, agree that I don't believe any U.S. CCP poses a systemic risk to the E.U. But the E.U. has raised concerns regarding the amount denominated in E.U. currencies, collected in margin, guaranty fund, and collateral. And they have also expressed concerns about third countries outside the European Union settling payments denominated in E.U. currencies.

And the CFTC, the five of us as well as the staff acting on our behalf, has the unilateral authority to address these things. And we will not hesitate to do so to avoid our clearinghouses being subject to an E.U. law that, again, on its face would purport to override our own laws and regulations. So I personally do not have any problem with German and French government bonds posted as collateral or even E.U. currency used as collateral or even E.U. currency used as collateral or even for settlement. But we can

easily revoke our no-action relief or amend our rules to prohibit certain types of foreign collateral that the CCP can accept for margin and settlement purposes.

Also in the interest of international deference, we have the ability to revoke previously issued Part 30 exemptions should we fail to get international comity from our foreign counterparts. Now, I very much hope that we don't have to take such drastic measures. So, to that end, I decided that at this point, I think we are going to withdraw that proposal, Mr. Secretary, for the time being. And we will not be voting on that today.

On a positive note, I will say that over the last three months, we have had a very constructive dialogue with the European Commission and ESMA on this issue. And collaboration, of course, is key to implementing the G-20 derivative reforms. I remain hopeful that the final delegated acts that will be published by the European Commission and ultimately implemented by ESMA will lead to strong cooperation and information sharing. We want even better oversight of international CCPs, but we don't

burdensome, duplicative, or even conflicting supervision.

So stay tuned. We may or may not be representing this and other proposals in the future. We are going to move on to the next agenda item, but before I do, so, I just want to check to see if any of my fellow commissioners have anything they would like to add.

[Nodding heads.]

CHAIRMAN TARBERT: Well, then we will move on to our agenda of the remaining three items. For each of the remaining items on today's agenda, the staff will make presentations to the Commission. The Commission will then separately vote on each of these proposed or in the final case the final rule.

After each staff presentation, the floor will be open for questions from each commissioner. Following the close of discussion on each matter, the Commission will vote on the recommendation. All final votes conducted in this public meeting will be recorded votes. The votes approving issuance of rulemaking documents will be included with those

documents in the Federal Register. To facilitate the preparation of the approved documents for publication in the Federal Register, I now ask the Commission to grant unanimous consent for staff to make the necessary technical corrections prior to submitting them to the Federal Register.

COMMISSIONER QUINTENZ: So moved.

COMMISSIONER BEHNAM: Second.

CHAIRMAN TARBERT: Thank you. Without objection, so ordered.

At this time, I would like to welcome the following staff for their presentation on our first agenda item, which is the proposed rule regarding the cross-border application of registration thresholds and certain regulatory requirements under our Part 23, which applies to swap dealers and major swap participants. From the Division of Swap Dealer and Intermediary Oversight, we have with us today Josh Sterling, Frank Fisanich, Lauren Bennett, Owen Kopon, Rajal Patel, and Jacob Chachkin.

Thank you very much. And you may go ahead and begin your presentation.

MR. STERLING: Good morning, Mr. Chairman, commissioners. It is a pleasure to be before you once again, I think the third time in five weeks perhaps, with another expertly crafted set of rules prepared by my world-class staff here in DSIO.

Allow me a moment to start to explain our approach and how it aligns with the agency's mission statement and core values. First, our proposal achieves the value of clarity by taking a smart, effective, and practical approach to the cross-border rule set based on seven years of real-world experience. That is because the proposal today is based on our 2013 swaps cross-border guidance in the main. I think it is only right to recede in the many years since that time on an approach that honors on the equities the efforts of market participants to build systems and design corporate structures that align with the Commission's earlier pronouncement for 2013.

In addition, as a division in this agency, we have observed over those same several years that the approach taken under the Commission's 2013

guidance has provided an effective basis for applying our rules on a cross-border basis.

I would also say as a second point that the proposed approach benefits from a prudent dose of comity. We recognize in the 10 years since the United States was the first mover on swaps reform under the 2009 G-20 commitments, the major money-centered jurisdictions around the world have stood up their own swaps regimes. This has enabled regulators in those countries to join in our efforts to oversee what is truly a global and cross-border swaps market. And, of course, we think those regulators have a legitimate interest in seeing their rules apply to activities in their own jurisdictions in the first instance.

We have taken due notice of these developments and seek only to push specific requirements to the outer reaches of the globe. We have identified transactions and related activities that may have a direct and significant effect on United States commerce in keeping with the statute. In doing so, this approach is faithful to the requirements of section 2(i) of the Commodity Exchange

Act, which we necessarily interpret with principles of comity in mind.

Third, we also achieve our value of clarity through a smart, effective, and practical approach that puts the requirements in the rules themselves with an appropriate degree of explanation in the preamble text. We think our text, for your consideration, is clear, simple, and direct. No one will need to be a student of the fine print I think to get our meaning. I have to say I think this is particularly salient for readers of our rules worldwide who are regulated by us in some way, for whom English may not even be their first or second language.

Fourth, we mean for this document, the proposal and the subsequent final rule released, to be complete. I think this honors our goal of being forward thinking. If the course we recommend is followed through, we don’t expect that the Commission or its staff will need to issue letter relief to augment, clarify, or hold in abeyance any aspect of these rules.

The rules are complete on their face and can be implemented with no more delay if ultimately adopted in some form and is customary in adopting a set of agency regulations. Of note, our proposal rejects the application of the requirements that it includes to non-U.S. transactions that are arranged, negotiated, or executed in the United States by U.S.-based personnel. These are the “ANE transactions,” on which much ink has been spilled, which had never gone into effect. The idea of ANE, as I recall, was put forward in an advisory that followed the 2013 guidance. And it has been held back since by no-action relief.

For reasons borne of experience and considerations of comity, we recommend, as written, that you just say no to the ANE concept for these purposes. We can’t miss what we have never used, after all. And my two decades of experience working in international markets told me that we don’t need to have it here. And, more to the point, putting it simply, this agency should not need an extraterritorial provision in the statute to reach

conduct that actually occurs in the United States.

Allow me one more moment, please, to tell you why I am so proud of my division's efforts on your behalf and on behalf of the American public. With this proposal, as with every other rulemaking we bring before the Commission, like capital last week, you have the full measure of our good faith in carrying out our responsibilities under the law. We have worked for months to craft rule text in a fulsome and transparent way that has sought and benefitted from diverse perspectives throughout the agency. These efforts have truly put pay to our other core values from this agency of commitment and teamwork. This is not to say that we have agreed with everyone on everything, but what it does mean is that we have all agreed to work together for the common good, even though we may disagree on the specifics from time to time.

As we are one team here and in the holiday spirit of togetherness, I will thank those that have contributed to this proposal in no particular order and without attribution to their division or office.

So hold on for a second. The list is kind of long. Amanda Olear, Nora Flood, Dan Davis, Stephen Kane, Sarah Josephson, Gloria Clement, Lauren Bennett, Peter Kals, Matt Daigler, Rajal Patel, Vince McGonagle, Margo Bailey, Jake Chachkin, Eric Remmler and Lucy Hynes, Paul Schlichting, Frank Fisanich, Dan Bucsa, Carlene Kim, Owen Kopon, Terry Arbit, Pamela Geraghty.

To wrap up, we think this rule fulfills our mission in promoting the integrity, resilience, and vibrancy of the U.S. derivatives market. I think it is a paragon of sound regulation. And, like capital last week, it also marks the beginning of the final chapter on my division's Dodd-Frank rulemakings.

I don't think any of us will be wistful when we are all done in this area, but my division and I are impressed with the tremendous amount of work that has been done by both this agency and market participants over the last 10 years. And in this sense and to paraphrase a former president, President Reagan, while we take inspiration from that past, like most Americans, we live for the future. And, by the grace of the Commission's deliberation and judgment,

as informed by our good advice, I am confident the Commission will be able to close out this chapter of cross-border on Dodd-Frank in the new year as we look ever forward to tackling together the new challenges and opportunities before that.

Thank you for considering this rule today. And, to get into the substance of things more, I will turn this over to my colleague Rajal Patel.

MR. PATEL: Thank you, Josh. And good morning.

I will start by noting that, for ease of discussion, given that there are no registered major swap participants, we are focusing this presentation on swap dealers. However, the treatment of what swap positions would need to be included in an MSP's de minimis threshold calculation is generally similar to the swap dealer threshold treatment we are discussing. We will start with a brief discussion of the defined terms.

First, under the proposed rule, a U.S. person would be defined consistent with the definition of U.S. person adopted by the SEC in the context of

its regulations regarding cross-border securities-based swap activities and largely consistent with the definition of U.S. person in the CFTC's cross-border margin rule. Specifically, a U.S. person would be defined as, one, a natural person resident in the United States; two, a partnership, corporation, trust, investment vehicle, or other legal person organized, incorporated, or established under the laws of the U.S. or having is principal place of business in the U.S.; three, an account, whether discretionary or nondiscretionary, of a U.S. person; or, four, an estate of a decedent who was a resident of the U.S. at the time of death.

The proposed rule also includes a definition for principal place of business and states that certain international financial institutions would not be included in the definition of U.S. person.

We believe that any person designated as a U.S. person under the proposed rule would also be designated as such under the cross-border margin rule. However, to provide certainty to market participants, the proposed rule permits time-limited reliance on any

U.S. person-related representations that were obtained to comply with the cross-border margin rule.

Under the proposed rule, consistent with the cross-border margin rule, a guarantee would mean an arrangement pursuant to which one party to a swap has rights of recourse against a guarantor with respect to its counterparties' obligations under the swap. In general, a party to a swap has rights of recourse against a guarantor if the party has a conditional or unconditional legally enforceable right to receive or otherwise collect, in whole or in part, payments from the guarantor with respect to its counterparties' obligations under the swap.

For purpose of our discussion, a non-U.S. person would be considered a guaranteed entity with respect to swaps that are guaranteed by a U.S. person. In other words, a non-U.S. person may be a guaranteed entity with respect to swaps with certain counterparties because the non-U.S. person's swaps with those counterparties are guaranteed, but would not be a guaranteed entity with respect to swaps with other counterparties if the non-U.S. person's swaps

with the other counterparties are not guaranteed by a U.S. person.

Owen will now discuss the definition of a significant risk subsidiary that is being introduced in this proposal.

MR. KOPON: Thank you, Rajal.

The concept of a significant risk subsidiary would be introduced by the proposed rule in order to apply a risk-based approach to determining which non-U.S. subsidiaries of U.S. parent entities are required to comply with the Commission's swap requirements. SRSes are those entities that raise particular supervisory concerns due to the possible negative impact on their U.S. parent entities and the U.S. financial system.

Under the proposal, an entity would be an SRS if, one, it is a subsidiary of a large U.S. parent entity that has more than $50 billion in consolidated total assets; and, two, it satisfies a three-part test of whether the entity is a significant subsidiary of its large U.S. parent entity. If a subsidiary is above a given percentage threshold for one of the

revenue, asset, or equity capital significance tests, then the subsidiary would meet the definition of a significant subsidiary as to its parent entity.

In addition, because the proposed rule applies a risk-based approach to determining which entities qualify as significant risk subsidiaries, the proposed rule would also exclude from the definition of an SRS two categories of entities that are already subject to significant regulatory oversight. The first are those entities that are part of U.S. bank holding companies and already subject to consolidated supervision and regulation by the Federal Reserve Board. The second are those entities subject to capital standards and oversight by their home regulators that are consistent with Basel III and are subject to a CFTC margin determination. Such capital and margin standards would adequately address the potential risk that the entity might pose to the U.S. financial system.

I will now turn it back to Rajal to discuss further definitions and the rules related to counting for registration purposes.

MR. PATEL: Thanks. To wrap up the definition discussion, the proposed rule also defines foreign branch, swap conducted through a foreign branch, U.S. branch, swap conducted through a U.S. branch, foreign-based swap, and foreign counterparty. These definitions are included to differentiate foreign and domestic swaps to determine if swaps needed to be counted for registration purposes and to determine the availability of exceptions and substituted compliance for the group A, B, and C requirements, which we will discuss later. Swap dealers would need to consider how they, their counterparties, and their swaps should be categorized under these definitions.

For discussion purposes, we also use the term “other non-U.S. person” to refer to a non-U.S. person that is neither a guaranteed entity nor an SRS, or significant risk subsidiary.

Now we will turn to what swaps need to be counted for registration purposes. Under the proposed rule, a U.S. person would be required to count all of its dealing swaps toward the swap dealer de minimis

threshold.

With respect to non-U.S. persons, there are three categories of entities: SRSs, guaranteed entities, and other non-U.S. persons. An SRS would be required to count all of its dealing swaps toward the threshold. A guaranteed entity would also be required to count all of its dealing swaps towards the de minimis threshold. An other non-U.S. person must count its dealing swaps in the following situations. First, other non-U.S. persons must count dealing swaps where their counterparty is a U.S. person other than swaps conducted through a foreign branch of a registered swap dealer. And, second, they must count dealing swaps when their counterparty is a guaranteed entity except when the counterparty is registered as a swap dealer and except when the counterparty is a guaranteed entity whose swaps are guaranteed by a U.S. person that is a nonfinancial entity.

Further, non-U.S. persons other than guaranteed entities and SRSs would be permitted to exclude from their de minimis threshold calculation swaps that are executed anonymously on a registered or

exempt SEF, registered DCM or FBOT, and that are subsequently cleared by a registered or exempt clearing organization.

Jake will now discuss the classification and exceptions from swap dealer requirements.

MR. CHACHKIN: Good morning. I will be summarizing the classification of the group A, group B, and group C requirements and certain exceptions from some of those requirements for certain foreign-based swaps, those by a non-U.S. swap dealer other than one conducted through its U.S. branch, or that are conducted through a foreign branch of a U.S. swap dealer.

As you know, Title VII of the Dodd-Frank Act and Commission regulations thereunder establish a broad range of requirements applicable to swap dealers. The guidance divided these based on whether the requirement applies to the firm as a whole, an entity-level requirement, or an ELR; or to the individual swap or trading relationship, a transaction-level requirement, or TLR. The proposed rule does not address the same set of requirements as

the guidance. So to avoid confusion that may arise from using the ELR, TLR classification, the proposed rule, instead, classifies certain regulations as group A, group B, and group C requirements for purposes of determining the availability of exceptions from, and/or substituted compliance for, such rules.

The group A requirements include, one, chief compliance officer; two, risk management; three, swap data recordkeeping; and, four, antitrust considerations requirements. Like the ELRs in the guidance, the proposed rule provides that these requirements would be impractical to apply only to specific transactions or counterparty relationships and are most effective when applied consistently across the entire enterprise.

The group B requirements include, one, swap trading relationship documentation; two, portfolio reconciliation and compression; three, trade confirmation; and, four, daily trading records requirements. These requirements relate to risk mitigation and the maintenance of good recordkeeping and business practices. Unlike the group A

requirements, the proposed rule provides that, like TLRs in the guidance, the group B requirements can practically be applied on a bifurcated basis between domestic and foreign transactions or counterparty relationships and, thus, do not need to be applied uniformly across an entire enterprise. This would allow the Commission to have greater flexibility with respect to the application of these requirements to the transactions of non-U.S. swap dealers and foreign branches of U.S. swap dealers.

Finally, the group C requirements, set forth in Commission regulations 23.400 through 451 and referred to as the external business conduct standards, are, broadly speaking, designed to enhance counterparty protections by establishing robust requirements regarding swap dealers' conduct with counterparties. The proposed rule provides that these requirements focus on customer protection and have a more attenuated link to, and are therefore distinguishable from, systemic and market-oriented protections in the group A and group B requirements. Additionally, the foreign jurisdictions in which non-

U.S. persons and foreign branches of U.S. swap dealers are located are likely to have a significant interest in the type of business conduct standards that would be applicable to transactions with such non-U.S. persons and foreign branches within their jurisdiction.

Swap dealers, whether or not U.S. persons, are subject to all of the group A, group B, and group C requirements, by virtue of their status as commission registrants. However, recognizing the potentially stronger supervisory interest of foreign regulators with respect to certain foreign-based swaps and the group B and C requirements, and in the interest of international comity, the proposed rule provides certain exceptions from the group B and C requirements for registered swap dealers. Specifically, the proposed rule proposes four exceptions that are largely consistent with the guidance: first, an exception from certain group B and C requirements for anonymous, exchange-traded, and cleared foreign-based swaps; second, an exception from the group C requirements for foreign-based swaps with

foreign counterparties; third, an exception from the group B requirements for foreign-based swaps where both parties are other non-U.S. persons; that is, neither party is a guaranteed entity or significant risk subsidiary; fourth, a similar exception from the group B requirements for foreign-based swaps of foreign branches of U.S. swap entities with foreign counterparties that are also other non-U.S. persons, subject to a 5 percent quarterly cap. This exception would not be available with respect to any group B requirement for which substituted compliance is available for the relevant swap. Swap dealers that avail themselves of these exceptions would be required to comply with the applicable laws of the foreign jurisdiction or jurisdictions to which they are subject, rather than the relevant group B and group C requirements for the swaps. However, they would remain subject to the CEA and Commission regulations not covered by the exceptions, including the antifraud requirements in section 180.1. In addition, swap dealers would need to address any significant risk that may arise as a result of utilization of these

exceptions in their risk management programs under Commission regulation 23.600 or comparable foreign regulations.

Thank you for your attention. My colleague Lauren Bennett will now discuss the proposed rule's approach to substituted compliance for the group A and group B requirements.

MS. BENNETT: Thank you, Jake.

The proposed rule also outlines an approach for substituted compliance for the group A and group B requirements that builds upon the Commission's current cross-border framework. Specifically, the proposal would permit a non-U.S. swap dealer to avail itself of substituted compliance with respect to the group A requirements where the non-U.S. swap dealer is subject to comparable regulation in its home jurisdiction.

Further, the proposal would allow a U.S. swap dealer that is transacting through a foreign branch or a non-U.S. swap dealer that is not transacting through a U.S. branch to avail itself of substituted compliance with respect to the group B requirements for swaps with foreign counterparties.

The proposal would also establish a process pursuant to which the Commission would conduct comparability determinations regarding a foreign jurisdiction's regulation of swap dealers. First, the proposal outlines procedures for initiating comparability determinations, including a provision which would allow the Commission to undertake a comparability determination on its own initiative.

Second, the proposal lists the information that outside applicants would be required to provide in connection with a request for comparability. The information is intended to provide the Commission with a comprehensive understanding of the foreign jurisdiction's relevant swap standards, including the ways in which they may differ from the Commission's own corresponding swap requirements.

Third, the proposal outlines the proposed standard of review pursuant to which the Commission would determine whether a foreign jurisdiction's regulatory standards are comparable to the group A and group B requirements. The proposed standard, which is informed by the Commission's experience in assessing

cross-border comparability, is intended to provide a flexible outcomes-based approach that emphasizes comparable regulatory outcomes over identical regulatory approaches. This proposal, if adopted, is not intended to have any impact on the effectiveness of any existing Commission comparability determinations that were issued consistent with the guidance.

Thank you for your attention. And we look forward to answering any questions you may have.

CHAIRMAN TARBERT: Well, thank you very much to all of you. I know a lot of time and effort went into proposing this rule. And, again, it is a proposed rule. It is not final. And I know my fellow commissioners and I will have many, many questions as we talk about this.

