

UNITED STATES OF AMERICA
COMMODITY FUTURES TRADING COMMISSION

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

Washington, D.C.

Tuesday, October 19, 2010

1 PARTICIPANTS:

2 Commission Members:

3 GARY GENSLER, Chairman

4 BART CHILTON, Commissioner

5 JILL SOMMERS, Commissioner

6 SCOTT D. O'MALIA, Commissioner

7 Presenters:

8 DON HEITMAN

9 DAN BERKOVITZ

10 BRUCE FEKRAT

11 STEPHEN SHERROD

12 CARL KENNEDY

13 HAROLD HARTMAN

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P R O C E E D I N G S

(9:35 a.m.)

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3 CHAIRMAN GENSLER: Good morning. This
4 meeting will come to order. This is a public
5 meeting of the Commodity Futures Trading
6 Commission to consider issuance of the following
7 proposed rules under Dodd-Frank Wall Street Reform
8 and Consumer Protection Act. First, the
9 definition of agricultural commodity; second,
10 large trader reporting for swaps on physical
11 commodities; a third, preventing certain business
12 affiliate marketing and establishing other
13 consumer information protection, what I'll call
14 privacy protections under the Fair Credit
15 Reporting Act; and fourth, expanding the scope of
16 existing privacy protections for consumer
17 financial information under Gramm-Leach-Bliley
18 Act.

19 This is our second public meeting with
20 regard to rulemaking under the Dodd-Frank Act.
21 Our next meeting will be actually next Tuesday,
22 October 26, in which the Commission will consider

1 actually six proposed rules. These will be on
2 anti-manipulation and disruptive trading
3 practices, rule certifications under Part 40 of
4 our regulations, alternatives to credit ratings,
5 and some associated revisions to our existing 1.25
6 regulations, and the process, lastly, the process
7 of reviewing swaps for clearing.

8 Before we hear from staff, I'd like to
9 thank my fellow commissioners for all their work.
10 I believe that Commissioner Chilton is on the
11 phone -- I'm hoping -- I just want to check to see
12 if we've got that connection. Commissioner
13 Chilton?

14 COMMISSIONER CHILTON: I'm here.

15 CHAIRMAN GENSLER: Great. And I think
16 that Commissioner Dunn, as it turned out, is at a
17 doctor's appointment, right? And so I'd like to
18 thank my fellow commissioners and also welcome the
19 public, the market participants and members of the
20 media to today's meeting, as well as welcome those
21 listening to the meeting by phone and by webcast.
22 I'm thanking the staff in advance for all their

1 work that's gone already, but also the work that
2 will come in the future as we get more public
3 comments, and thoughtful recommendations on how
4 the Commission should proceed on these provisions.

5 We look forward to receiving public
6 comment, as we said in our last meetings. These
7 public comments are very important to us. Each of
8 the rules, as well as the factsheets and questions
9 and answers will be posted on our website. But
10 before we turn to the staff presentations, I turn
11 to my fellow commissioners, and I think with
12 Commissioner Dunn not here, Commissioner Sommers.

13 COMMISSIONER SOMMERS: Good morning.
14 Thank you, Mr. Chairman. I just really briefly
15 want to say this morning that as we move forward
16 on the three proposals that we're considering
17 today, to help us implement provisions of the
18 Dodd-Frank Act, I just want to compliment the
19 staff of all of the rule writing teams for all of
20 your hard work and the long hours that you've put
21 in, and again want to stress that in order for us
22 to continue to move forward with all of the

1 different proposals that we have to implement to
2 comply with this law, that the resources for this
3 Commission are extremely important.

4 So thank you all, not just the rule
5 writing teams that are here before us today, but
6 to all 30 of the teams for all of your help, and I
7 look forward to discussing these issues this
8 morning.

9 CHAIRMAN GENSLER: Thank you,
10 Commissioner Sommers. Commissioner Chilton.

11 COMMISSIONER CHILTON: I guess all I can
12 say is, you go, Commissioner Sommers, I'm with
13 you. Thank you. That's all.