So what I would ask the secretary to do, actually, in thinking about this is let’s have a half an hour for questions. And then what we will do is we will put another 25 minutes on after that to give each commissioner 5 minutes to maybe say a statement. So we will have a period of questions, and then we will

have individual statements afterwards. Does that work for everyone? Okay.

COMMISSIONER BERKOVITZ: It works in concept. I don't know if -- I mean, I might have more than -- I don't know exactly how many minutes of questions. I haven't timed myself totally. So I just want flexibility to ask sufficient questions and make between a 5- and 10-minute statement.

CHAIRMAN TARBERT: You have flexibility. Just be mindful we want everybody to give a chance to speak. So thank you. With that, why don't you go ahead first?

COMMISSIONER BERKOVITZ: Thank you, Mr. Chairman. And I thank the staff for the presentation and the description of the rule. And I thank you for your work on this rule. It is a multiyear effort. And I thank you for working with my office and incorporating things and not incorporating others, but we will continue to work on it.

Let me start off by just putting in the larger context what the issue is that we are talking about here. I see this rule as two fundamental

issues, but they are really related. Maybe that will put it in context because the presentation was excellent, but it was very technical. So I am going to take it up a level.

What is the basic issue? What we are trying to decide, what the Commission is struggling with today, and what this rule proposal tries to get at is, U.S. banks, many of them, are global. Our banks have a global presence. When a U.S. bank has an operation overseas, how much should we regulate that bank under U.S. law or how much should it be regulated according to its host jurisdiction? The proposal actually does a good job of describing the risks that are presented to the U.S. financial system from the operation of our banks overseas. When JPMorgan or Morgan Stanley or Goldman or any of our banks operating in London or in Asia, Japan, Korea, wherever they operate, undertake these transactions, they are U.S. banks. Fundamentally, those risks are going to come back to the United States. Okay? And it is our financial system that bears those risks. The proposal lays that out I think accurately and well.

The problem is if we just said, “U.S. law applies to everything those banks do because they are U.S. banks is that these banks have to compete overseas in overseas markets. And one problem is the overseas jurisdictions want to apply their laws to our banks operating in their territory. And, secondly, if we insist 100 percent on our laws across the board for everything a U.S. bank does, other banks may not want to deal with those U.S. banks. They may say, “Well, I don’t want to comply with U.S. law. I am a Korean bank. I want to transact with other banks that follow Korean law. I am not going to comply with U.S. law.” And, therefore, U.S. banks will be at a significant competitive disadvantage.

How do you balance the protection of risk coming back to the United States with the competitiveness of our banks overseas and our ability through U.S. banks of end users to use U.S. banks to access foreign markets? It is not just the banks. It is enabling U.S. companies and persons to use U.S. banks to access these overseas markets. We don’t want to have U.S. citizens having to use foreign banks for

all of their banking overseas. So it is enabling U.S. market participants access to these foreign markets, but at the same time, it is protecting U.S. financial markets from these overseas activities. And it is getting the balance right between application of our laws and the application of other jurisdictions laws and when can we say it is okay to comply with foreign laws.

The Commission first tackled this in 2013. And that is what the 2013 guidance is and the structure that we are building off. And it has been basically struck a particular balance. And one of the things it addressed is, when do risks really come back to the U.S.? What is a critical feature of the relationship between a foreign bank and a U.S. bank that brings that risk back to the U.S.? Well, it is if there is a guarantee. If the U.S. parent is guaranteeing the transaction, that is definitely bringing the risk back into the U.S. And the 2013 guidance had a broad definition of guarantee. It said it doesn’t just have to be a formal written guarantee. It can be anything that effectively brings that risk

back. And that is when we pulled in the non-U.S. affiliates through that broad definition of guarantee.

And then we have various other rules for when particular requirements might apply to that entity and which swaps various non-U.S. entities had to count as swap dealing. We had a broad definition of guarantee in that 2013 rule, recognizing that, even if it is not a formal written guarantee of a swap transaction overseas, if it is some other arrangement, it is going to bring the risk back to the U.S. So if the CFTC has a strong interest, you are going to be treated like a U.S. swap dealer in many respects. And there may be substituted compliance for some of your transactions.

The prudential regulators promulgated a margin rule for when U.S. banks have to collect margin for uncleared swaps. And the prudential regulators in their margin rule in 2013 had a cross-border component to it also. And they went much further than the CFTC went in 2013. The prudential regulators didn’t use the concept of guarantee, but the prudential regulators, looking at it in a broad sense, said if it

is a foreign consolidated subsidiary, if the balance sheet of the -- if a U.S. bank consolidates its affiliate on the balance sheet, it is effectively the risk is being brought back to the U.S. And it was the prudential regulators in 2013 who said, “That is really the test. Is the balance sheet consolidated?” And when the balance sheet is consolidated, whether there is a guarantee or not, the risk is coming back to the U.S.

And we in our margin rules followed the lead of the prudential regulators. And so our cross-border margin rules adopted this concept of foreign consolidated subsidiary, so that we really don’t need to pay so much attention to the guarantee because if it is consolidated, that is the test that is going to bring it back. And that is where it is going to be treated as a U.S. entity for margin purposes. We didn’t need to pay so much attention to the fact of a guarantee. So we narrowed the definition of guarantee in that rule because those entities, even if it wasn’t a broadly defined, unspecified guarantee, it would be included in this concept of foreign consolidated

subsidiary, where it is consolidated on the balance sheet. And that is our cross-border margin rule.

In 2016, the Commission said, “Hmm. Well, why don’t we use this concept of foreign consolidated subsidiary as the prudential regulators do? Instead of having this guarantee concept like we did in 2013, why don’t we just treat all of these U.S. affiliates as U.S. persons if it is a foreign consolidated subsidiary?”

So that was proposed in 2016. And, basically, the banking community, if I may use a colloquial expression, went ballistic on that proposal. Okay? And they felt that if we had such a broad envelope bringing in non-U.S. affiliates of our banks that would really harm their competitiveness and really be detrimental to their ability to conduct business overseas. So that was very strongly objected to in 2016.

So here we are today again trying to get the right balance between how far do we reach and how far do we protect -- how far do we reach overseas to ensure that our banks are protected? And the question

is, did we get the right balance today?

My personal view I will say at the outset is the 2013 guidance, plus some of the modifications that have been made, pretty much got it right. And, for reasons we will get into, I am concerned that today's proposal -- and it is the fine print in the proposal -- it is some of the things that were outlined in the presentation -- is the fine print that makes it a concern of whether we have got the balance right or not.

So let me actually ask some specific questions. And maybe the first question is because there is talk in here, particularly when we get into "significant risk subsidiary" whether there is going to be deferring to prudential regulators. Can you just say what prudential regulation is and how it is similar or different to what we do? I mean, can you maybe explain prudential regulation?

MR. KOPON: Sure. So the preamble cites to the Federal Reserve bank holding company supervision manual, which sort of goes into explaining the Fed's broad powers to regulate the foreign activities of

bank holding companies and what those powers include, and it lists a number of them. But, you know, briefly the authorities established foreign branches of national banks and regulate the scope of their activities as well as conduct examinations at the foreign operations of U.S. banking organizations. And those exams may include reviewing for the accuracy of financial and operational information as well as test adherence to safe and sound banking practices.

COMMISSIONER BERKOVITZ: And that is typically things like capital and margin and those types of rules or --

MR. STERLING: Well, you will forgive us, Mr. Commissioner, as not being bank regulators. Of course, we did look into it, but our understanding is that consolidated supervision by a Federal banking regulator of a bank and its foreign operations is extensive. I would say it does get into operations and permitted and nonpermitted activities. It is very close.

My sense in talking with the team about it and others in the building is that that is a very good

standard. And it is not clear that we would necessarily be additive in that context given the rules that are captured in this proposal, sir.

COMMISSIONER BERKOVITZ: When you say what we do is not additive, are we redundant of the prudential regulators?

MR. STERLING: No, sir. I don't mean to say they were redundant. I think that we take great comfort in the fact that the prudential regulators, which do have primary oversight of banking organizations, do have complete authority in the way I would say that we're comfortable looking at it and saying as we consider where we focus our resources, it wouldn't be necessary to do it in that context. It is more judgmental than a declaration of redundancy, sir.

COMMISSIONER BERKOVITZ: Well, let me ask you, do you think some of the swap dealer requirements that are in Title VII, 4(s) procedures particularly, as applied to banks, are those redundant with what the prudential regulators do?

MR. STERLING: I wouldn't say they were redundant.

COMMISSIONER BERKOVITZ: Okay. Let me give an example of an overseas activity where I think we added value. And that is the London Whale. London Whale, if you recall those activities -- and, frankly, it is not exactly clear where all of these trades were booked, but it was conducted out of the London office of JPMorgan, done by the CIO office there. I am not sure exactly where it was booked. And, frankly, it's not particularly critical we know where it was booked. It was actually the events happened before our swap dealer regulations were in place. But the CFTC did issue an enforcement action against JPMorgan for the London Whale for $100 million for attempted manipulation of the market.

Let me read you what we said in 2014 in our enforcement order. This is the Commission's enforcement order on the London Whale. "JPMorgan's management of the SCPs" -- that is a division there -- "risk during the first quarter of 2012 was wholly inconsistent with principles of sound risk management, principles that have been incorporated into many of the risk management provisions of regulations 23.600

to 23.607. Indeed, had the regulations been in place" -- this is our swap dealer regulations -- "much of the offending conduct at issue and the significant losses it caused may well have been detected and remedied internally much more quickly, thereby potentially reducing losses."

So this is our 23.600s risk management procedures for swap dealers. These were prudentially regulated institutions at the time. The Commission's view at the time was the Commission said in 2014 -- and it is our enforcement order -- we hit them up for $100 million, that our swap dealer regulations could have prevented it. The prudential regulators didn't prevent this. They didn't have risk management procedures like we did. So our regulations add value, and they can prevent significant market events for swap dealers that implement them. We can't just rely on prudential regulators for something like this. Would you agree that we add value like this?

MR. STERLING: I think that our enforcement powers are broad and are used effectively. I think that, sir, in proposing a rule, we need to be, if I

may, more circumspect than we are in writing what I presume is a settlement order that is phrased as a "had," meaning counterfactual. And so I think we have to take due notice of things that do exist in the world and that do happen, which includes comprehensive regulation of overseas activities of banks by prudential regulators. And so we have tried, in particular, in our rules to make a judgment about where we think that we can provide proper oversight. So that is my sense of it, sir.

COMMISSIONER BERKOVITZ: Okay. Well, I appreciate your view. I have a view that happens to agree with what the Commission said when it fined JPMorgan for $100 million and said they didn't have adequate risk management procedures in place and if they had our swap dealer risk management procedures in place, maybe it would have been prevented, and that banks who engage in these activities if they are swap dealing, if they are swap dealers, they should have risk management procedures in place like 23.600.

It is not just my opinion. It is what Congress said. So Congress said in Title VII of the

Dodd-Frank, “If those activities have a direct and significant effect on or connection to,” not just “effect on,” not just “effect on.” It is “connection to activities in the United States.” It is not just a risk-based test. It is also a relationship test. It is an activity-based test that our swap dealer risk management procedures should apply. It is a congressional mandate, not a question of opinion.

So let’s move on to the guarantee issue. As I mentioned, the guarantee is one of the components that the Commission traditionally has looked to to determine whether the overseas affiliate needed to count swaps and whether its counterparty needed to count swaps towards a dealer threshold and then the various applications of the requirements that apply to swap dealers and transactions and conduct.

But the proposal narrows the definition of guarantee. Is that correct?

MR. PATEL: Yes.

COMMISSIONER BERKOVITZ: And why does it do that?

MR. PATEL: So the narrower definition than

that in the guidance, as we state in the proposal, we believe it achieves a more workable framework for non-U.S. persons, particularly because the definition of guarantee that we are proposing is consistent with the definition that exists in the cross-border margin rule. And, therefore, we believe that market participants would not have to do a separate and independent assessment of whether or not a guarantee existed. And we still believe that the definition doesn't undermine the protection of U.S. persons in the U.S. financial system.

COMMISSIONER BERKOVITZ: Okay. I appreciate that. I am not convinced that we have the definition of guarantee in the proposal right. And, as I also noted, although it is consistent with the cross-border margin rule definition of guarantee, the reason the cross-border margin rule could accept a narrower definition of guarantee is because those entities were brought in under the concept of foreign consolidated subsidiary. So we didn't need to have such a broad definition of guarantee threre.

CHAIRMAN TARBERT: Maybe could you ask one

more question, Commissioner Berkovitz? And then I will move to Commissioner Stump.

COMMISSIONER BERKOVITZ: Well, can I have another round of questions?

CHAIRMAN TARBERT: Well, you --

COMMISSIONER BERKOVITZ: I am not done with my -- I have more questions. Mr. Chairman, we have had this proposal for three weeks I think and the commitment is that we are going to have an open public meeting on it. And I think I ought to be able to ask as many questions as I have got on this to have a full discussion. I am not agreeing to only one more question.

CHAIRMAN TARBERT: You can use the allotted time afterwards to ask more questions.

COMMISSIONER BERKOVITZ: Okay. Well, I am happy to defer to my colleagues now, but I have more questions.

CHAIRMAN TARBERT: Okay.

COMMISSIONER BERKOVITZ: I am not agreeing to any time limit on my questions.

CHAIRMAN TARBERT: And all of us do have

written statements as well that we will be issuing.

COMMISSIONER BERKOVITZ: I am also going to have an oral statement I am going to issue at this meeting, too. Mr. Chairman, I have not objected to any process so far, but I will strongly object to any attempt to limit what I can say in public at a Commission meeting. I think it is inappropriate to ask me to limit the number of questions I may have.

CHAIRMAN TARBERT: We do need to keep the process moving.

COMMISSIONER BERKOVITZ: No, no. Mr. --

CHAIRMAN TARBERT: So if we could ask you to move --

COMMISSIONER BERKOVITZ: We need to have a debate, but the most important thing is not to keep the process moving. The most important thing is to get these rules right and to make sure we are protecting the market.

CHAIRMAN TARBERT: That is fine. You can ask as many questions, but you took seven minutes to make a public statement before asking a single question of the staff.

COMMISSIONER BERKOVITZ: Seven minutes. Oh, my gosh. Commissioner Berkovitz took seven minutes on a swap dealer rule. Mr. Chairman, that --

CHAIRMAN TARBERT: Why don't we -- we will come back to you.

COMMISSIONER BERKOVITZ: Is seven minutes too much for me?

CHAIRMAN TARBERT: No. I am just asking that we -- that this time has been set aside for questions. So we just want to ask questions here.

COMMISSIONER BERKOVITZ: That is what I -- I am asking questions. We are having the public --

CHAIRMAN TARBERT: Please continue.

COMMISSIONER BERKOVITZ: This is what happens at a public meeting.

CHAIRMAN TARBERT: Okay. Okay. Thank you. I want to move things. That is all.

COMMISSIONER BERKOVITZ: Well, no. It is --

CHAIRMAN TARBERT: All right. Continue. We will move to Commissioner Stump. We will come back to you, Commissioner Berkovitz. Thank you.

COMMISSIONER STUMP: So I have a few

questions. I have a fairly lengthy statement, too. So I am going to try to follow the procedure that has been laid out here.

I wanted to point out, most importantly, that some of what we are doing today is getting lost in the fact that we have guidance on the books that is not today enforceable. So we all were not here in 2013 and 2016 in our current capacities, but what we are left dealing with today is trying to get the guidance to a place of an actual role that is enforceable. And some might have us believe that we are abandoning our charge and rolling back regulatory oversight. I would suggest just the opposite. We are actually transitioning from nonbinding guidance to a rule that if adopted as final would for the first time impose binding obligations with respect to cross-border activities of swap dealers, and major swap participants.

If those rules are violated, I expect that we would bring enforcement action as a result of the transition from guidance to binding rules. But because they will be binding and enforceable, what we

are attempting to do today is make the rules more clear, more sensible, and more workable. Ambiguous rules make for challenging enforcement.

So I have a question for the Office of the General Counsel. The cross-border guidance isn't binding, is it?

MR. DAVIS: That is correct.

COMMISSIONER STUMP: Could the CFTC today bring an enforcement action against a defendant for violating the cross-border guidance?

MR. STERLING: I can answer that, Madam Commissioner. The answer is no, they cannot.

COMMISSIONER STUMP: So when we talk about the London Whale, specifically my question is, at the time when that occurred, under the cross-border guidance we had issued, we wouldn't have been able to bring an enforcement case. We were able to bring an enforcement case under our broad antimanipulation authorities. But since that time, had the U.K. regulators put in place risk management regulations comparable to our 23.600 risk management rules?

MR. FISANICH: Actually, if somebody looked

for a swap dealer located in London, they have had substitute compliance for E.U. rules since 2013 for risk management. So to the extent that it would occur post-2013, they would have been following the E.U. risk management rules, rather than our rules, on a substituted compliance basis.

COMMISSIONER STUMP: Because we found them comparable?

MR. FISANICH: Because we found them comparable.

COMMISSIONER STUMP: Thank you. That is all I have for now.

CHAIRMAN TARBERT: Okay. Commissioner Behnam?

COMMISSIONER BEHNAM: Thanks, Mr. Chairman.

Just to follow up on Commissioner Stump’s point, do we have any authority under our adjudication authority through the APA to bring a case against a foreign entity, specifically if we are going to talk about the London Whale matter and the sort of juxtaposition with the enforcement authority we have? We have adjudication authority under the APA to sort

of engage with market participants. Would we have had authority under that specific provision within the APA to bring that matter or to have a discussion with the entity in London?

MR. STERLING: If you will give me just one second, Mr. Commissioner? I will have to confer with the General Counsel's Office on that. Sorry. We may have a question about your question.

MR. DAVIS: I guess I am not following the question, Commissioner Behnam.

COMMISSIONER BEHNAM: Believe me, I need to educate myself, but we do have adjudication authority under the APA. Is that correct?

MR. STERLING: Yes. That is different than our --

COMMISSIONER BEHNAM: Enforcement authority.

MR. STERLING: Our enforcement authority.

MR. DAVIS: Certainly, right.

COMMISSIONER BEHNAM: It is a mechanism to engage with registrants and market participants, the adjudication authority.

MR. DAVIS: Yes. We make adjudication

decisions when we adjudicate like a registration or comparability determination is, arguably, an adjudication.

COMMISSIONER BEHNAM: So to the extent that there was some risk out of that entity in London, could we have used our adjudication authority to engage with that entity to the extent we thought it was bringing risk back to the U.S.?

MR. DAVIS: If it is a registrant, yes, yes, we could have used our authority to engage with that entity.

COMMISSIONER BEHNAM: Okay. That is all. Thank you.

As a very high-level matter, I guess for you, Director Sterling, I think the document that we received Monday afternoon had changed the comment period from 90 days to 60 days. Was there any particular reason you did that?

MR. STERLING: Sir, that is my fault. We had an oversight. I think the 90 days was a carryover from an earlier draft. We had actually always intended it to be 60 days. So that was an oversight

in an earlier draft. And I apologize for that.

COMMISSIONER BEHNAM: Okay. I guess just as a general matter, though, I would request that the mistake be sort of reinstated. Given the depth and breadth of this rule and the importance of it to the broader market and the complexity, I would hope, at the minimum, that we provide 90 days, if not more, given what is ahead and the fact that the market will need time to respond appropriately, so just going to put that request in for both you and the chairman.

MR. STERLING: Thank you, sir.

COMMISSIONER BEHNAM: On page -- I am going to make a couple of references to the document, specifically the one I think that we received Monday afternoon or Monday evening. And this is a general question about the decision to go to a final rule, as opposed to maintaining status quo with the guidance.

There is a brief sentence in the middle of page 15. You don’t need to look it up. It says, “In that regard, giving due regard to how market practices have evolved since the publication of the guidance is an important consideration.”

The general thrust of my question is market practices have evolved. So you mentioned that we have had this several years of experience to sort of see how Title VII rules and regulations have been implemented, how the market is reacting. The guidance provides a bit of flexibility. And, for technology reasons, for socioeconomic reasons, for geopolitical reasons, for any number of reasons, the markets have evolved and they will continue to evolve.

Do you think that the guidance provides us a level of flexibility that enables us to move with the markets in a more nimble way, as opposed to putting something into a formal rule and potentially being boxed out or in many cases not limited to our jurisdiction or this agency having the marketplace work around a very formal rule set?

MR. STERLING: Thank you for that question, Mr. Commissioner. I appreciate the point on flexibility. I think there is a necessary need to balance that with a notion of certainty. And we feel having final rules and the certainty they provide is useful. A concern I would have in attempting to

administer cross-border regimes is if we have guidance and then a series of no-action or other written interpretive letters. It can become a bit of a construct, if you will. And if we try to get as much right as we think is durable, then the rules will be in a better position.

I know it is important in the interest of transparency, as the chairman has articulated, to try to use rules where we can, as opposed to, you know, non-rule-based promulgations.

COMMISSIONER BEHNAM: And I agree with that 100 percent, but, for whatever reason, I think -- and I don’t know if you recognize this or you agree with me or disagree, but the cross-border rule set and our cross-border jurisdiction is highly complicated. It is technical, obviously, in nature, but it is a matter of the global marketplace. So we have to be particularly flexible in this space because it is not only sort of the oversight of our domestic markets. We have to be able to appreciate the scope of the global markets and be able to adjust.

And, you know, I think there is a case to be

made. If you think about after the 2013 guidance came out, the 2014 District Court case in my view seemed to affirm that the guidance was a move that the CFTC both could make and was appropriate at the time, specifically given section 2(i) and what Congress intended for this regime to be. So I will say this in my statement a bit later, but I do caution against the idea.

And I would hope that we would be a little bit more -- and I mentioned this to you and your team last week. I do recognize, and I appreciate the fact that the questions are very objective within the context of this rule. I think, despite the rule not going in a direction I particularly like, I think the comments and the questions specifically that are asked and the comments that we are requesting are going to give the public an opportunity to weigh in, not specifically on the sort of thrust of where this rule is going but what market participants think, what the public thinks, and whether or not we should keep things as status quo or move to what the rule, the proposal intends to do.

MR. STERLING: I would just say, thank you, sir. We appreciate that observation. As within any proposed rulemaking, we are intently interested in what the public is asked to say, to sort of show us where we are pointing and whether that could be better. So thank you.

COMMISSIONER BEHNAM: So there is another high-level question. We are shifting towards a risk-based approach here. Is that correct? Is that fair to say? It seems to come up in the document quite often.

MR. STERLING: Well, I agree in the sense that we provide an interpretation of section 2(i) that talks about, yes, what, indeed, are the risks to U.S. commerce, to the U.S. system. So in that sense, yes, sir.

COMMISSIONER BEHNAM: And this is where I need help sort of bridging a gap between 2(i) and the sort of risk-based approach evolution. In my mind, when I read, 2(i), it is fairly specific and affirmative in mentioning activities. Right? And when I read the language, “Swap provisions of Title

VII shall not apply to activities outside the United States unless those activities have a direct and significant connection with activities in or effect on commerce of the United States in contravening such rules or regs as the Commission may prescribe or promulgate as necessary or appropriate to prevent the evasion of any provision of the CEA," how are we going to distinguish between activities -- I know this goes to a lot of questions and a lot of uncertainty that has existed since 2013, but by moving towards a risk-based approach, are we flying in the face of what Congress intended to have a more prescriptive oversight of specific activities if that activity has a significant connection to commerce of the United States.

MR. STERLING: Thank you. So I appreciate your question, sir. I hadn't realized that you perhaps are suggesting a distinction between a looking at risk, on the one hand; and a focus on activities as a separate concept, on the other. What I would say is I think that the construct we have of group A, B, C requirements and how they apply to various

permutations is indeed activities-based. I think that risk is a consideration we have when we try to think about what else we need to capture. And that is where we think about that connection of that risk into the United States and U.S. commerce.

Certainly risk can express itself in many different ways. One way would be through the mechanism of a guarantee. That concept is in here. One area that could express itself is through sort of a non-guaranteed entity. And it is still a big chunk of a big U.S. company that is not supervised. It is a roundabout way of saying a significant risk subsidiary. So we are trying to find or identify where we think this risk could otherwise arise through different mechanisms to round out our coverage we think. And in that sense, we also look to the second prong of 2(i), which expresses concerns about evasion. And that, of course, strongly implies risk oddity, oddity of focus, sir.

COMMISSIONER BEHNAM: So you mentioned SRS. Let’s just talk about that a little bit. I don’t want to be redundant to where Commissioner Berkovitz was

and may go in a second round of questions, but we have 107 swap dealers I think. Is that somewhere in that ballpark?

MR. STERLING: Yes, sir.

COMMISSIONER BEHNAM: So do you expect -- if this rule were to go final as is, is that number going to change?

MR. STERLING: We do not believe so, sir.

COMMISSIONER BEHNAM: Do you have any expectation how many entities would be designated as an SRS based on the prongs that you have laid out there?

MR. STERLING: We do not. That would take some global omniscience and factfinding that is not in our possession or perhaps anyone's. I think it may be that SRSes exist today. It may be that they could exist in the future. And so it is an effort to sort of look out and say, "What do we think we really ought to capture that we are not sort of under these identified constructs of A, B, C categories and guarantees?" And so this is a formulation we came up with with some research and analysis. And, of course,

we are opening it for comment.

COMMISSIONER BEHNAM: What is -- and if you haven't thought about that, that is fine. But like what is essentially going to be the enforcement mechanism or sort of the way we scope out SRSes, make that sort of determination? What is the process that you foresee as a possible workable solution to making SRS decisions?

MR. STERLING: Right. So I thank you for that question, sir.

I think the decision is really to sort of identify in the rule text what we think the entity is. And then it requires an analysis by participants in our markets. And I would say, as I sit here, to my way of thinking, it is no different than a or, rather, very similar to, you know, an asset manager in another jurisdiction saying, "Well, have I become a commodity pool operator or someone who is trading in futures contracts in the United States, well am I an introducing broker on behalf of anyone else?" So it requires knowledge of and awareness of the law, just like a registrant category. That is my sense of it,

sir.

COMMISSIONER BEHNAM: That is fair, but it certainly is going to be a bit more challenging. My assumption is that it is going to be a bit more challenging given, you know, we are not dealing with domestic entities here and the sort of complex web of the larger holding companies that we are going to have to be examining.

I want to -- and, again, out of the interest of time, I don't want to be repetitive, but I do sort of want to associate myself with Commissioner Berkovitz's comments about the potential oversight of SRSes or the prong where if, you know, $50 billion threshold and if the entity is -- and correct me if I am wrong, right? -- but if the parent or the holding is a prudentially regulated entity, then the potential SRS can't be an SRS or something of that nature. Is that right?

MR. STERLING: That is right. If it is prudentially regulated, then --

COMMISSIONER BEHNAM: It can't.

MR. STERLING: -- it falls out of the

analysis.

COMMISSIONER BEHNAM: It falls out of the analysis.

MR. STERLING: Yes, sir.

COMMISSIONER BEHNAM: And I just want to mention that I do think, you know, we are talking about a registration threshold. That is the thrust of this exercise, of this cross-border rule. Our dealer registration under 4(s) and then under the 23.00 rules is fairly specific. And registration serves a very different purpose in my mind, as opposed to what -- and, Owen, I appreciate the way you laid out the sort of core responsibilities of prudential regulators, but I do think there is a divide there. And we will be missing something if we just quickly defer and punt to a prudentially regulated entity and not implement the registration factors or that sort of the benefits of a registration regime. And I think that, above all else, sort of flies in the face of congressional intent. So I am a bit concerned about that and whether or not that prong is appropriate to consider within the SRS context.

Margin. And, Rajal, I think you mentioned this. If you could help me understand? There is a little bit of a distinction that I have identified -- and correct me if I am wrong, but we refer to the cross-border margin rule and align the definitions with respect to guarantee, but we draw a distinction with the unlimited U.S. liability prong. Is that right?

MR. PATEL: Yes, that is correct.

COMMISSIONER BEHNAM: When I think about margin and I think about counterparty credit risk -- and, again, this goes to what I was saying earlier about the registration regime. There are different purposes for which we apply our regulatory oversight, whether it is regulation or whether it is capital and margin or in the case of a prudential regulator safety and soundness. Why do we have this inconsistency with respect to these two pieces thinking about the 2016 margin rule?

MR. PATEL: So just to make sure I understand the question or to clarify, you are referring to the unlimited U.S. responsibility prong

that exists in the U.S. person definition in the cross-border margin rule.

COMMISSIONER BEHNAM: Correct.

MR. PATEL: So yes. So that prong is not in the proposed rule. You know, as we said in the proposal, our belief is that the corporate structure that the unlimited U.S. responsibility prong is designed to capture is not one that is commonly used in the marketplace. But we request comments on whether this understanding is correct and if not, you know, whether we should reassess if that prong should be included in a final rule. And so we are basically asking for comments. And then we look forward to seeing what market participants tell us --

COMMISSIONER BEHNAM: And, again, correct me if I am wrong, but there is an effort to align ourselves with the 2016 cross-border margin rule with respect to guarantee and the definition and scope of guarantee. Is that correct?

MR. PATEL: Yes.

COMMISSIONER BEHNAM: Right. And I understand that we are striking the U.S. liability

prong from this proposal but asking request for comments of whether or not that is the right decision.

MR. PATEL: Yes.

COMMISSIONER BEHNAM: But then we are aligning ourselves with respect to the liability prong on the 2016 cross-border margin rule in saying that it is okay to sort of use that as a reference?

MR. PATEL: So we are not including the unlimited U.S. liability prong that exists in the 2016 cross-border margin rule.

COMMISSIONER BEHNAM: Margin rule.

MR. PATEL: Right. But we are harmonizing. Just generally speaking, you know, I think we are harmonizing in the places where we think it makes sense based on our seven years of experience in the market and six or seven years of experience with the guidance.

COMMISSIONER BEHNAM: So do you think it is appropriate given, again, the distinction of what margin is going after and in my mind primary purpose across counterparty credit risk? Is it appropriate within the context of a cross-border rule that is

focusing on dealer registration thresholds to reference a 2016 cross-border margin rule and the definition or the scope of guarantee within that rule?

You know, you mentioned this earlier. I think this was a conversation with Commissioner Berkovitz. But the definition or the scope of guarantee is being reduced. And I am wondering, why are we referencing the 2016 cross-border margin rule to sort of think about the scope of the definition versus thinking about this within the lens of this rule before us.

MR. STERLING: Absolutely. No. Thank you for that, sir. Excellent point, of course.

I think that our sense was we do have a definition of a guarantee going back to the 2013 guidance, which is, admittedly, quite broad. And I think that for the purposes of the rules we cover, which are significant and do include registration, that that was a very broad definition. I think since that time, standing up our swap dealer registration regime, we have had many firms register. We have tried to align ourselves with things that have been

iteratively updated in the cross-border context, including that definition, but I think our judgment was we didn't need to take it whole hog. And that is a determination we have made. And, as Rajal pointed and you rightly observed, we do ask questions about that.

I think we do feel comfortable with the proposal as stated. Thank you.

COMMISSIONER BEHNAM: Thanks.

And the final question I have is, there is a reference in this document to Wickard I believe is the case. And it is sort of -- it is a Supreme Court case. And it is in reference to sort of aggregate effect.

And, you know, without boring the audience here, the Wickard case deals with a farmer who doesn't even sell his production, his wheat production, but there is a sort of discussion about what effect that individual farmer's wheat production will have on the larger market.

And, moving beyond that but using it still as a reference, I want to read a sentence from page

30, which was amended on Monday evening. And your original sentence said, “In exercising its supervisory oversight outside the United States, however, the Commission will do so only when the activity has a direct and significant connection to the U.S. financial system.” And that was the original version.

And Monday evening, we received a revised version. And the revised version says, “In exercising its supervisory oversight outside the United States, however, the Commission will do so only as necessary to address risk to the resiliency and integrity of the U.S. financial system.”

And that is pretty concerning to me because, again, going back to the discussion we had earlier about the definition of 2(i) and the very explicit inclusion of the word “activities” in 2(i), I wonder and question and am concerned about the fact that, are we shifting too far away, taking into consideration the importance of certainty and adapting with the market as it does as well? Are we perhaps going too far away from congressional intent on examining activities and just looking at things in a very, very

macro level about resiliency and integrity of the U.S. financial system? Those are terms that are from 2008 and that go to the sort of thrust of what we went through after the crisis. And I question whether or not that is the way we should view this and whether or not it is way too broad and does not really identify to go back to the Wickard case, not necessarily just the macro, big, issues that will have on effect on any ecosystem but potentially identifying the smaller issues. And they might not be small individually, but as a reference and relative to other issues, thinking about institutions, foreign institutions, that may not directly pose a systemic risk, but in the aggregate, if we are not looking at these entities alone and also in the aggregate, perhaps we are going to miss something. And perhaps that risk will come back to the U.S. I have a big concern with I think the shift in the sort of theme of the way we are going to view cross-border. And there is too much at stake.

And, granted, as I will say in my prepared remarks, we certainly need to evolve. And we need to adapt. But I would hope that we are staying focused

on entity-level activities, as Congress dictated, so that we observe and identify potential risks to the U.S. system.

I will stop there. I want to thank all of you for your hard work. And certainly I know this is a challenging rule. Director Sterling, I appreciate your comments at the beginning of recognizing all of these individuals, not just all of you who spent many hours putting this rule together over many months, but I would like to add my two staff, John Dunfee and Laura Gardy, who did a tremendous amount of work to get us to here and to hopefully, as we always try, to engage with your office to make these rules better.

MR. STERLING: Thank you, sir.

CHAIRMAN TARBERT: Okay. Thank you.

We are going to move to Commissioner Quintenz, but we are going to have another round robin of questions after each of us has an opportunity. So we will have another round of questions, and then we will go with closing statements. I just want to make sure everybody has a chance here.

COMMISSIONER QUINTENZ: On that point, Mr.

Chairman, a number of us have worked on the Hill. I personally consider the House and the Senate to be some of the most robust and august deliberative bodies in the world. Do you know how much time senators or members of Congress have during committee hearings to ask questions?

CHAIRMAN TARBERT: Well, during my confirmation hearing, it was five minutes apiece. I wish it were a minute apiece, but it is --

COMMISSIONER QUINTENZ: So even if we did another round of questions, that would give them 10 minutes of questions, right? So if they did 3 rounds of questions, which I have never seen before -- maybe it happens -- that would give them 15 minutes in bodies that are the most deliberative bodies in the world.

Now, we all live in a world of limited time. And I appreciate the balance for transparency and the ability to articulate views. One place where time is unlimited to articulate those views is online. I would like to try to make sure that I use my time here more for questions than for statements. So let me get

into that quickly.

Chairman Gensler, when he was in front of one of those august committee bodies on the Hill, was asked a question about how many swap dealers he anticipated his rules would ultimately cover upon registration. His answer was 15 to 20.

Director Sterling, how many do we have?

MR. STERLING: Sir, at last count, we have 107.

COMMISSIONER QUINTENZ: We have 107. And, even if you consolidated the five largest financial institutions in the United States, which have 37 combined -- Bank of America has seven registered swap dealers. Morgan Stanley has 10 registered swap dealers. Citibank has four. Goldman Sachs has 13 registered swap dealers. JPMorgan has three. That would bring that total roughly to 70, correct?

MR. STERLING: Yes, sir.

COMMISSIONER QUINTENZ: Okay. So I discussed this before in the context of the swap dealer de minimis discussion. That is a 350 percent margin of error, which may cut it for Washington, but

I think in the projection industry and the real world may not be sufficient. So I think there needs to be an honest discussion about how many entities we are currently regulating, how many entities we should be regulating, and how far we need to go abroad to apply our own rules, CFTC rules, in the regulation of entities that have some connection to the United States.

Now, I think the language of 2(i) is very important, "direct and significant connection with activities in the United States or direct and significant effect on commerce of the United States." There has been a lot of discussion around the word "activities" and that if there is some connection to activities, therefore, it should be considered significant or direct. I am not exactly sure. Do we have a measurement of activities in the United States? What does that mean?

MR. STERLING: Activities in the United States?

COMMISSIONER QUINTENZ: How much activity is there in the United States?

MR. STERLING: Well, I think there is a lot of activity in the United States, not to put too fine a point on it.

COMMISSIONER QUINTENZ: Yes. But we have a measure of commerce.

MR. STERLING: Sure.

COMMISSIONER QUINTENZ: We have GDP.

MR. STERLING: Oh, yes. That is massive, sir.

COMMISSIONER QUINTENZ: We have market capitalization of firms. We have an understanding of revenues across the private sector. So we can either focus on some generic, unmeasurable construct - like activities - or we can look at other language in 2(i), a direct and significant effect on commerce of the United States. I think it is reasonable to consider both, but I think it is more reasonable to focus on something we have measurements of so that we can make sure we are applying our resources abroad in an appropriate way and even domestically, I think, in recognition of other regulators.

There was some discussion about the Federal

Reserve. The Federal Reserve supervises bank holding companies, correct?

MR. STERLING: Yes.

COMMISSIONER QUINTENZ: Do you know how many pages the banking holding company supervisory manual is?

MR. STERLING: I don’t have a count on that, sir.

COMMISSIONER QUINTENZ: It is 1,800.

MR. STERLING: Yes.

COMMISSIONER QUINTENZ: Do you know how many times it references the word “swap”?

MR. STERLING: I do not.

COMMISSIONER QUINTENZ: I have them marked.

MR. STERLING: Excellent.

COMMISSIONER QUINTENZ: Two hundred twenty times that this manual references the word “swap” in connection with prudential regulation over bank holding companies.

So while I appreciate the fact that our rules may be designed in different ways, and there may be different components of what we do, the activities

of a bank holding company on a consolidated basis are regulated by the Federal Reserve. Even despite that fact, we still have an aggregation principle across subsidiaries, correct?

MR. STERLING: Yes.

COMMISSIONER QUINTENZ: So that you look across all the activity of all subsidiaries. And if it is over $8 billion, one of those subsidiaries has to register with us, correct, in terms of dealing with U.S. persons?

MR. STERLING: Yes.

COMMISSIONER QUINTENZ: Yes. So maybe one final question. Do you know how many foreign consolidated subsidiaries exist in the world of U.S. financial institutions?

MR. STERLING: No, I do not.

COMMISSIONER QUINTENZ: Do you think it is in the hundreds?

MR. STERLING: I would venture to say it is probably higher than that, but I don’t know.