14 CHAIRMAN GENSLER: Thank you,
15 Commissioner Chilton. Commissioner O'Malia.

16 COMMISSIONER O'MALIA: Mr. Chairman, I'd
17 like to thank the teams that have spent the long
18 hours developing the rulemaking. I'd like to
19 commend Don Heitman and his team for a
20 well-constructed and straightforward proposal,
21 with good questions. I'd like to thank Carl
22 Kennedy and his team for their work on the Fair

1 Credit Reform Act. Protecting sensitive and
2 personal information is always of paramount
3 importance.

4 With regard to the large trader
5 reporting proposal, I continue to have concerns
6 with the reporting methodology being developed by
7 the Commission. I do appreciate the hard work of
8 Bruce and his team in putting this rulemaking
9 together.

10 Mr. Chairman, the other night I was
11 watching a profile that -- on television, a
12 profile of the construction of a zero energy home,
13 or a passive home, located in Maine. As the name
14 suggests, a zero energy home means the home
15 operates on no external energy sources. The home
16 profiled in the segment operates on the same
17 amount of energy as a hair dryer to keep it warm
18 and operating. During the show, they discussed
19 how this was possible and it came down to the
20 foundation and how all the parts -- the doors, the
21 windows, the air handling -- all work together to
22 minimize energy use and optimize a solar

1 potential, even in Maine.

2 This new design concept is the first of
3 its kind built in Maine and only the 12th built in
4 the U.S. While I'm passionate about energy
5 policy, the real reason I was watching the show
6 instead of reviewing another memo or term sheet
7 was that the home was designed and built by my
8 younger brother, Matt, and his company, Geologic
9 Homes.

10 This project made me think about what
11 we're doing here today with these rulemakings.
12 We're attempting to build a foundation for a new
13 of market oversight and surveillance that is
14 nothing like we have done so far. In particular,
15 the large trader report is attempting to bring
16 together information from both swaps and futures
17 markets, to set position limits on applicable to
18 linked contracts.

19 The foundation of the position limit is
20 the reporting. However, I am concerned that the
21 foundation will not be robust and that the large
22 trader reports will not effectively support the

1 structure given that they will ultimately be
2 replaced by swap data repositories. Furthermore,
3 the temporary system is not up and running, and
4 the cost born by industry and the cost of the
5 Commission will be considerable to both
6 Commissioner Sommers' and Chilton's point. The
7 large trader reporting scheme will provide greater
8 insight into the OTC market, but it lacks a
9 fidelity required to track the individual
10 positions across both swaps and futures markets.

11 On July 19th of this year, the
12 Commission proposed a rulemaking on ownership and
13 control which was necessitated by the fact that
14 the existing large trader reports were
15 insufficient to fully capture the analysis of
16 dynamic and integrated trading across regulated
17 futures markets. In particular, the proposed
18 rulemaking stated that the OCR is necessary to
19 improve the Commission's surveillance capabilities
20 by "linking individual transactions reported on
21 exchanged trade registers with aggregate positions
22 reported on large trader data, the TSS and ISS

1 systems."

2 DMO would have the necessary data to
3 reconstruct trading based on a trade register and
4 determine how large traders establish their
5 positions as recorded in the large trader
6 reporting system. This is directly from the OCR
7 rulemaking and why this is so necessary. I fear
8 that we are rushing to implement new reporting
9 methodologies without taking into consideration
10 how each of the new and existing reporting
11 requirements fit together as our foundation.

12 From a technology standpoint, I believe
13 we must undertake a complete overhaul of our
14 reporting system to clarify and streamline the
15 process, and, at a minimum, ensure that all
16 Commission forms are electronic and will
17 automatically populate our trade and market
18 surveillance systems.

19 Establishing and relying on a trade
20 reporting system that lacks critical details will
21 undermine the effectiveness of any proposed -- of
22 any position limit proposal. The Commission will

1 address the position limit proposal very shortly,
2 and I hope to see a proposal that will: One,
3 protect bona fide hedgers, including looking
4 through the swap dealer to the actual commercial
5 trader to determine whether or not to issue an
6 exemption; two, ensure that we establish limits on
7 contracts that have clear price linkages based on
8 empirical data; and three, not adversely impact
9 commercial interests such as a utility that uses
10 these markets to hedge multi-year commercial risk
11 of building a power plant. Recognizing that the
12 Commission will spend months establishing
13 reporting protocols, agreeing on futures
14 equivalent positions and trying to prevent double
15 pounding or filling in gaps in the reporting of
16 data, I question whether we would be better off
17 waiting until we have a solid foundation using a
18 complete and accurate data from a swap data
19 repository and a modified ownership and control
20 rule before we impose hard limits on contracts
21 outside the most liquid swaps and futures
22 contracts being traded today.