COMMISSIONER QUINTENZ: I think it is in the thousands.

MR. STERLING: Okay.

COMMISSIONER QUINTENZ: Considering there was some estimate that there would be 15 to 20 swap dealers originally registered, and a foreign consolidated subsidiary prong would stretch our extraterritorial application of CFTC rules into the thousands, I am not sure that is appropriate.

Let me leave it there until we have our own second round of questions, Mr. Chairman, but let me also just say that I am very appreciative of the hard work of my staff, Peter Kals, Margo Bailey, and Kevin Webb, for their hard work over the last four weeks since we originally got this rule to look into, as well as countless discussions we have had with you and your staff, especially Matt Daigler, over the last number of months.

CHAIRMAN TARBERT: Thank you. No. And I want to make clear all of the staffs, as Commissioner Behnam says Commissioner Berkovitz said, contributed to this. I think everybody didn't get everything they wanted, but this does have a lot of input into it. And I think it is really an important issue. As you

can see, it is obviously I wouldn't say controversial, but there are divergent views, you know, because, as Commissioner Berkovitz said in the very beginning, we are trying to get that balance right. And we may fall on different sides of that balance, but this really is a question. Just to put things in perspective because I think people watching this are wondering, what are we talking about, just to make just sort of a "Yes" or "No," we are talking about transactions that occur overseas, where there are two foreign persons. They may be related to a U.S. person back here, but that is what we are talking about.

MR. STERLING: Yes, Mr. Chairman.

CHAIRMAN TARBERT: Right. And right now we have guidance. And that guidance, there is no legal requirement that market participants actually abide by the guidance, though we understand most of them are. Is that right?

MR. STERLING: Yes, sir.

CHAIRMAN TARBERT: Okay. So one question I had was -- I think Commissioner Berkovitz raised the issue -- well, the guarantee. So we have tweaked the

definition of the guarantee. And I think that is something we have asked people to comment on. We have got to be able to get that right. My understanding, though, is that our definition is the same as the SEC's definition in our final rule, which they are approving right now. Is that right?

MR. PATEL: I don't have the SEC's final rule in front of me, but I think that that understanding is correct.

CHAIRMAN TARBERT: Okay. Okay. And not that we do everything and follow the SEC blindly, but -- so they have agreed on that standard as well?

MR. STERLING: Right.

CHAIRMAN TARBERT: So there is something to be said I think about having a similar. And if we were to take I guess -- let's take not the 2013 guidance but the 2016 proposal. And one of the questions I ask is if we were to universalize that, what would that mean for our banks operating here in the United States? In other words, if we went with a 2016 proposal, made it law and every other jurisdiction in the G-20 did so, what would that mean

for -- would everybody be regulating everyone else, effectively, then?

MR. STERLING: I think so.

CHAIRMAN TARBERT: Okay. So that is something you thought about when you were constructing this rule is, what would make sense sort of on an international basis?

MR. STERLING: Oh, yes, Mr. Chairman, absolutely. We considered that the world has changed significantly in terms of where other jurisdictions' requirements are since 2013 looking at the comparability of the requirements. And that gave us comfort that an approach like this was one we felt good recommending.

CHAIRMAN TARBERT: Now, the reliance on the Federal Reserve -- and I was a banking lawyer for a decade. So I am well familiar with Regulation K, Part A of which deals with U.S. operations overseas. There is a clear statement there that banks needs to -- their overseas subsidiaries and branches need to conform to the same high standards.

But I am concerned I think by the issue that

Commissioner Berkovitz raised about the London Whale and other things. And that may say more about our counterparts, but they have been working on that since then. But weren't those trades in the London Whale case cleared, centrally cleared?

MR. STERLING: Yes.

CHAIRMAN TARBERT: Okay. So we would have that information. Is that correct?

MR. STERLING: Sir, yes.

CHAIRMAN TARBERT: As would the Fed. And then, secondly, you know, when that happened, however many years ago it was -- the U.K. has the Financial Conduct Authority as well as the PRA, the Prudential Regulatory Authority. Are you familiar? Do they have margin rules now, similar to what we do, as well as swap, swap dealer-like requirements?

MR. FISANICH: Yes. And we found them comparable.

CHAIRMAN TARBERT: Okay. All right. That is all I have, all of my questions for now. Before we go to the next round of questioning, we'll start with Commissioner Berkovitz, you again, I have to entertain

a motion to adopt the rule before us so we can consider it and then vote on it. So could I have someone second the motion?

COMMISSIONER QUINTENZ: So moved.

COMMISSIONER BEHNAM: Second.

CHAIRMAN TARBERT: Thank you. Okay.

So let's go ahead to our next round of questioning. Commissioner Berkovitz?

COMMISSIONER BERKOVITZ: Thank you, Mr. Chairman.

First, let me just agree totally with what Commissioner Behnam's line of questioning was regarding that change made on Monday night. And we had the discussion. We had a productive meeting last week. I met with the team. And one of my questions then -- and it is my belief; I have said this consistently over the years. I support codification of the 2013 guidance. If people want the guidance to be binding, I am fine with that.

The 2013 guidance really is how we interpret 2(i). It doesn't tell other people what to do. It is our interpretation and how we are going to enforce the

statute. It is hard for somebody to -- they could engage in activity that we would find inconsistent with the guidance. We can't bring an enforcement action on that basis because it is not binding. But okay. If people want binding guidance, let's codify it and give it some certainty. That is okay. I don't have a problem with that.

What concerns me and what we talked about last week in our meeting was I am fine with codifying the 2013 guidance. If the intent of this Commission is to put that out for notice and comment and then codify it, I am supportive of that. The first time around, there was a lot of criticism of the 2013 guidance. Our interpretation of 2(i) at the time was believed way out there. It was too far out. We were expanding our jurisdiction. You go back in the record and look at the comments when we put the guidance out for comment the first time. That is a lot of the comment we got. We got criticized over the 2013 guidance over the years as being too expansive in our jurisdictional reach.

So, given that, we are putting it out for

comment yet again. We will get the comments. And that is fine. I am not afraid of comments. But I think, realistically, there is going to be a lot of critical comments saying, “Your interpretation is wrong. 2(i) doesn’t stretch as far as you want.” And, therefore, one response of this Commission might be to pull back and not go as far as we did in 2013.

And that is why that statement that is in there now that was changed two days ago in what our fundamental interpretation of 2(i) is, where we said initially the draft said the Commission -- the change from “direct and significant connection” was to “necessary to address risk and resiliency” is concerning because the change is a much narrower interpretation. The proposal says, “In exercising supervisory authority outside the United States, however, the Commission will do so only as necessary to address risk to the resiliency and integrity of the U.S. financial system.” As necessary to address risk to the resiliency and integrity of the financial system. That is what this proposal says, only where we will exercise our jurisdiction. The statute has

the different “direct and significant connection” standard.

So this, as Commissioner Behnam pointed out, is a fundamentally different standard than we have been using. So that raises my concern that we are actually not codifying the 2013 guidance as is claimed. We are pulling back our cross-border jurisdiction based on some risk and resiliency test. And then we adopt the risk and resiliency test, and we say, “Well, that is what the prudential regulators do. So why do we need to do anything? Risk and resiliency to the financial system is covered by prudential regulation. So what do we need our regulations for?” That is sort of my fundamental concern on this.

Let me put up a graphic -- I want to ask some specific questions about the significant risk subsidiary. And I have a graphic that I have constructed to help me understand the flow. And I take full responsibility for any errors in here. I am not going to hold the team accountable or to verify this or anything like that, and it is actually probably too small for everybody to read. But the

first test for significant risk subsidiary is whether the parent has greater than $50 billion in consolidated assets. And by my ability to figure out what that meant, the information that I pulled off the web -- actually, if you do a Google search for 50 billion in consolidated assets, there is actually a study by Better Markets that comes up that says there are 38 entities that meet that threshold. It is used in other financial regulations. So maybe we are talking about 38 entities here.

Then you get to various tests for whether the subsidiary is significant. If the parent meets the $50 billion threshold, there are 3 tests: equity capital test, which has to do with a 3-year rolling average percentage of equity of a subsidiary in relation to the parent; similarly, a 3-year rolling average of revenue of the subsidiary compared to the parent; and assets, similar-type test. If it doesn’t meet any of those tests, it is not a significant risk subsidiary. In other words, if the subsidiary is a small enough percentage of the parent, it is not a significant subsidiary.

If it meets any of those tests, it is considered a significant subsidiary, but that doesn't mean it gets regulated. Okay? If there is prudential regulation in the U.S. -- I think there was a discussion on that. If there is a prudential regulator the subsidiary doesn't qualify as a significant risk subsidiary or if there is comparable non-U.S. capital and margin rules in a non-U.S. jurisdiction where the subsidiary is not subject to prudential regulation, then it is not a significant risk subsidiary.

The cost-benefit analysis on this says more precisely than what I have shown here on this box. The cost-benefit analysis says "few, if any." That is correct. Few, if any, would meet all of these tests and become a significant risk subsidiary?

MR. STERLING: That is what we said for cost-benefit analysis purposes, sir. And what I would say is I haven't had an opportunity -- you will forgive me -- to review. I have no reason to agree or disagree with the study you found. The idea is to try and identify under both prongs of 2(i) potential where

risk that could arise that otherwise would not be on our radar from a rules perspective. And we tried to draw with this proposal reasonable lines around wherein and at what level we should look.

I think I must thank Commissioner Quintenz. He articulated it much better than I. As we think about a direct or significant effect, if you will, or connection to U.S. commerce, we do consider the size of U.S. commerce. And so starting the winnowing-down or focusing, if you will, we thought 50 billion, as referenced under financial regulations would make great sense for that.

COMMISSIONER BERKOVITZ: Okay. Thank you.

So I have a question about the application of this comparable non-U.S. capital and margin rule standard determining whether an entity is in a jurisdiction that has comparable non-U.S. capital and margin rules. And let me read something from the proposal. I am reading on page 58 of my text. This was the Monday evening text. I don’t think it probably changed substantially. But “For purposes of determining whether proposed 23.23(a)(12)(ii)” -- and

that is the comparable non-U.S. capital and margin rule standard -- “would apply, the Commission intends for persons to independently assess whether they reside in a jurisdiction that has capital standards that are consistent with Basel III.”

So who is making the test on whether they are in a comparable jurisdiction? Is it they making it, or are we making it, or they make it and we oversee? Who is making the test whether there is comparable non-U.S. capital and margin rule jurisdiction?

MR. STERLING: Well, I would invite input from my chief counsel on this, but I think the Commission, sir, has made comparability determinations in these areas. And I think it is, therefore, incumbent on people with knowledge of our rules to understand that and ascertain whether they find they are a subsidiary in such jurisdiction.

COMMISSIONER BERKOVITZ: Well, it says they reside in the jurisdiction that has capital standards that are consistent with Basel III. That is --

MR. FISANICH: And we do ask a question

about whether that is an appropriate test and, you know, whether we should add some --

COMMISSIONER BERKOVITZ: Whether we should be the one who --

MR. FISANICH: Whether we can articulate a standard that is more objective.

COMMISSIONER BERKOVITZ: Okay. It seems to me that we should be the one determining where they are in jurisdictions who -- if they have certain rules -- then they don't have to follow our rules, rather than say, "Oh, I am in a jurisdiction that has comparable capital rules. Therefore, I don't have to follow your rules." I would feel a lot more comfortable if we made that determination.

On the test whether there is prudential regulation, if there is prudential regulation, then we are -- I don't know what the proper word is -- deferring to the prudential regulators or they are not called a significant risk subsidiary because presumably there is sufficient prudential regulation. In this case, the Commission preliminarily believes deference to the foreign regulatory regime would be

appropriate because a swap activity is occurring within an organization that is under the umbrella of U.S. prudential regulation with certain regulatory protections already in place. So we have got some degree of comfort that because it is prudentially regulated, we don't have to regulate?

MR. STERLING: In the context of looking towards the outer bounds under 2(i), yes, that is right. We made the decision in recommending something for the Commission's consideration and public comment ultimately that a prudentially-regulated subsidiary or a prudentiallyregulated U.S. entity that has a subsidiary subject to consolidated supervision is not a place we would need to go to apply our swaps requirements overseas.

COMMISSIONER BERKOVITZ: Well, let's put this in perspective. These are significant risk subsidiaries. These are the big subsidiaries that pose significant risks. These are the most risky of those overseas bank organizations. These are the most risky affiliates. They are the biggest subsidiaries. And there is 50 billion in the parent. And the risk

is coming back. And that is the situation we are going to defer to the prudential regulators in.

MR. STERLING: What we are saying is, yes, the size of the subsidiary would be large in relation to the parent. The parent itself is large. The parent itself is bank-regulated. And I wish I had had the snap count that Commissioner Quintenz did, but through 200 codicils and 1,800 pages of regulation, we feel pretty good at that point that, inasmuch as the activities themselves are essentially offshore, that, yes, the banking regulators are exercising appropriate supervision over that. That is our sense of it, sir.

COMMISSIONER BERKOVITZ: Right. But the banking activities are offshore, but it is coming back to the U.S. because it is consolidated. The U.S. Bank is a parent. It is consolidated. And the entity, it is a significant subsidiary of a U.S. parent. So if something happens, the risk is going to come back to the U.S. And it is prudentially regulated. And it is those big risky entities. The biggest risky entities are the ones we are going to be deferring to the prudential regulators on or the non-U.S. as long as

there is capital and margin.

And I have a fundamental problem with deferring to the prudential regulators. I have tremendous respect for the prudential regulators in certain respects. And I know that, you know, they cover what they have to cover.

But the fact is the only reason we are all in this room debating this is because they got it wrong. Okay? There was a crisis because the prudential regulators got it wrong. Greenspan concedes error on regulation. Okay? The “modern risk management paradigm held sway for decades,” he said, Greenspan. “The whole intellectual edifice, however, collapsed in the summer of last year.”

Bernanke -- and there are quotes up and down through 2005, 2006, 2007 -- couldn’t see any risk that the housing issue was a national issue. He didn’t see any national risk for this, Greenspan, Bernanke. The prudential regulators got it wrong, fundamentally got it wrong. And we had a financial crisis, largely for that reason.

Now, should they have gotten it right? Is

it in the power of, you know, any individual to have omnipotence about what is going to happen in the future? No. I mean, I don't necessarily blame them for getting it wrong.

MR. STERLING: Sure.

COMMISSIONER BERKOVITZ: And Bernanke did a great job in helping address it. But the fact is what Congress did in response to that was not just to beef up prudential regulation. It said, "We also want market regulation."

They put in Title VII in the Dodd-Frank Act, in addition to Title II and Title III. We have a whole title directing us to regulate activities because Congress didn't believe prudential regulation of these entities was sufficient. And that is why we are here today. That is what we do. That is why you have 23.600. That is all the JPMorgan/Whale risk events. That is what the enforcement order said. And that is what we are directed to do.

And for us now to say, "Oh. Well, it is prudentially regulated. Everything is fixed. Now we can trust the prudential regulators" I find

inconsistent with our direction in Title VII, at least where we have got the balance.

I am happy if you want to respond to that or --

MR. STERLING: Oh, sorry.

COMMISSIONER BERKOVITZ: It is not a question, but if you want to respond, feel free to.

MR. STERLING: Oh, I was only going to say I appreciate your observations and thoughts on that. We understand them. And I would just only reiterate, if I may, that we have a very robust and complete

The Commission has prior voted on a set of regulations that apply to dealers and dealing activity here. We apply our requirements on a cross-border basis. Significant risk subsidiary was an effort to identify potential pockets of activity that would not otherwise be captured in some meaningful way.

We did draw a line there, and we look forward to public comment on it, just like we appreciate your observations today. So thank you for that.

COMMISSIONER BERKOVITZ: Well, let me just

also trot out some other ancient history. Well, it is not so ancient. And this was the first time this agency tried to regulate the OTC market in the ’90s, and that result was a disaster. And ultimately I think in the wake of the financial crisis, people recognized that Congress’ action in the CFMA and the action of the prudential regulators to squash this agency’s attempt to exercise jurisdiction in these markets was a mistake.

Let me read you what they said back then. It was a report of the President’s Working Group on Financial Markets, the Treasury, the Federal Reserve, the SEC. And the Chairman Bill Rainer, CFTC chairman, was on this report, too, after Brooksley Born was, effectively, removed from the scene. This august group said back then one of the reasons why the CFTC didn’t need to regulate these markets, the first reason, was that sophisticated counterparties use derivatives and don’t need this regulation.

In addition, most of the dealers in the swaps market are either affiliated with broker-dealers or FCMs that are regulated by the SEC or the CFTC or

are financial institutions that are subject to supervision by bank regulatory agencies. Accordingly, the activities of most derivatives dealers are already subject to direct or indirect Federal oversight. And that was the reason in 1999 to prohibit us from regulating over-the-counter derivatives that these were supposedly already overseen by bank regulatory agencies and the SEC and others. And that rationale was a fundamental mistake in 1999. Then we had the financial crisis and Congress changed that with the Dodd Frank Act.

I just have to add here, a point when reading this document. It goes on. This is just how wrong people can be. I mean, nobody is the repository of perfect knowledge. We aren't. They aren't. That is why we have multiple agencies regulating these activities now, not just one.

But the next sentence, believe it or not, says, "Most OTC derivatives are not subject to manipulation." Okay? "Thus, for example, it is highly unlikely that interest rate swaps could be used to manipulate interest rates."

Now, technically, that may be correct and what happened was interest rates were used to manipulate interest rate swaps, but they said interest rate markets couldn't be manipulated. Okay? We are proud to have with us today -- okay? And all of the prudential regulators of all of that activity before us -- and, Mr. Chairman, I know you have got to get to a meeting.

We issued a release today on this very issue. Who was the first agency? Who was the leader? Who was the global leader in fixing the LIBOR rate fixing problem? Okay? I mean, which agency took the lead on that? And who do we have here today? You know, Vince, Vince McGonagle, Vince. Okay? Read the Spider Network about the story about the LIBOR investigation and what this agency did and Vince, reading the Wall Street Journal article, and Vince going to talk to Gretchen Lowe and bringing it up the chain and this agency taking the global lead, ok? and exposing LIBOR and manipulation fixing that global market.

We are and have been for a decade or more, a

global leader in all of these markets. We can't just simply defer to the prudential regulators. We have a robust enforcement program. We have a robust regulatory program. We are on a level playing field with all of these regulators now. We are not subservient to prudential regulators like we used to be 10-15 years ago where everything in this world was "Mother, may I?" with the prudential regulators.

I have full respect for them. Okay? They keep our banking system safe and sound. Okay? But we have our rule. And I am not going to defer to them and say, "We don't need our risk management processes and procedures for affiliates of our banks overseas" because they are all prudentially regulated.

So, fundamentally, I am a very strong proponent of the CFTC and our jurisdiction. And I don't want to see us back off our role that Congress mandated. So thank you.

MR. STERLING: Thank you, sir. If I may, just by way of conclusion to your remarks, which I greatly appreciate, I just want to say that certainly in putting together this recommendation and working

with several in this building -- and we also like Vince a lot, too. By no means do we mean to create a roadmap for prior crises or oversights to arise.

I think, as you said towards the beginning of your first round of remarks, we are trying to draw a reasonable line looking at the swap regulation regime that has been stood up under the world under the G-20 regime, where, indeed, we were the first movers. We continue to be at the vanguard of regulation in this area. And in a particular space where we wouldn't, per se, apply our dealing requirements right now, we made a decision that banking regulators can now take a macro potential approach because it has changed in the last 10 years, too, can have a lead and that that is all we have said.

So I certainly thank you for your observations and just wanted to assure you that in thinking through these areas, not only are we mindful of the prior financial crisis. We will feel comfortable that we are not seeking to lay the seeds for it to repeat itself. Thank you.

COMMISSIONER BERKOVITZ: Yes. Thank you.

Just one final thing in that we have made a lot of progress with the margin requirements, the capital requirements, and clearing. I have said it many times, and I will say it again. The world, the financial world, is safer today because of our actions, because of the other regulators' actions, and because of industry actions. But we have to be very careful about "This time is different" syndrome and to be thinking here today that we have solved it all and it is now all safe. "We don't need to be vigilant, and this agency doesn't need to be vigilant anymore because everything is safe." We can't go that far.

CHAIRMAN TARBERT: Thank you very much, Commissioner Berkovitz.

Commissioner Stump?

COMMISSIONER STUMP: I just want to follow up on the last points that were made. I agree, the CFTC has often been the global leader and often been unrecognized for being the global leader in many regards. But, that said, we can be the global leader, but we don't seek global dominance.

And I want to point out that, in 1999, perhaps we relied too heavily on the prudential regulators, but today we are not only relying on the prudential regulators, but oftentimes jurisdictions have comparable market regulations that are being applied. And we are talking about a set of dealers and foreign potential dealers in foreign jurisdictions that are regulated by their market regulators as well as overseen as part of a bank holding company under our prudential regulations. Is that accurate?

MR. STERLING: Madam Commissioner, that is correct.

COMMISSIONER STUMP: Okay. Thanks.

And while we are talking about this, I just have a few questions with regard to this new concept: significant risk subsidiary. I think we can all go back to whether we are codifying the guidance or we are improving upon the guidance. There was this concept in the guidance that no one has talked about yet of affiliate conduits. And it was very confusing. And we are trying to today put on the table something for the public to weigh in on that is an alternative

to that. But I just have a few questions about how we got here.

Is it fair to say that both affiliate conduits and significant risk subsidiaries are designed to get at a universe of entities that have some type of connection to U.S. interstate commerce, and we have to consider whether that should be brought into the CFTC as swap dealer regulation? But it is in addition to U.S. persons and those guaranteed entities that are already going to be captured under this proposal?

MR. STERLING: Madam Commissioner, that is correct.

COMMISSIONER STUMP: So this is in addition to U.S. persons and guaranteed affiliates. So when we talk about that narrow universe of people and the fact that conduit affiliates was extremely confusing and, in fact, it wasn't even defined in the guidance, it was the result of a set of factors that people were supposed to interpret and try to understand and come to some conclusion as to whether or not they were, in fact, a conduit affiliate. So today we are trying to

put in place more clarity by having measurable, quantifiable metrics around this concept of significant risk subsidiary. Is that right?

MR. STERLING: That is correct, bright-line percentages and numbers and so forth.

COMMISSIONER STUMP: Which should, frankly, lead to better compliance and more enforceable rules. So if the objective here is for people to comply and if they don't for us to enforce our rules, it stands to reason that a quantifiable, objective metric is the right approach, as opposed to what previously was included in the guidance, which was a set of factors that I am sure every banking entity in the world spent bzillions of dollars on legal fees trying to determine if, in fact, they were captured under any of these factors.

You don't have to answer, Josh.

MR. STERLING: Well, I do agree.

COMMISSIONER STUMP: So, in my opinion, this may or may not be the right path forward, but we are putting this out for comment, to ask the public if, in fact, it makes sense, because what we have learned in

the last six years is that conduit affiliates was confusing. In 2016, in an attempt by Chairman Massad to put forward a proposal to codify the guidance, the concept of foreign consolidated subsidiary was introduced. That was confusing in this context. And so now we are simply putting on the table something else for the public to consider as we attempt to get this rule to a place that makes sense in capturing entities, in addition to U.S. persons and guaranteed affiliates. It is not as though we are creating a loophole you can drive a truck through. We are capturing all of these other folks already.

So I just wanted to point that out because the conversation is fascinating. I think it is going to be more fascinating once the public has an opportunity to weigh in on something that they have never had the chance to consider. And so we are just providing another alternative to those things that had been put on the table previously. We are not finalizing anything today.

Just a couple of other questions. And Commissioner Behnam and Commissioner Quintenz talked a

little bit about the number of swap dealers that have been registered with the CFTC. So there are 107, but approximately how many of those are located outside the United States?

MR. PATEL: So there are approximately 60 that are outside the U.S., so just over half.

COMMISSIONER STUMP: To your numbers, have those numbers remained relatively constant, with approximately half of them located outside the United States over the course of the provisionally registered swap dealer regime that we put in place?

MR. PATEL: Yes. I think that is a fair statement. You know, since the end of 2014, there have been approximately 90 or more registered swap dealers, with approximately half outside the United States.

COMMISSIONER STUMP: Would you expect to see a significant number of those currently provisionally registered swap dealers withdraw from registration under this proposal?

MR. PATEL: We do not, though we do ask questions about it.

COMMISSIONER STUMP: It is fascinating that today, over half of the swap dealers registered with a United States market regulator are not located in the United States.

That is all the questions I have.

CHAIRMAN TARBERT: Thank you very much, Commissioner Stump.

Commissioner Behnam?

COMMISSIONER BEHNAM: No questions, but I do want to react in support of Commissioner Stump's comments about this being obviously a proposal and for all of us in the room, for all of you. And thank you again for all of your work. And those listening understand the distinction between a proposal and a final. And, then, although I have articulated my concerns with this and we have had a pretty robust back and forth, I do appreciate your team and your effort to be objective in the questions we ask and to take a pretty holistic approach to what the next step is on this rule. It is extremely important.

And Commissioner Berkovitz pointed out, obviously, the history, which I talk a little bit

about in my statement, and why we are here and what we need to do going forward as a regulator and as policymakers, as a country. And I look forward to those responses.

So thank you again.

CHAIRMAN TARBERT: Thank you very much, Commissioner Behnam.

Commissioner Quintenz?

COMMISSIONER QUINTENZ: Maybe just a couple of quick questions to wrap up or put a few things in context. There was some discussion about the London Whale and the CIO losses in April and May of 2012. Director Sterling, do you know how much money JPMorgan made in the second quarter of 2012?

MR. STERLING: I don't.

COMMISSIONER QUINTENZ: They made $5 billion in 2012. So the $4 billion of losses by the CIO did not affect their profitability.

MR. STERLING: Right.

COMMISSIONER QUINTENZ: So, I mean, I think that while that activity was concerning, it was also designed as a hedge for Europe blowing up, which it

almost did. I was in the markets during that period. There was significant risk to the global financial system at that point. While it was in my view a very poorly constructed hedge, and I think JPMorgan through its own report admitted that, it was, nevertheless, designed as a hedge. In my own experience as an investment manager, maybe not to this degree, but I think you always want to lose money on your hedges because they are designed to lose money. So I would like to put into context the JPMorgan/Whale event in terms of anyone's suspicion that it threatened the bank or the U.S. financial system as a whole.

Along those lines, do we have -- I appreciate this chart. I think it is very helpful. When we are looking at the concept of a significant risk subsidiary, it isn't the case that none exist, but it may be the case that a number exist but they are all regulated by the Federal Reserve or a prudential regulator authority abroad. Is that a possibility?

MR. STERLING: It certainly is, sir.

COMMISSIONER QUINTENZ: So even if there are

no residual significant risk subsidiaries, that doesn’t mean that none exist and because they would already be regulated at the prudential level. And I think it is important -- and I will get to this in my comments. I think that this is an important test because what we are talking about is the risk to commerce or activity, however we define that general concept, in the United States of a foreign entity dealing to foreign counterparts, if they are dealing in the United States and to U.S. persons, our rules already capture that through de minimis tests. But what threat does a foreign entity dealing to foreign participants pose to the U.S.? There has to be some measure of significance to the U.S. financial system or U.S. commerce in terms of the limiting authority that Congress put on our agency. And I think that this is a well-designed test that captures the significance of the parent, in terms of its size, that captures the significance of a subsidiary, in terms of its size, and that respects the jurisdiction of the Federal Reserve or other foreign regulators. So I compliment you and your staff on the work on this

product.

Thank you, Mr. Chairman.

CHAIRMAN TARBERT: Thank you.

Just some final questions. Fraud and manipulation authority. Nothing in this rule changes or somehow reduces our authority to prosecute fraud or manipulation. Is that right?

MR. STERLING: That is correct, sir. And I did consult with leadership in the Division of Enforcement who I believe share that view.

CHAIRMAN TARBERT: Okay. So this is focused on registration and supervision as swap dealers?

MR. STERLING: Yes, Mr. Chairman.

CHAIRMAN TARBERT: So I appreciate Commissioner Berkovitz's recounting the tale of the Clinton years and this Commission's fight. I will say, however, number one, I think that, again, many of those arguments had to deal with domestic markets. And, again, this rule is focused on overseas activities only. Is that correct?

MR. STERLING: That is exactly right.

CHAIRMAN TARBERT: Okay. Do we have the --

and many of the things I agree with Commissioner Berkovitz, but Congress did make some fundamental choices in Dodd-Frank. I was in the Senate Banking Committee at the time. Does the CFTC promulgate the regulations covering margin and capital requirements for insured depository institutions or banks that are swap dealers?

MR. STERLING: No, sir.

CHAIRMAN TARBERT: No? So Congress clearly gave that authority to them. Congress also sort of removed a provision that was called Fed-lite, which disallowed the Federal Reserve as consolidated supervisor to sort of defer to regulators such as us and particularly the SEC. They gave, essentially, the Fed the power to override market regulators like us that were, you know, regulating subsidiaries. You may or may not be aware of that or you --

MR. STERLING: Yes, sir. I recall that, yes.

CHAIRMAN TARBERT: Yes. So there is something I think that prudential regulators have and supervisors today that we don’t have.

The other thing I would ask you is, do you think the international framework for derivatives regulation has changed since 10 years ago?

MR. STERLING: I can state with absolute conviction that yes, it has.

CHAIRMAN TARBERT: So pretty much everybody is required to apply the same rules and regulations?

MR. STERLING: That is right, yes, sir, under the G-20.

CHAIRMAN TARBERT: So does this recognize that as well?

MR. STERLING: It certainly does, sir.

CHAIRMAN TARBERT: And I would agree with Commissioner Berkovitz that we need to make the comparability determinations or at least rely on the Federal Reserve or something if we are talking about Basel rules. I will not vote for anything that allows an individual institution to say, “Well, we are in Macao, and they have similar rules and regulations. And, therefore, we are out of this thing.” So I just want to make that clear. I think that is a good point.

MR. STERLING: Yes.

CHAIRMAN TARBERT: And it will be interesting to see what the commenters say, but that is my position.

MR. STERLING: No. We certainly would agree with you, sir.

CHAIRMAN TARBERT: Okay. So, with that, why don't we go ahead and turn to any closing statements people would like to make? Go ahead, Commissioner Berkovitz.

COMMISSIONER BERKOVITZ: Thank you, Mr. Chairman.

And I made many of the points that I had in my statement. And so I am not going to read the whole statement. I just want to make two points.

One is I am very concerned about the relaxation of the guarantee definition along with, combined with -- and we haven't had discussion on this here and I am not going to start it now about the ANE, the arrange, negotiate, execute. I am very concerned that by relaxing the guarantee test, that this will enable the U.S. affiliates or the non-U.S. affiliates

of the U.S. banks to potentially deregister as swap dealers because they won't have the guarantee requiring them to register. They will reduce their non-U.S. -- a U.S. bank with many non-U.S. affiliates may concentrate all of its U.S.-facing swap activity in one of those foreign affiliates, the other affiliates would not be required to register. It could do all of its outward-facing swaps in those nonregistered non-U.S. affiliates, use its New York offices for booking and the personnel, conduct activities out of New York, simply book it in one of these other locations, and conduct a lot of swap dealing activity out of entities that are nonregistered entities that are currently registered swap dealers. That is a potential, a potential I see from the relaxation of the test for guarantee, which I would if there is a way to prevent that from happening. I would love to work with you on that as we go through and get the comments, but that is one of the concerns I have on this.

I just want to -- rather than go through my prepared remarks, which will be on the web, I

appreciate the comments from Commissioner Quintenz because I think your comments highlight the difference in viewpoint between your views and where I am coming from on this. And some of that is another issue which we highlighted in the way the test is worded and a lot of this proposal reads, the jurisdictional test that we are only going to exercise jurisdiction when we believe there is a significant risk to the U.S. financial system. Okay?

That is one thing that we -- and JPMorgan and the London Whale, did JPMorgan's $6 billion loss threaten the financial system? So does that mean we have a lesser interest in it or what is our interest in it? If it doesn't threaten the financial system, is that something that we should be concerned about or should only be concerned about these larger things that we consider risks and you set up the tests for significant risk subsidiary? Only if we believe that there is significant risk are we going to regulate the activity?

And here is what my concern about that reasoning is. We don't know what the significant

risks are. Sometimes it is clear and they stare us in the face. And this goes to the quotes I was reading about Greenspan and Bernanke. Even the best of us don't know what the risks are. It is not that there was anything wrong with the analysis -- well, I guess there were things wrong with the analysis, but we have the best and the brightest, basically, not knowing what the risks are. So if we adopt a risk-based test, we are not going to get all the risks. And there are examples.

Long-Term Capital Management. I don't think Long-Term Capital Management would have popped up on any of these screens. We have two Nobel Prize winners advising Long-Term Capital Management. Do you think if they thought that they were engaging in incredibly risky activity, they would have gone ahead and done it? They didn't think they were betting the company or potentially setting a cascade, in effect, that would affect the entire financial system. Nobody did. And so you have Nobel Prize winners who can't see what these risks are out in the future.

Bear Stearns. Nobody would have thought

that the Bear Stearns hedge funds that were collapsing were systematically important, but they turned out to be very systematically important. And sometimes risks that aren't systematically important set in motion these cascading events of a loss of confidence and set forth other people selling or doing what. So you just don't always know what the big risks are. And if you focus only on risks that you know are large, you are going to miss some. And that is what we did in 2008. We missed those.

So what do you do? What the Congress set forth was an activities-based test as well. So that is why we have risk management procedures in these institutions. So they manage all types of risk. You just don't say, "Well, here is a big risk. I am going to manage it." You have processes and procedures to make sure that people think these things through carefully.

So I believe, based on activities -- and the significant risk subsidiary doesn't have any swap activity test in it. It is all on bigness. Okay? There is nothing about their swap activity in there.

I would much rather focus on the swap activity. If you engage in certain swap activities, then you come within our purview. It is not solely a risk-based focus. And I don't think we should solely pay so much deference to other regulators. All of these risks are going to come back to the U.S. taxpayer ultimately.

The one difference between us and the other jurisdictions is -- the question was asked about, "Well, what if all of the countries in the world did this?" Okay? Well, one distinction between us and all of the other countries in the world is we are the ultimate financial backstop for the entire world. That is what we were in 2007 and 2008. Our Federal Reserve not only bailed out our U.S. banks, our overseas affiliates, foreign banks in the U.S., but our Federal Reserve, $4 and a half trillion worth of credit to foreign central banks so they could bail out their banks. We were the ultimate backstop on the world. And I think that gives us some say in how the regulations go around the world different from other countries as well.

So thank you. I appreciate being able to

discuss these issues in an open meeting. I think it is healthy. And I appreciate your commitment to openness and being able to discuss these in public meetings. So I thank you.

CHAIRMAN TARBERT: Thank you very much, Commissioner Berkovitz.

Commissioner Stump?

COMMISSIONER STUMP: Thank you.

I just wanted to point out again our intent in issuing this proposal is, or at least my intent is, not to sweep even a greater portion of potential global dealing activity within our jurisdiction. Nor is it to enable a significant number of those currently registered swap dealers to withdraw from registration. Rather, the intent is to attempt to codify the guidance into a rule set. But we would be remiss if we didn't make the improvements we know need to be made.

We have learned a lot in the past six years about some aspects of the guidance that lacked clarity. I think that this proposal sets forth our attempt to obtain input from the public on whether or

not we have made the rule set clearer than it was perhaps in previous proposals.

With regard to this conversation about risk, I think that I should take some credit for the change that was made that has caused all of the controversy. But I would also say that risk may not necessarily be the only thing we need to consider. So I am open to taking out the word “only,” but the reality is that in interpreting 2(i), risk to the financial system is something that we do consider. And previous leadership of this Commission, notably Chairman Gary Gensler, repeatedly told me when I was working on Capitol Hill at the time that we needed to focus on risk washing onto U.S. shores. So we have to take into consideration, especially in the context of this rule, whether the risk is potentially coming back to the United States. And so I do think including the words here are important.

I was somewhat skeptical -- I should admit to this, too -- of a restatement of the 2(i) analysis from the guidance. And I want to make very clear that as we go forward, I do not consider it to be

precedent-setting. The application of the 2(i) elements that is contained in this preamble to this rule is not something I will intend to be held to as we go forward on other rules. But I do appreciate the inclusion of the risk element.

So it is also somewhat ironic that I would today be supporting any codification of the guidance. As I was sitting in this room in 2013, when the guidance was discussed, I shared the view, vividly articulated by then-Commissioner Jill Sommers, that the guidance as it had been proposed reflected “what could only be called the ‘Intergalactic Commerce Clause’ of the United States Constitution.” Had I been a commissioner at the time the final guidance was issued, I likely would have voted against it. But the question before us today is not whether the guidance was the right thing to do at the time, but what the right thing to do now is.

So much has changed since then. We have now implemented nearly the entire swap regulatory regime called for under the Dodd-Frank Act. And many of our fellow regulators around the world have implemented

commensurate reforms. Since the guidance was issued, the CFTC has issued 11 comparability determinations regarding the regulation of swap dealers in the European Union, Canada, Japan, Australia, Hong Kong, and Switzerland.

And it is also appropriate to acknowledge the tremendous resources that market participants have devoted to compliance in the wake of the guidance, which they should not have to endure again absent a demonstration that the guidance is not working.

Based upon our experience during these intervening years, we are now able to transform the guidance into actual regulation. I believe the guidance was always intended to be temporary. And so today I see our role as updating and improving upon the guidance as we seek to codify it such that it is finally enforceable.

Thank you, Mr. Chairman.

CHAIRMAN TARBERT: Thank you very much.

Commissioner Behnam?

COMMISSIONER BEHNAM: Thanks, Mr. Chairman.

I will respectfully dissent from the

Commission's notice of proposed rulemaking addressing the cross-border application of the registration thresholds and certain requirements applicable to swap dealers and major swap participants, though I support the Commission's effort to make good on its commitment to periodically review its approach to evaluating the circumstances under which the swaps provisions of Title VII of Dodd-Frank ought to apply to swap dealing and related activities outside of the United States. Indeed, the guidance currently in place and section 2(i) of the Commodity Exchange Act itself provide the Commission the flexibility to evaluate its approach on a case-by-case basis, affording interested and affected parties the opportunity to present facts and circumstances that would inform the Commission's application of the relevant substantive Title VII provisions in each circumstance.