1 In addition, because the large trader
2 reports or swaps will be produced by swap dealers,
3 the dealer definition will not be effective until
4 July 2001. It might be wise for the Commission to
5 delay the implementation of the large trader
6 reporting scheme until the Commission rulemaking
7 defining the swap dealer is finalized.

8 I would prefer the Commission take an
9 aim ready fire approach to position limits rather
10 that they shoot first, ask questions later. I
11 hope the Commission will think through these
12 concerns before implementing a reporting
13 rulemaking. Thank you.

14 CHAIRMAN GENSLER: Thank you,
15 Commissioner O'Malia. We'll hear from the large
16 trader reporting system group, but I think that we
17 are very much, all five of us, taking an approach
18 that we're aiming first. So all of what we're
19 doing and all of our good collaboration, I think
20 there's even a question in the large trader
21 reporting as to whether it should be delayed until
22 the swap dealer definition is defined in that

1 rule.

2 COMMISSIONER O'MALIA: Agreed.

3 CHAIRMAN GENSLER: Before I turn to the
4 presentations, though, I would like to note for
5 the record that I am aware that due to a
6 publishing error, the notice of this meeting was
7 not published in the Federal Register until
8 October 14th. We're learning a lot about Federal
9 Register releases and getting things there and so
10 forth.

11 So in order to ensure that we conduct
12 this meeting in accordance with the Sunshine Act,
13 the chair will entertain a motion that the
14 business of the Commission necessitates the
15 holding of this meeting today.

16 COMMISSIONER SOMMERS: So moved.

17 COMMISSIONER O'MALIA: Second.

18 CHAIRMAN GENSLER: All in favor.

19 GROUP: Aye.

20 CHAIRMAN GENSLER: Any opposed? The
21 ayes having had it, then we can conduct this
22 meeting I guess in the way that we're supposed to.

1 And then, also, before we proceed to the
2 proposed rules we'll be considering, we'll need to
3 deal with a matter of practice and procedure.
4 Commissioner Dunn has an unavoidable conflict
5 today and is unable to attend this meeting either
6 in person or by phone. He's requested that he be
7 permitted to vote by limited proxy for all votes
8 taken just at this meeting.

9 Our general counsel, Dan Berkovitz, will
10 further describe the voting procedure. Dan.

11 MR. BERKOVITZ: Thank you, Mr. Chairman.
12 As you noted, this would be a vote by limited
13 proxy. Limited proxy voting would allow a
14 commissioner to delegate his or her voting
15 authority on a specific matter in a specific way
16 to another member of the Commission. The limited
17 proxy could only be used particularly as specified
18 in the proxy. It would not be a general proxy
19 which would be delegating general voting authority
20 to another member of the Commission, so there
21 would be no discretion as to how to vote the
22 proxy.

1 Generally, proxy voting is typically
2 addressed in the agency's rules. In the absence
3 of a particular rule, addressing unauthorized
4 proxy voting, if the Commission were to vote at a
5 meeting to authorized proxy voting at the meeting,
6 that would be as good as authorization if there
7 were a rule in effect. So if the Commission were
8 to accept a motion to allow limited proxy voting,
9 it would be effective for that purpose at this
10 meeting.

11 CHAIRMAN GENSLER: And in your opinion,
12 Dan, is this proxy voting consistent with the
13 Commodities Exchange Act and other, you know,
14 various federal laws?

15 MR. BERKOVITZ: Yes, it is. The
16 Commodities Exchange Act gives the Commission
17 sufficient authority to establish rules and
18 procedures for the conduct of its meetings and
19 governance of its business.