Today, the Commission is proposing to discard both the existing guidance and the use of agency guidance and nonbinding policy statements altogether in addressing the cross-border reach of its authority in favor of hard and fast rules. I simply

do not believe the Commission has made a strong enough case for wholesale abandonment of guidance at this point in the evolution of our global swaps markets and in light of current events that are already impacting market participants and their view of the future global swaps landscape. As well, I have serious concerns and questions as to what the Commission may give up should the proposal be codified in its current form.

Whereas, the Commission understands the scope of our jurisdictional reach with respect to Title VII, a Federal district court has confirmed that understanding, and we have operated within such boundaries. Aware of the risks and successfully responding in kind, the Commission is now making a decision based on the most current thinking that we should retreat under a banner of comity and focus only on that which can fit on the head of a pin. Oddly enough, that pin will hold only the giants of the swaps markets. Indeed, where our jurisdiction stands on its own, the ability to exercise our authority through adjudication and enforcement has allowed the

Commission to articulate policy fluidly, refining our approach as circumstances change without the risk of running afoul of our mandate. Today's proposal suggests that we can resolve all complexities in one fell swoop if we alter our lens, abandon our longstanding and literal interpretation of 2(i), and limit ourselves to a purely risk-based approach. I cannot support an approach that would limit our jurisdiction and, consequently oversight, directly in conflict with Congressional intent, and potentially expose the U.S. to systemic risk.

Throughout the preamble, the proposal evinces a clear understanding that the complexity of swaps markets, transactions, corporate structures and market participants create channels through which swaps-related risks warrant our attention by meeting the jurisdictional nexus described in 2(i). However, in many instances, we manage to simply acknowledge the obvious risk and step aside in favor of the easier solution of doing nothing, assuming that the U.S. prudential regulators will act on our behalf, or waving the comity banner.

The proposal provides shorthand rationales for each of its decision points without the support of data or direct experience as if doing so would reveal the vision's vulnerabilities. Perhaps most concerning are the proposal's contracted definitions of U.S. person and guarantee, its introduction of substantial risk subsidiaries, and its determination that ANE means something akin to absolutely nothing to explain. These represent some notable examples where the proposal undermines the core protections sought to be addressed in 2(i), as the Commission has until now understood them to be.

My concerns aside for a moment, I am grateful that within the four corners of the document, the requests for comment seek to build consensus and operatively provide the public an option to maintain the status quo with regard to most aspects of the guidance, albeit without sticking with guidance. While this leads me to more questions as to whether and how the proposal could go final absent additional intervening process, I am pleased that there is recognition that the public and market participants

may have lost their appetite for this brand of rulemaking or perhaps have come to agree with the D.C. District Court that the Commission's decision to issue the guidance benefits market participants. Further, as the Commission currently engages with our foreign counterparts regarding impending regulatory matters related to Brexit, I hope we are measured in timing and substance on this proposal.

Before I highlight certain aspects of the proposal, which I won't, Mr. Chairman, because I will keep this brief, I want to take a brief moment to acknowledge why as a general matter we are here and why this particular proposal is so important. Without rehashing market realties that led to the economic devastation of 2008, it should be never lost on our collective consciousness that a significant driving force that exasperated the financial crisis and great recession, at least within the context of OTC derivatives, was housed overseas. Although much of the risk completed its journey within the continental U.S., it was conjured up in foreign jurisdictions. But, as we all also know too well, more than 10 years

later, despite the products often being constructed, sold, and traded overseas, the highly complex web of relationships between holding companies, subsidiaries, affiliates, and the like, created a perfect storm that brought our financial markets to a near halt and the global economy to a shudder. Those experiences should always serve as the foundation from which we craft cross-border derivatives policy.

Despite my concerns regarding this proposal, I look forward to hearing constructive input from market participants and the public. I am encouraged by the balanced nature of the requests for comment and would like to modestly request that in responding to the proposal, commenters indicate whether they believe it is appropriate and prudent for the Commission to proceed with a rulemaking at this time or whether the preference is to adhere to the current guidance or some hybrid of the two.

As with all rulemakings, input the Commission receives through the public comment process drives the conversation and sets us on a course that balances diverse interests; seeks transparency,

resiliency, and efficiency; and, above all else, focuses on protecting U.S. markets, its participants, and, most importantly, the customers that rely on this truly global marketplace. One might assume that making targeted, surgical changes to an existing regulatory framework is easier than creating a framework. But, in some circumstances, it is exactly the opposite. Global swaps markets have grown and evolved over rule sets that were completed and implemented in the very recent past. As regulators, I believe we should caution against any wholesale rewrite when we find well-regulated, transparent, and generally well-running financial markets. But if we do find vulnerabilities or inefficiencies in our rules, certainly both old and new, the process to reconsider should be deliberate, balanced, and inclusive to ensure the Commission as a collective body understands the gravity of its decisions.

Mr. Chairman, I will reserve the rest of my comments given the time constraints. They will be published in whole.

Again, thanks to you and, of course,

Director Sterling and the team for this work. I certainly look forward to working with you in the future. Thanks.

CHAIRMAN TARBERT: Thank you very much, Commissioner Behnam.

Commissioner Quintenz?

COMMISSIONER QUINTENZ: Thank you, Mr. Chairman. Let me thank again the staff from DSIO for all of your hard work on this, as well as you, Mr. Chairman, your office and your team; my team, as I had thanked before.

I am very pleased to support today’s proposed rule, which in my view delineates important boundaries of the Commission’s regulation of swaps activity conducted abroad, which would codify elements of the 2013 interpretive guidance and make important adjustments with the benefit of six years of additional experience in swaps market oversight.

Congress deliberately placed a clear and strong limitation on the CFTC’s extraterritorial overreach, recognizing the need for international comity and deference in a global swaps market.

I believe the proposal strikes a strong balance in interpreting Section 2(i) of the CEA. The proposal before us would interpret it in ways that provide both important safeguards to the U.S. financial markets, as well as avoid duplicative regulation or disadvantage U.S. commercial and financial institutions acting in foreign markets.

Let me also say that I appreciate the comments of all of my colleagues. And I agree with Commissioner Berkovitz that our discussion has, I think, really shown our own philosophical perspectives as well as our analysis of the facts and of history. I believe that risk exists everywhere and at all times. And I think the question for us is how much of it, and in which locations, we need to apply our regulations, particularly and uniquely, I think in the context of that risk as existing abroad and even in the context of here at home. We have a de minimis threshold under which risk exists, but we have made the decision, some of it I don’t support, but we have made this decision, that the cost and the benefit of the regulations shouldn’t apply under a certain amount

of swaps dealing risk.

In terms of the risk that exists abroad, I think there is a difference between risk generally, which, as I said, exists everywhere and at all times; substantial risks, significant risk, which we are trying to get a framework around; and then systemic risk, which everyone at all times is concerned about and which I think we have a multilayered approach to in the United States and globally.

Let me also raise some comments around the test for the significant risk subsidiary. I think that the three tests proposed are very interesting. I think they do a good job of trying to limit our reach, but I am very interested in other ideas for tests that could get at different risks to the United States. As long as it is not based on notional value, that would be fine with me.

Long-Term Capital Management was brought up. And I just wanted to highlight something in the rule because it stuck out at me that, in our definition of a U.S. person, we are ensuring that if the management of a fund is done in the United States, we consider

that entity a U.S. person. So this definition would actually have captured Long-Term Capital Management, even though I think it was organized overseas officially. But beyond that, Long-Term Capital Management had $4 billion of equity, which they levered up through loans to $100 billion, which they then used to buy or deal $1 trillion worth of derivatives. I am pretty sure that, even without our U.S. person definition, we would have caught that entity through all of the other regulations and regulatory constructs that we have. And I think we need to view all of these things holistically and not try to take them apart as representing our entire framework individually.

Let me leave it there, Mr. Chairman, and thank you again for the time you dedicated to this proposal and to all of my commissioners for their comments.

CHAIRMAN TARBERT: Thank you very much.

I mean, just in closing, I would say, look, when I approach this, I think about a few things. First is I do think we need some finality to this. It

has been 2020 will mark 10 years since the Dodd-Frank Act. And I do think we need a regulation that is binding on all of those to whom it applies, as opposed to just sort of guidance.

The other thing is -- and I can't stress this enough about what we are talking about -- is here we are not talking about dealing with U.S. persons. We are literally talking about swaps activity that occurs outside the U.S. where the counterparties are outside the United States. So then we ask ourselves the question, well, what outside activities should trigger registration and requirements?

Now, Congress gave us a clear directive or, I should say, they gave us a directive. It is clear that there may be some differences in interpretation, but they basically said, "Look, Title VII does not apply outside the United States except in two circumstances: number one, where there is a direct and significant connection with activities in the United States in interstate commerce; and, secondly, basically where those activities can be used to evade Title VII." So this proposal I think tries to strike

that balance. It is neither an intergalactic commerce clause, nor is it a totally isolationist mentality.

And, personally, when I think about this and when I approach this proposed rule, I had sort of three guiding principles. The first was protect the national interest. The important role of the CFTC is to think about the United States and our interest. For me, that means U.S. taxpayers. We don't want to have a framework that incentivizes risk to come back that ultimately leads to bailouts.

The second thing I thought about is, look, we also are taxpayer-funded. So we have to focus primarily on our markets, our participants, the things where they need the CFTC the most. And we can't be out regulating things in far-flung lands that don't present risk to U.S. taxpayers. That is not a good use of taxpayer money. So we are trying to sort of get that right.

In thinking about this, I ask the question, well, is there a significant risk out there? And if so, is there anybody else looking at it? And if the answer is yes and no, there is a significant risk and

no one else is on the case, then I think it is incumbent upon us under 2(i) to go after that. And so the significant risk concepts, subsidiary concept, basically says, look, is this something that is potentially a risk to U.S. taxpayers, something somebody needs to be looking at?

And then if we say yes, then we say, “Well, is the Federal Reserve required to look after that under their consolidated supervision under the Bank Holding Company Act and that entire regime?” If the answer is yes, okay. We have got someone on that.

Then we say, “For subsidiary overseas, do they have the same capital and margin requirements that we do here in the United States?” If another overseas regulator is looking at it, okay. Then we are not.

If there is, though, an Enron subsidiary that they created, let’s say, overseas, it is not subject to Federal Reserve requirements. It is not subject to any -- let’s say it is in an offshore taxation thing and they are doing swaps activity. Then we basically treat them the same as if they were

sitting here in Washington doing that activity because that is a potential risk. So that is really what it is focused on. So the first principle is the U.S. national interest.

Second is I rarely bring up an 18th Century philosopher but Immanuel Kant, his famous “Categorical imperative.” Any time we are dealing with foreign activities, how much we regulate abroad, I ask the question, if we took what we were going to do and we universalized it, what would be the result? And if you have a situation where we are regulating everything overseas, external activities, and every jurisdiction in the G-20 did the same thing, we would end up with everybody regulating everyone else. And the end result would be absurdity. So I think my view on this is basically we afford comity to other regulators. If their institutions are here in the United States, they play by our rules. If our institutions are over there, they play by their rules assuming they have those rules. And if they don’t have rules comparable to us, then, again, if it rises to the level of being significant and no one else is

-- our fellow domestic regulators are not looking at it, we are going to focus on that.

And then the third principle, any time we are dealing with the swaps realm is harmonization with the SEC. In the jurisdictional fight over swaps, some of us were there on the Hill in different committees during the Dodd-Frank Act. Basically, Congress split the baby. They said, “Well, CFTC, you take swaps. SEC, you take securities-based swaps.” That has a long lineage for decades in other areas of the law. We have about 95 percent I think of the swaps market. But they also directed the two agencies to work together, to coordinate, to harmonize where possible. Simple enough? Wrong. We couldn’t even agree on the definition of a U.S. person. And a U.S. person is not something that is distinct or particular to financial regulation. So I think this makes a stride in that regard where now we finally define U.S. person the same way.

But, as my colleagues have said on many occasions, we are also not just going to blindly follow the SEC. So we have departed from their view

on arranged, negotiated, and executed because I think our markets are very different from their markets. And, instead, we focus on the significant risk subsidiary to get at a risk such as a potential Enron that would Enron around our laws and regulations.

And so I think this is a really great proposal. I thank the staff for all of the work. I look forward to the comment period, to continue discussion among the Commission. And I think it is really important that we get this done.

I would just end by a quote by President Eisenhower in his farewell address. He said, "The world must learn to work together or, finally, it will not work at all." I think this is a step forward in the right direction in working with our domestic and international counterparts. And I hope this will be a step towards making our global swaps market subject to even greater sound regulation. So thank you very much.

Now I ask the question, are the commissioners prepared to vote?

COMMISSIONER BERKOVITZ: Yes.

CHAIRMAN TARBERT: Okay. So, Mr. Kirkpatrick, will you please call the roll for the proposed amendments to Part 23 of the Commission's rules?

MR. KIRKPATRICK: Thank you, Mr. Chairman.

The motion now before the Commission is on the approval of the proposed rule making amendments to Part 23 of the Commission's rules. Commissioner Berkovitz?

COMMISSIONER BERKOVITZ: No.

MR. KIRKPATRICK: Commissioner Berkovitz votes no.

Commissioner Stump?

COMMISSIONER STUMP: Aye.

MR. KIRKPATRICK: Commissioner Stump votes aye.

Commissioner Behnam?

COMMISSIONER BEHNAM: No.

MR. KIRKPATRICK: Commissioner Behnam votes no.

Commissioner Quintenz?

COMMISSIONER QUINTENZ: Aye.

MR. KIRKPATRICK: Commissioner Quintenz votes aye.

Chairman Tarbert?

CHAIRMAN TARBERT: Aye.

MR. KIRKPATRICK: Chairman Tarbert votes aye.

Mr. Chairman, on this matter, the ayes have three, the noes have two.

CHAIRMAN TARBERT: Thank you very much. The ayes have it. And the motion is hereby approved by the Commission.

Given that we have had a robust discussion and a really good one, what I would propose is whether we can have a quick, 10-minute, break for people to -- for, number one, the new team to come up to the table, for those of us that need a quick 10 minutes. And then we will reconvene.

MR. KIRKPATRICK: Sure. If the Commission is agreeable, yes.

CHAIRMAN TARBERT: Yes. Okay. We will take a 10-minute intermission.

[Recess taken.]

CHAIRMAN TARBERT: Well, welcome back, everyone.

At this time, I would like to invite a second staff presentation on a proposal to amend Part 37 of the Commission's rules. The proposed rule would prohibit the practice of post-trade name give-up for swaps that are executed anonymously on a SEF and intended to be cleared. From the Division of Market Overnight, we have Vince McGonagle and Aleko Stamoulis. A pleasure to have you both with us today. Please go ahead and begin.

MR. McGONAGLE: Thank you, Mr. Chairman. I will turn it over to Aleko.

MR. STAMOULIS: Thank you, Mr. Chairman and commissioners. Thanks for the opportunity to present the staff recommendation that the Commission approve a notice of proposed rulemaking relating to post-trade name give-up on swap execution facilities.

This proposal is to amend part 37 of the Commission's regulations in order to prohibit the practice of post-trade name give-up for cleared swaps. The term "post-trade name give-up" refers to a

practice whereby the identities of swap counterparties are disclosed to one another after a trade is executed anonymously.

The proposed regulation would prohibit a SEF from directly or indirectly, including through a third party service provider, disclosing the identity of a counterparty to a swap if the swap is executed anonymously and intended to be cleared. The proposed regulation would also require SEFs to establish and enforce rules that would prohibit any person from making such a disclosure. The prohibition would only apply to those SEFs that facilitate anonymous trading of cleared swaps. So otherwise all name-disclosed execution methods for both cleared and uncleared swaps would still be permitted. And post-trade name give-up would also continue to be permitted for uncleared swaps.

This proposal has been made after considering public comments received in response to a request for comment on the practice of post-trade name give-up that was published by the Commission in November of last year. Both prior to and through the

public comment process, market participants have expressed views that post-trade name give-up deters some market participants from trading on SEFs that employ the practice, thereby limiting participation and competition on these SEFs. By this recommendation for a proposed rule, the Commission would consider whether prohibiting post-trade name give-up for cleared swaps would promote additional swaps trading on SEFs as well as promote fair competition among market participants, two statutory objectives provided under the Commodity Exchange Act. Encouraging a greater number and more diverse set of market participants to anonymously post bids and offers on these affected SEFs may promote greater interaction and competition, which should allow these platforms to act as more efficient mechanisms for price discovery.

Furthermore, pursuant to the Commodity Exchange Act and Commission's regulations, swap data repositories are already prohibited from disclosing the identities of cleared swap counterparties. Allowing SEFs to disclose counterparty names diminishes the purpose of prohibiting access to this

information at an SDR. Prohibiting post-trade name give-up on SEFs, therefore, would help to advance the objectives underlying the statutory privacy protections applicable to SDRs and the Commission's implementing regulations.

Finally, the practice of post-trade name give-up for cleared swaps may be inconsistent with the requirement that SEFs provide market participants with impartial access to trading on their markets. Post-trade name give-up may be undermining the policy goals of impartial access, which the Commission has stated are to ensure that market participants can compete on a level playing field and to allow additional liquidity providers to participate on SEFs. Prohibiting post-trade name give-up for cleared swaps may better fulfill these goals.

This concludes our opening remarks. At this time, we are happy to answer any questions on the proposal. Thank you.

CHAIRMAN TARBERT: Thank you very much, Aleko. And thank you, Vince, for your leadership on this.

To begin the Commission's discussion and consideration of the rulemaking, I would now entertain a motion to adopt the proposed rules amending Part 37.

COMMISSIONER QUINTENZ: So moved.

COMMISSIONER BEHNAM: Second.

CHAIRMAN TARBERT: Thank you very much.

I would now like to open the floor for commissioners to give any statements and ask questions in order of seniority. So I will go ahead and begin.

I will begin by stating that Commissioners Berkovitz, Behnam, and I have worked on a joint statement that I think represents our views. And it was a pleasure to work with you and your staff on that joint statement. So that will be posted on the Commission's website.

And let me just briefly say that I agree with the proposal. I think it does, really, two things consistent with what you just said, Aleko. Number one, I think it will attract more participants to SEFs in a diverse array. And, secondly, I think it promotes fair competition among market participants. So, again, we have a joint statement on this proposal.

I look forward to reviewing the comments on the proposal and working with all external stakeholders to address this issue in a way that enhances liquidity, ensures impartial access, and promotes an increase to this fair competition.

Commissioner Quintenz?

COMMISSIONER QUINTENZ: Thank you, Mr. Chairman.

A couple of questions. Then I will try to go through my statement quickly. Are there particular types of swaps transactions that trade predominantly or maybe even exclusively on interdealer platforms? It is my understanding that spread-over, spread trades are almost exclusively traded on interdealer SEFs. Is that your understanding?

MR. STAMOULIS: Yes. We are aware of data provided by market participants in the past that indicates that spread-overs make a significant, and in many cases a majority, portion of trades executed on interdealer SEFs while they make up a much smaller percentage of trades on dealer-to-client platforms. So yes.

COMMISSIONER QUINTENZ: Okay. Does staff or does the proposal express any concern about the potential impact that banning this practice could have on the ability of market participants or dealers to actually execute those trades?

MR. STAMOULIS: The proposal does specifically ask for comment regarding whether and how a prohibition on post-trade name give-up should apply to package transactions. So we definitely encourage market participants to comment on this and include any relevant information relating to how trading in spreads might be affected. So yes.

COMMISSIONER QUINTENZ: Okay. Thank you.

Has the Commission done its own analysis of the average pricing on dealer-to-dealer versus dealer-to-client SEFs? And is that information the Commission would be able to analyze if it hasn't done it yet and incorporate into a final rule?

MR. STAMOULIS: I am not aware of a study done within the Commission that specifically, directly compares prices between dealer-to-dealer and dealer-to-client SEFs. However, the proposal does

specifically request comment and additional information on this issue and, for example, how prices for swaps on order books compare to those on undisclosed RFQs, which are more commonly used in the dealer-to-client space, and how post-trade name give-up relates to that. So we are looking forward to learning more about that.

COMMISSIONER QUINTENZ: Okay. Thank you.

I would like to pay particular close attention to any comments that come in on that or any analysis that is done by the Commission. I think there is a perception that pricing is better on certain platforms than others or certain categories of platforms than others. So, to the extent that the Commission can analyze that issue using our own internal SDR data and leveraging off what the commenters provide us, I think that would be important for us to consider in any final rule.

So, Mr. Chairman, with your permission, maybe I will just run through my statement real quick.

I will vote in favor of today’s proposal to prohibit post-trade name give-up practices for swaps

that are anonymously executed on a SEF and cleared in order for the Commission to receive further comment on the proposal's potential market structure impact.

As was already described, in November 2018, the Commission issued a request for public comment regarding the practice of post-trade name give-up, which I supported. The overwhelming majority of comment letters to that release opposed post-trade name give-up and requested the Commission explicitly prohibit the practice. And the proposal before us today was heavily informed by those commenters' perspectives.

This proposal rightly notes that for anonymously executed and cleared trades, the need for market participants to know the identity of their counterparties for credit risk, legal, or operational purposes was obviated by the central clearing of swaps. However, I have concerns about the government banning an established trading practice that has supported liquidity in a marketplace and serves a market function. That market function is to enhance swap dealers' own risk management needs resulting from

their clients' exposures. And while I am very sympathetic to arguments around promoting fair competition, and I think that that is a strong mandate and something with which I would like to align myself, it gives me great pause to consider something that the government would mandate a change to a market structure in the hopes of increasing competition and liquidity but perhaps without fully understanding how those changes may implicate fundamental market dynamics.

So let me leave it there, Mr. Chairman, and just say that I am going to support the proposal today, but I am going to pay very close attention to both the comment letters and our own internal analysis in my consideration of any final rule.

And I would like to thank Vince and Aleko for your hard work and DMO generally. Thank you.

CHAIRMAN TARBERT: Thank you very much, Commissioner Quintenz.

Commissioner Behnam?

COMMISSIONER BEHNAM: Thanks, Mr. Chairman.

First, thank you, Aleko and Vince, for your

work on this. I am also pleased to join you, Mr. Chairman and Commissioner Berkovitz, in a concurring statement. Certainly when we have the opportunity, I think it serves us all well and the Commission, above all else.

I have no formal comments or questions immediately, but I certainly, above all else, look forward to the comments. I think, to Commissioner Quintenz's point, a lot of the information that we can glean from internal data, SDR, and otherwise will be helpful in sort of the process as we move toward a final rule. Above all else, I think this proposal is consistent with Dodd-Frank, with Title VII. And many things I have said in the past, specifically thinking about just a little bit over a year ago, when we proposed the SEF rule, promoting healthy markets, liquidity, certainly impartial access, as you pointed out, Aleko. These are key fundamentals of the Dodd-Frank trade execution requirement and vision for what the OTC swaps market would become.

So I think this is a step in the right direction but certainly look forward to comments from

market participants and the public to the extent they are willing to weigh in and look forward to moving forward on this rule.

Thank you.

CHAIRMAN TARBERT: Thank you very much, Commissioner Behnam.

Commissioner Stump?

COMMISSIONER STUMP: I just have a few questions. One, just in the context of a central limit order book, which is when we talk about post-trade name give-up that is the sharing of the name of the counterparty after the trade is executed anonymously. So the concept of anonymous execution applies to one of several execution methods, known as the fully anonymous central limit order book. We are not getting rid of any other execution methods here. But when we talk about the liquidity to date and the central limit order book, it is minimal compared to the other methods of execution. Is that correct?

MR. STAMOULIS: It does depend somewhat on asset class but generally yes. So for IRS, in particular, in the dealer-to-client space, for

example, trade volume is predominantly through disclosed RFQ, not anonymous order book.

And with respect to the fully anonymous CLOB, in particular, with anonymous execution and no post-trade name give-up, we don't see a lot of volume on purely electronic and fully anonymous CLOBs.

COMMISSIONER STUMP: So while the existing requirement to offer CLOB for required transactions may have been a little more prescriptive than I would have liked years ago when the SEF rules were adopted, the reality is that by providing a choice, we have given the marketplace the ability to choose where they want and in what sort of forms they want to transact. But what we are really contemplating here I think is a bit of a chicken-and-egg concern with regard to the liquidity on the CLOB and the practicality of the CLOB structure that subscribes to pre- and post-trade anonymity for cleared swaps. In that very narrow context, I think there is a fundamental question here that is being overlooked. Does the market require more demand for pre- and post-trade anonymity to incentivize liquidity or does it need more liquidity

to incentivize pre- and post-trade anonymity? It is a little bit of an unfair question, but I would love to hear your thoughts.

MR. STAMOULIS: Yes. It is an interesting point, Commissioner Stump. And we look forward to the comments in addressing that point and, generally, market structure issues. I think those would be an important part of informing the Commission and staff on a final rule.

COMMISSIONER STUMP: I look forward to the comments also. I think this point gets lost sometimes when we talk about customer choice, but the reality is there is very little liquidity in this space. And we don’t know why that is. So I think that is fundamental to us being able to move forward in finalizing this rule.

My other questions are really more about trade processing and protocols. And I just wanted to ask how the proposal deals with package transactions, where some elements are cleared and some are not.

MR. STAMOULIS: Yes, the proposal does specifically raise this issue. So, you know, post-

trade name give-up, the proposal acknowledges, could be necessary for certain cleared swaps that are components of packages, in particular, where the package includes an uncleared component. There is a question in the proposal requesting additional public comment on the necessity and the scope of an exception for package transactions.

COMMISSIONER STUMP: Okay. And I just wanted to take the opportunity to encourage commenters' input on how the proposed prohibition on post-trade name give-up affects trading protocols, such as auctions, portfolio compression, and work-up sessions. I think you offer including a question on that. I think that is very important here that we have a conversation about what the implications are.

And then I just want to make sure I understood correctly. The proposal supports the prohibition by referencing SDR privacy regulations. Am I understanding correctly the assertion here that allowing post-trade name give-ups on the back end at a SEF renders moot another CFTC rule for SDRs prohibiting one party from accessing the identity of

their counterparty under swap data reporting rules?

MR. STAMOULIS: Yes. There is an SDR regulation that would prohibit counterparty name disclosure at the SDR level. So what the proposal says is that post-trade name give-up may undercut the intent of this requirement and the congressional objectives underlying the statutory privacy protections in the CEA for SDRs.

COMMISSIONER STUMP: Okay. Thank you.

So just a very brief statement. I have said it many times, that building a new market structure for swap trading and execution on top of a legacy market that existed prior to enactment of Dodd-Frank is a challenge and one we are expected to fulfill under the Act. And no one said it would be easy. We know what Congress' stated goals for establishing SEFs. And they are fairly simple: to promote the trading of swaps on swap execution facilities and to promote pre-trade price transparency in swap markets.

We also know, as evidenced by the recent request for comment on the practice of post-trade name give-up, that there are diverse viewpoints as to what

prohibiting the practice will do to the episodic nature of the swaps trading, the depth of the book, bid offer spreads, and execution costs for market participants. However, unlike in 2010, when the Dodd-Frank Act was passed and provided us with this authority, and in 2013, when the Commission finalized the Part 37 regulations, we now have the benefit of data that could assist the public in justifying all of these divergent viewpoints. Unfortunately, other than the CFTC, no one is privy to what transpires across the entire SEF market structure.

So I would support -- I will support this proposal. I think it is very well-timed, and it is important. But I also believe that the Office of the Chief Economist should produce a publicly available study aggregating and anonymizing the market data for publication such that everyone can ascertain the overall incentives and interests that inform customers', dealers', and liquidity providers' willingness to achieve the congressionally mandated goal of promoting trading of swaps on swap execution facilities. This will enable more informed dialogue

with market participants going forward.

Congress entrusted us to achieve the specific goal of promoting swap trading on SEFs. And I assume it also expected us to preserve the ability of market participants to transfer risk using swaps. Our challenge is finding the appropriate market structure to achieve both. SEFs were not intended to be a club. Nor were they intended to be casinos.

So I look forward to all of the comments. I think it is going to be quite a challenge to digest them and reconcile the divergent comments we are expecting to get on this one. But I support putting the proposal out.

Thank you.

CHAIRMAN TARBERT: Thank you very much, Commissioner Stump.

Commissioner Berkovitz?

COMMISSIONER BERKOVITZ: Thank you very much, Mr. Chairman. And I sincerely thank you for putting forth this proposal. I was very pleased to join in the joint statement with you and Commissioner Behnam on this. And I really applaud your leadership

in putting forth this proposal. This is something that I have been very interested in since I came onto the Commission and been supportive of as we have considered other proposals for improving our trading regulations. So I am very glad to see this proposal put forward for today and largely for the reasons that you have noted: to get a level playing field. Under a post-trade name give-up, one side to the transaction has information advantage knowing the trading of the counterparty. And generally that is not the case on anonymous trading.

I also look forward to the questions. There is already a number of economic analyses, economic papers on this. There is our experience with other markets, but we don't have experience in our markets on it because we still have, on the prohibition because we still have, the practice. So I just want to focus on some of the questions, ask questions about the questions, if I may.

So the preamble, there is a number of questions in the preamble. And some of them have been discussed by my colleagues here today, including on

how the proposed rule would impact liquidity on the SEFs. For example, question 4 in the preamble asks, "How would the proposed prohibition on post-trade name give-up affect liquidity on SEFs? How would the proposed prohibition affect liquidity on central limit order books? Would the proposed prohibition directly affect liquidity on name-disclosed request for quote systems? If so, how? In particular, please provide substantiating data statistics and any other quantifiable information related to such comments."

So I think all of those questions are important. How would the prohibition affect liquidity?" How would there be data on something that doesn't exist? We can't expect hard data for people's projections of what would happen if this were to happen. Correct? We don't have experience in name give-up. We don't have data on trading where the practice is prohibited, right, or do we?

MR. STAMOULIS: No. That is correct. The data would be useful in providing perhaps a snapshot of the current market structure, but yes, I agree with your premise that it wouldn't be predictive.

The cost-benefit analysis included in the proposed rule does talk about some studies of other markets, but not the swaps market. And our markets are unique.

COMMISSIONER BERKOVITZ: Right. Appreciate it. So my only caution here is that ultimately at the end of the day, how this rule would affect liquidity will be somewhat -- we will have to make a judgment based on various market participants and academics and whoever is commenting, and our chief economist, whoever weighs in on it or we can call in as a resource and get their views as to what might happen if this rule -- whether, in fact, this rule will benefit.

I look forward to considering all of the comments and all of the viewpoints on how this rule would work. I just want to caution we may not get hard data because it is asking for something that doesn't occur yet. So we will do that. I look forward to that. And we also consider whatever comments on the other issues that you ask for as well, too. So, with that, I definitely support going

forward with this.

I would also just say that in all of these market structure things, we had the issue recently of the asymmetric speed bump; one exchange wanted to impose an asymmetric speed bump to promote liquidity. And I think there were different views on that issue as well as to whether, in fact, that would attract liquidity, or be detrimental to liquidity. The goal I think everybody has is to get liquidity in our markets. It is just that how we deal with these market structure issues is difficult. As Commissioner Stump said, it is a chicken and an egg issue. You don't know whether the change will help things or not because you can't run a trial experiment necessarily when you change a rule.

So, anyway, look forward to the comments on it. Thank you very much.

CHAIRMAN TARBERT: Thank you.

And I would like to pick up on something both Commissioner Stump and particularly Commissioner Berkovitz said. You know, we are dealing with a counterfactual here. So, you know, the way I look at

it is we have a general principle. And we have applied it in our exchange-traded markets and other markets that if it starts off anonymous, it remains anonymous. Prior to the clearing requirement, there was a need for post-trade name give-up because of counterparty credit risk. We have eliminated that now, but, yet, this practice still stands. And so in many ways, the principle will see whether it is vindicated if the proposed rule becomes a final rule. And then we will obviously study it thereafter to consider, you know, what the effects are.

But, with that, are the commissioners prepared to vote? Okay. Well, Mr. Kirkpatrick, would you please call the roll for the proposed amendments to Part 37 of the Commission's rules?

MR. KIRKPATRICK: Thank you, Mr. Chairman.

The motion now before the Commission is on the approval of the proposed rule on amendments to Part 37 of the Commission's rules. Commissioner Berkovitz?

COMMISSIONER BERKOVITZ: Yes.

MR. KIRKPATRICK: Commissioner Berkovitz

votes yes.

Commissioner Stump?

COMMISSIONER STUMP: Aye.

MR. KIRKPATRICK: Commissioner Stump votes aye.

Commissioner Behnam?

COMMISSIONER BEHNAM: Aye.

MR. KIRKPATRICK: Commissioner Behnam votes aye.

Commissioner Quintenz?

COMMISSIONER QUINTENZ: Aye.

MR. KIRKPATRICK: Commissioner Quintenz votes aye.

Chairman Tarbert?

CHAIRMAN TARBERT: Aye.

MR. KIRKPATRICK: Chairman Tarbert votes aye.

Mr. Chairman, on this matter, the ayes have five, the noes have zero.

CHAIRMAN TARBERT: Well, it is unanimous. The ayes have it, and the motion to adopt the proposed rule is approved. Thank you so much for presenting.

At this time, I would like to invent -- to invite a third staff presentation on a final rule amending Part 39 of the Commission's rules for derivatives clearing organizations. So we started off with DSIO. We then went to DMO. And now our third major policymaking division, Division of Clearing and Risk, will present. From DCR, we have Clark Hutchison, Eileen Donovan, and Parisa Abadi.

Thank you so much for joining us. You may begin when ready.

MR. HUTCHISON: Thank you, Mr. Chairman. Good morning, commissioners, fellow staff.

On May 16th of this year, the Commission proposed and sought comments on amendments to the provisions of Part 39 of the Commission's regulations that pertain to derivatives clearing organizations. Today, the staff and I will present a final rule amending Part 39.

The Commission received 14 substantive comments from market participants and the public. And we feel that this final rule given to you today reflects a fair balance of those comments. So with

that, in the deference of time, I will turn this over to Parisa. Parisa?

MS. ABADI: Thank you, Clark.

Good afternoon, chairman and commissioners. As Clark stated, staff is presenting today a final rule for the Commission's consideration amending Part 39 of the Commission's regulations. Part 39 implements the statutory core principles for DCOs. Since Part 39 was adopted in 2011, the staff of the Division of Clearing and Risk had been keeping track of issues with the regulations, including provisions that needed further interpretation or clarification, inconsistent procedures, and provisions that didn't reflect actual practice. So this rulemaking was really meant to clean up the regulations and address those issues identified.

Because the rulemaking covers a range of topics under Part 39, I will focus on some of the key highlights of the rulemaking, including where the staff recommendation in the final rule differs from the proposal.

At the time Part 39 was adopted, the

Commission had one registered DCO that cleared fully collateralized positions for which many of the requirements would not apply; for example, margin and default procedures. This was addressed at the time through staff relief. But, with the addition of other registered DCOs that clear only fully collateralized positions, this rulemaking will carve them out of the requirements that are inapplicable. In addition to the changes that were proposed, staff is recommending that the Commission adopt a few other changes related to fully collateralized positions that were suggested by commenters.

The Part 39 regulations already require DCOs to manage various types of risks, but some DCOs lack a formal program to address those risks on an enterprise-wide basis. A DCO will now be required to have an enterprise risk management program and to identify as its enterprise risk officer an appropriate individual that exercises the full responsibility and authority to manage the DCO’s enterprise risk management function.

Whereas, the regulation was silent before,

DCOs will now be required to calculate their largest financial exposure net of required margin on deposit, rather than total margin on deposit, including excess. This is a change that will bring CFTC regulations into line with international standards on this issue.

Part 39 regulations currently provide that a DCO must require its clearing members to collect initial margin from their customers for non-hedge positions at a level that is greater than 100 percent of the DCO's initial margin requirements with respect to each product and swap portfolio. Before this requirement was implemented in 2012, several DCOs noted that, as written, it would actually require DCOs to significantly increase margin requirements for certain types of customers, for example, non-clearing futures commission merchants, or FCMs, which are typically charged the same initial margin as clearing FCMs. At the time, staff issued interpretive guidance that gave DCOs greater flexibility in determining to which category of customers the higher margin would apply. The rule is now being amended consistent with this interpretive guidance with additional edits

suggested by commenters for further clarification.

In response to a recent default at a CCP outside of the Commission's jurisdiction, the Commission proposed a number of changes to its regulations on DCO default rules and procedures. First, the Commission proposed to require that a DCO include clearing members in a test of its default management plan. Staff is recommending that this change be adopted but modified to require clearing member participation in testing of the plan, only to the extent that the plan relies on the participation of clearing members, as suggested by commenters.

The Commission also proposed to require DCOs to provide immediate public notice of a default. Due to concerns about the potential market impact of providing immediate notice, staff is recommending that the timing of the notice be left to DCOs but that notice be given as quickly as possible, taking into account the potential negative impact it might have on the DCO's ability to manage the default.

Lastly, the Commission proposed to require that a DCO establish a default committee in the event

of a default involving substantial or complex positions to help identify any market issues that the DCO is considering. In light of strong divergence in the views expressed in the comments on this proposal, staff is recommending that the change not be adopted at this time. Staff believes it would be appropriate to give industry stakeholders some time to come closer to consensus on this issue.

As the Commission is aware, a designated contract market or swap execution facility is required to submit a certification to the Commission prior to listing a product for trading that has not been approved under regulation 40.3. However, DCOs are not required to provide any notice to the Commission before clearing new products. As a result, the Commission had proposed to require a DCO to provide notice to the Commission no later than 30 days prior to accepting a new product for clearing. Due to many objections raised by commenters, staff is recommending that this change not be adopted at this time and the issue be revisited in a future rulemaking.

And, finally, in 2011, the Commission

proposed but never finalized rules addressing core principles O, P, and Q relating to governance fitness standards, conflicts of interest, and composition of governing boards. The Commission subsequently adopted rules for systematically important DCOs and subpart C DCOs in this area that are consistent with the Principles for Financial Market Infrastructures, but there are DCOs to which they do not apply. Therefore, the Commission proposed to make these requirements applicable to all DCOs. Staff recommends that these changes be adopted largely as proposed.

This concludes the overview of the rulemaking. We are happy to answer any questions you have.

CHAIRMAN TARBERT: Thank you very much for that excellent presentation. Thank you, Clark. Thank you, Eileen. But particularly, Parisa, thank you so much. I have seen you here late at night burning the midnight oil with you and your staff to get this done.

To begin the Commission’s discussion and consideration of the rulemaking, I will now entertain a motion to adopt the final rules amending Part 39.

COMMISSIONER QUINTENZ: So moved.

COMMISSIONER BEHNAM: Second.

CHAIRMAN TARBERT: Thank you.

I would now like to open the floor for commissioners to ask questions and give statements. We will go in reverse order of seniority this time. Commissioner Berkovitz?

COMMISSIONER BERKOVITZ: Thank you, Mr. Chairman. I have no questions. I will give a statement. And I want to thank the staff, Director Hutchison, Parisa, and Eileen. We met last week. It was a very helpful meeting to help us walk through this rule.

The shortness of the presentation and the lack of controversy on this rule really mask the tremendous amount of work that went into it. This is not a simple rule that is being finalized. It is very technical. And there is a lot of technical aspects to it that are being codified and changed. And accumulating all of these changes over the years and putting them in rule form and clarifying it. That is excellent work, and I want to thank you for it.

I support the final rule to amend Part 39 of our regulations for derivatives clearing organizations. Part 39 codifies 18 core principles and related regulations with which a DCO must comply to obtain and maintain its registration status. Part 39 also provides additional standards for systemically important DCOs, SIDCOs.

Clearing of futures, options on futures, and swaps at Commission-registered DCOs is a key pillar supporting responsible derivatives risk management. The G-20 leaders recognized the benefits of central clearing when they adopted central clearing of swaps as a key global response to the 2008 financial crisis. In the United States, Congress enacted a swaps clearing mandate in the Commodity Exchange Act and established SIDCOs as a higher regulatory tier for large DCOs as determined by the Financial Stability Oversight Council. Maintaining strong DCOs through effective risk management and regulation is critical to the safety of the derivatives markets and to preventing another financial crisis.

The final rule for Part 39 that we have

before us is an example, a good example, of how the Commission can make tailored amendments to improve the clarity of its regulations and codify staff guidance and relief that has accumulated over time. The final rule updates the regulations without undermining the overall effectiveness and protective intent of the rules.

In one area of note, the final rule does not codify the proposal to require DCOs to have a default committee with member participation and to convene the committee in the event of a substantial or complex default. The Commission received an array of comments on the proposal reflecting strongly held views both for and against the proposed changes. The preamble to the final rule notes the Commission's desire to provide the market with additional time to consider this issue, with the goal of attaining a consensus of stakeholders. I look forward to continued engagement in this area.

And this is the last rule that we will be considering today and the last meeting for 2019. Again I would like to thank all of the staff that has

presented today and that we worked with for the rules and generally on matters before the Commission. What we see today and do today and what the public sees is really just a small fraction of the really hard work and dedication that goes on. And even where we have controversial issues and even where we disagree, the public does not see all of the areas that we have cleared out we have resolved before those public meetings. So you are just seeing it looks like, well, we are disagreeing on all of these things, but people aren't seeing where we agree. And that is true for a lot of this. So many of the issues go smoothly and aren't discussed in public because we have been able to resolve them. So I want to thank the staff conferring with my staff and my colleagues here. My staff has been working with your staff on all of these rules and all of these issues. There were issues that weren't discussed today because they didn't rise to the level or they were resolved or otherwise taken care of. So there is a lot of work that goes on behind the scenes, and I want to acknowledge that.

I want to thank my own staff for all of the

work they have done over the past year to support what we do in my office. And there is just a tremendous amount of work behind the scenes that goes into these hearings, into the statements, and into that process, just putting up the charts and getting our information accurate and with proper analysis. I want to thank my own staff, Erik Remmler, Lucy Hynes, and Sebastian Pujol, for all of the great work they have done this year for me and for the CFTC as a whole.

So I want to thank everybody again and look forward to a new year, where we will get a little breather and then pick up. Thank you.

CHAIRMAN TARBERT: Thank you very much, Commissioner Berkovitz.

Commissioner Stump?

COMMISSIONER STUMP: I just echo everything everyone has said in thanking you all, but I want to thank all three teams. I was sitting here thinking about the many times I have been briefed on the three topics we covered today by all three of the teams that presented today under different chairmen. Some of them long before I got here have been dealt with under

four different chairmen. And the staff in all three of the divisions always exercised the most professional responses to the manner in which we prioritize things based upon who is leading the Commission and the manner in which we choose to change things based upon who is leading the Commission. So thank you all for sticking with us through in my time two chairmen and two different sets of priorities.

And, in particular, with regard to this rule, this team spent considerable time with me last summer, when we proposed this rule. And I thank you for all of the work you did to further streamline it. I think it was probably obvious last summer that I had some concerns with regard to elements that were a bit more controversial. So I support moving forward in truly advancing the less controversial items without disregarding the more controversial items. I assume we will continue to consider how we might address those. And I look forward to those conversations as well.

I just have one question based upon some comments that came in. I understand that several

commenters raised a concern with the proposed requirement that a DCO report to the Commission on a daily basis margin, cash flow, and position information by individual customer account. Do DCOs currently report this sort of information to the CFTC?

MR. HUTCHISON: Yes, they do.

COMMISSIONER STUMP: So all we are doing here is codifying current practice?

MR. HUTCHISON: That is right.

COMMISSIONER STUMP: Does the final rule clarify what individual customer account means?

MR. HUTCHISON: Yes, it does. It is a customer account --

COMMISSIONER STUMP: Excellent. Thank you.

MR. HUTCHISON: -- not the beneficial owner but the underlying customer account.

COMMISSIONER STUMP: I appreciate the clarity. Thank you.

CHAIRMAN TARBERT: Thank you very much, Commissioner Stump.

Commissioner Behnam?

COMMISSIONER BEHNAM: Thanks, Mr. Chairman.

And thanks to the team, Eileen and Clark and especially Parisa, for your work on this. Dan said it very appropriately that this is a bear of a rule. And it seems a lot simpler than it is, but the public should realize that it is a very complicated proposal or final rule that we are putting forth today. So I do appreciate all of the time and work that has gone into it.

And I appreciate before I have just a few questions that we are considering especially the default committee, very difficult issue. There is a lot of difficult issues in this space. And, although we are not finalizing it or some others, I appreciate the fact that we are continuing to engage, continuing to think about these issues. There are very core challenges I think that we face as an agency and as a sort of community and the marketplace, where we do have very divergent views on how to move forward on it, but I think we can all agree that we want as transparent and safe markets as possible. The question is, how do we get there and can we get there in an appropriate amount of time? So I continue to

look forward to those conversations.

Regarding the specific text, I have a couple of questions about market participants, specifically including a “market participant” on a DCO board. The proposal defines “market participant.” And I am just wondering how did we get there and specifically the definition and then if I am not correct -- and please do correct me if I am wrong -- we are not codifying that definition.

MS. ABADI: That is correct. In the proposal, because -- you know, DCOs had asked for guidance as to how we would define “market participant.” So in the proposal, the idea was to limit market participants to clearing members or customers. And commenters pointed out that this would create certain challenges for certain DCOs. For that reason, the preamble just states the Commission’s expectation that a DCO would include customers on its board, but that is not a requirement now.

COMMISSIONER BEHNAM: Okay. And are we distinguishing between customer representation versus market participant on the boards? And then what is

our expectation sort of going forward with both of these?

MS. DONOVAN: So the statutory requirement in the core principle, core principle Q, requires that they have market participants on the board. So that is a requirement, that they have to have market participants. What we stop short of is defining what is a "market participant."

We had proposed to define it as clearing member or customer, as Parisa said. Commenters raised issues that that would create for them, for instance, we have several DCOs that only have retail participants. So they said, "Well, if we have to include customers, you know, how would we decide which of them we would include?"

So we stopped short of having the definition, but the preamble does indicate that we would expect the DCO to have customers. So I think we would see it as presumably they should have them and there would have to be a pretty good reason to not have them. But we did stop short of putting it actually in the rule as a requirement.

COMMISSIONER BEHNAM: And, then, going forward, will we have any mechanism to sort of review whether or not there are customers, in fact, on the board or are we just going to have this expectation that they do it in the future?

MS. DONOVAN: Well, I mean, we will be able to look at -- they have to have market participants. So we would want to see who on their board they considered to be a market participant and who they are and why they made the choices they did. So yes.

COMMISSIONER BEHNAM: That is all I have from questions. I appreciate those answers. I did prepare a statement that will be published on the website. It is not very long. So, again, thank you to all three of you.

And I think we are kind of wrapping up some things. I do want to thank you, Mr. Chairman. You have been with us six months now, and it has been a very productive six months. We had a lot to do in the past month. So thank you and your staff, my fellow colleagues here, of course, and all three of the teams that presented today. It certainly was a busy month

leading into today and as we look forward to 2020.

One thing I thought about this morning was we have a common theme about transparency. It has been coming up a lot. And I think that is critically important. We talked about it a bit at the last meeting. And we might disagree of sort of where this agency has come from, but I think we all agree that we need to be as transparent as possible going forward. And that manifests itself in public meetings, which I think are great for the Commission and the public to understand and appreciate what we do on a day-to-day basis, also what we put on the website and what access we allow the public and market participants to see about this Commission and this agency and the work that it does, the important work that it does. But I certainly hope that the other elements of transparency, the communication between the commissioners, between commissioners and the staff can continue to grow and we can improve on that in the future.

The commissions are such unique bodies in the U.S. Government. And we will all benefit from

dialogue and discourse. Despite the fact that we might disagree on many things, I think we all share the same common goals of, fulfilling our statutory mandate and doing our duties that we swore to but, of course, doing good by the market and the customers that we represent and, of course, the taxpayers.

And, with that, I want to take a quick moment to thank my staff above all else, not unlike Commissioner Berkovitz mentioned. The amount of work that goes into these rules, it is tremendous. It is late nights. It is constant communications. It is weekends. And we all did that. So I want to recognize my chief of staff, David Gillers, who is not here today, but especially John Dunfee, my counsel; and Laura Gardy, who did a tremendous amount of work with the cross-border rule. So I couldn't have done anything without them, and it has been a great few years that I have been with them and looking forward to 2020.

Thank you, Mr. Chairman.

CHAIRMAN TARBERT: Thank you very much, Commissioner Behnam. And it has been a pleasure to

work with all of you.

Commissioner Quintenz?

COMMISSIONER QUINTENZ: Thank you, Mr. Chairman.

I have a couple of questions at the risk of making me even more tardy to a prior speaking engagement. I feel like this is an important rule that I think deserves some targeted questions.

I know this was issued as a proposal I think under the prior framework of Project KISS. I think it is even more streamlined now. So it is kissier, or better, but I appreciate what we have been able to do and what you have been able to do in this rule.

I had a quick question on cross-margining. The final rule requires a DCO that is seeking to implement or modify a cross-margining program with another clearinghouse to submit those rules for Commission approval under 40.5. The preamble to the rule points out that this requirement is based on the Commission's existing practices for approving cross-margining. Could you just quickly remind us how many cross-margining programs the Commission has approved

since the adoption of the new Part 39 DCO rules in 2011 and how many clearinghouses have petitioned the Commission for cross-margining approval?

MR. HUTCHISON: Sure. Thank you. I will go back to 1988. So from 1988 to the present, there have been 14 cross-margining programs submitted to us and since 2011, only 2, so in recent times, 2.

COMMISSIONER QUINTENZ: Okay. I would also like to bring up the risk limits issue. The proposed rule would have expanded upon the existing requirement promulgated under core principle D that a DCO impose risk limits on members by adding a requirement that risk limits should address positions that may be difficult to liquidate. In response to comments from both from DCOs and clearing members, so both sides there, the final rule eliminated that proposed expansion of the risk limits requirement. Can you explain the significance of the phrase “positions that may be difficult to liquidate” and how DCOs currently address that, address those concerns?

MR. HUTCHISON: Sure. Thank you.

I think it should be noted that in the May

time period, when this was originally proposed, there had been a default at a clearinghouse in a jurisdiction that we don't regulate. And that default caused I think notoriety globally. And with that notoriety and I think the thought process that people had, we thought it prudent at the time to put a question out about risk limits. And I think that, as you rightly said, the comments that we received, nearly all of them, if not all of them, did not like the idea of imposing risk limits. And one of the reasons why they didn't like imposing risk limits is that in many ways, they thought that that idea was already being dealt with in a form of margin requirements. And I think that, if I may, as I recall, there was a response that I thought was important that illustrates that point.

A response said that margin requirements can more effectively account for the liquidity risk associated with specific positions held by specific clearing members because margin requirements can be tailored to the risks and particular attributes of each relevant product, portfolio, and market. The

margin requirements can then serve as the one single input the DCO uses in determining appropriate risk limits.

I think that the staff and I discussed that that point was rather salient simply because risk can mean many things to many people; whereas, a DCO today can define risk the way it thinks it needs to and then can manage that risk in the form of a single concept called margin. And so we decided to accept the proposal or the comments by the commenters to say that using risk limits as a bright line feature would not be something that we would entertain, but we would, rather, refer back to the wisdom of what clearinghouses currently do, which is use margin as the methodology by which they limit those risks.

COMMISSIONER QUINTENZ: Yes. So as I think about what you just said, I think that that seems to me to indicate that there are already risk limits. They are not just placed on customers directly. They are placed on customers' financial resources through the imposition of liquidity and margin concentration charges.

MR. HUTCHISON: That is exactly right.

COMMISSIONER QUINTENZ: Yes. Okay. Thank you for that.

Commissioner Stump asked my question on the individual customer accounts reporting. So let me just thank you, Clark, Eileen, and Parisa, for your hard work on this rule and for meeting me and my staff, very helpful meeting in answering all of our questions. I would like to thank the staff of the Commission generally for all their hard work over this last year as well as my colleagues.

I think Commissioner Berkovitz at one point said we can disagree without being disagreeable. I think we can disagree while being agreeable. And I think it is even a fact that not only are we colleagues, but I think there are friendships that exist up here, which I highly value.

So I would like to wish everybody a happy holidays, a happy break and early happy new year and thank my team for their dedication, Kevin Webb, Margo Bailey, and Peter Kals. I couldn’t do this job without them. So thank you to all of you. Thank you.

CHAIRMAN TARBERT: Thank you very much, Commissioner Quintenz.

I think my colleagues have asked all of the questions that I had about this rule. The only thing I want to say, in closing, particularly as members of the public are watching this, is that I think we can't emphasize enough how critical clearinghouses are to make our futures options and a large swap of our swaps market work. Taking away and removing counterparty credit risk really makes our derivatives markets able to work. And so one of the most critical responsibilities of the CFTC is clearinghouse, what we call derivatives clearing organizations, but the shorthand is clearinghouse or CCP, supervising and regulating that.

Now, I believe our clearinghouses are the soundest and the most resilient in the world. And we need to continue to keep them that way.

One of the things that strikes me is when I hear the term "prudential regulators" thrown around in Washington and even when I look at the Dodd-Frank Act or the implementing regulations, I am astonished that

the CFTC is not listed among them because I don't think anything could be more misleading than that. We are the Nation's chief prudential regulator for derivatives clearinghouses. We do do prudential supervision and regulation when it comes to clearinghouses. And, as a result, our Part 39, which sets out the statutory core principles and implements them, is really critical to remain up-to-date. So, as technology changes, as market-driven changes occur, we have got to make sure they are amended and they are kept up-to-date.

And today, the amendments that you have worked so hard on over the past few months codify nearly a decade of best practices adopted by our clearinghouses under our core principles. So the United States I think remains at the forefront of CCP regulation and supervision. So I am very pleased to support that.

So, with that, are the commissioners prepared to vote? Okay. Mr. Kirkpatrick, would you please call the roll?

MR. KIRKPATRICK: Thank you, Mr. Chairman.

The motion now before the Commission is on the adoption of the final rule on amendments to Part 39 of the Commission's regulations. Commissioner Berkovitz?

COMMISSIONER BERKOVITZ: Aye.

MR. KIRKPATRICK: Commissioner Berkovitz votes aye.

Commissioner Stump?

COMMISSIONER STUMP: Aye.

MR. KIRKPATRICK: Commissioner Stump votes aye.

Commissioner Behnam?

COMMISSIONER BEHNAM: Aye.

MR. KIRKPATRICK: Commissioner Behnam votes aye.

Commissioner Quintenz?

COMMISSIONER QUINTENZ: Aye.

MR. KIRKPATRICK: Commissioner Quintenz votes aye.

Chairman Tarbert?

CHAIRMAN TARBERT: Aye.

MR. KIRKPATRICK: Chairman Tarbert votes

aye.

Mr. Chairman, on this matter, the ayes have five, the noes have zero.

CHAIRMAN TARBERT: I am pleased to say, then, the final amendments to Part 39, which will now be promulgated, have been so on a unanimous basis. Thank you.

Before we move on to closing statements -- I am not sure we need to make closing statements. Okay. Well, then before we adjourn the meeting, I will ask whether there is any other Commission business from my colleagues.

(No response.)

CHAIRMAN TARBERT: Okay. Well, I have two final items of Commission business. And don’t worry. They are going to be quick.

First, I would like to announce the release of staff no-action release for the transition away for LIBOR to alternative reference rates. We wanted to move quickly to get relief out there, and we expect other regulators will follow.

I want to thank, in particular, Commissioner

Behnam, for your leadership on this issue. And I also, of course, thank the staff for your hard work. And, again, this also involved all three of our policy-making divisions coordinating. So well done on that.

The second and final piece of other Commission business is going to be a fun one. As you are all aware, 2020 marks the CFTC's 45th anniversary. Now, to celebrate this milestone, the CFTC has purchased four wooden flags from the company Flags of Valor to hang in each of our agency's offices: Chicago; Kansas City; New York; and here in our Washington, D.C. headquarters.

These are beautiful pieces of artwork. And each one is handcrafted here in America by a U.S. military combat veteran. Now, the one that is going to hang here in the lobby of this CFTC in Washington was made by a 14-year veteran of the U.S. Air Force who fought in Operation Iraqi Freedom; Operation Enduring Freedom, which is Afghanistan; Operation New Dawn; and Operation Inherent Resolve, which was the fight against ISIS.

So now I would like to invite our executive director, Tony Thompson, who also happens to be a retired Air Force colonel and the chair of our newly created Veterans Affinity Group, to unveil our flag.

[Flag unveiling.]

CHAIRMAN TARBERT: There we are. Fantastic. Isn't that beautiful?

[Applause.]

CHAIRMAN TARBERT: So it has the CFTC's seal on it, on the wood, and it says, "In commemoration of our 45th anniversary."

So these will go up starting in the new year in all of our four offices. And so it is an honor to have this as a fine tribute to not only the service of our veterans but also the service of all of us here at the CFTC to celebrate our 45th anniversary.

Any other Commission business?

[No response.]

CHAIRMAN TARBERT: Okay. Well, with that, there being no further business, I would entertain a motion to adjourn the meeting.

COMMISSIONER QUINTENZ: So moved.

COMMISSIONER BEHNAM: Second.

CHAIRMAN TARBERT: Those in favor of adjourning the meeting will say, “Aye.”

[Chorus of “Ayes.”]

CHAIRMAN TARBERT: Those opposed, “No”?

[No response.]

CHAIRMAN TARBERT: The ayes have it. Again, I am so grateful for the CFTC staff; the staff of my fellow commissioners; my own staff in the Chairman’s Office; and, of course, my fellow commissioners for making this such a great year. Thank you all very much. And I will see you in 2020. We are hereby adjourned.

[Whereupon, at 12:49 p.m., the meeting was adjourned.]