20 CHAIRMAN GENSLER: Then I'll entertain a
21 motion to permit limited voting as described by
22 Dan there on all votes subsequently taken at this

1 meeting.

2 COMMISSIONER SOMMERS: So moved.

3 COMMISSIONER O'MALIA: Second.

4 CHAIRMAN GENSLER: All in favor, say
5 aye.

6 GROUP: Aye.

7 CHAIRMAN GENSLER: And nays? No. The
8 ayes having it. Thank you, Dan.

9 And then we're going to turn to the
10 rules. The first proposed rules consideration
11 today is to define the term "agricultural
12 commodity." Don Heitman from the CFTC's Division
13 of Market Oversight will be presenting an overview
14 of the proposed rule. Don.

15 MR. HEITMAN: Mr. Chairman,
16 Commissioners, the Dodd-Frank Act includes
17 provisions applicable to a swap in an agricultural
18 commodity as defined by the CFTC. Up to now,
19 neither Congress nor the Commission has ever
20 promulgated a definition of agricultural commodity
21 for purposes of the Commodity Exchange Act or CFTC
22 regulations. The rulemaking proposal before you

1 today would publish for comment a proposed
2 definition of the term, agricultural commodity.
3 The definition will be significant in two areas.

4 First, under Section 723(c)(3) of
5 Dodd-Frank, swaps in an agricultural commodity are
6 prohibited unless permitted under the Commission's
7 Section 4(c) general exemptive authority. As the
8 Commission knows, an advanced notice of proposed
9 rulemaking seeking comment on the appropriate
10 conditions, restrictions or protections to be
11 included in any rules governing the trading of
12 agricultural swaps is currently out for comment,
13 and the comment period closes on October 28th.

14 Second, Section 737 directs the
15 Commission to adopt speculative position limits
16 for agricultural commodities within 270 days of
17 the enactment of Dodd-Frank. Turning to the
18 definition itself, the proposed definition is
19 broken down into four categories. First is the
20 enumerated commodities listed in Section 180 of
21 the Act, including such things as wheat, cotton,
22 corn, the soybean complex, livestock and so on.

1 Then the second part is a general
2 operational definition that covers all other
3 commodities that are or once were or are derived
4 from living organisms, including plant, animal and
5 aquatic life, which are generally fungible within
6 their respective classes and are used primarily
7 for human food, shelter, animal feed or natural
8 fiber.

9 Then the third category is the catch-all
10 category for commodities that would generally be
11 recognized as agricultural in nature, but which
12 don't fit within the general operational
13 definition, and that includes tobacco, products of
14 horticultural and such other commodities used or
15 consumed by animals or humans as the Commission
16 made by rule regulation or order designate after
17 notice and opportunity for a hearing.

18 And then finally there's a provision
19 applicable to commodity based contracts based
20 wholly or principally on a single underlying
21 agricultural commodity.

22 Just looking quickly a little more

1 closely at the four categories, obviously,
2 category one, the enumerated commodities, is
3 self-explanatory. Congress has declared these
4 things to be agricultural commodities. Category
5 two seeks to draw a line between products derived
6 from living organisms that are used for human
7 food, shelter, animal feed or natural fiber, which
8 are covered by the definition, and products that
9 are produced through processing plant or
10 animal-based inputs to create products largely
11 used as industrial inputs, which would be outside
12 the definition.

13 And just to give a simple example,
14 polylactic acid, a corn derivative used in
15 biodegradable packaging, falls outside the
16 definition. So when you buy a bag of Sun Chips in
17 a biodegradable package, the chips are within the
18 definition, but the package is not.

19 Category three, as I noted, includes
20 commodities that don't readily fit within the
21 first two categories, but would generally be
22 recognized as agricultural in nature. And the two

1 examples that are in the definition are tobacco
2 and products of horticulture, for example,
3 ornamental plants. Anything else used or consumed
4 by humans or animals that doesn't fit within
5 categories one or two, the Commission would deal
6 with under this category on a case- by-case basis
7 as questions arise in the context of specific
8 markets or products, so there's only -- if
9 somebody actually develops market that we have to
10 take a look at would that come into play.

11 And then category four covers contracts
12 that are based wholly or principally on a single
13 underlying agricultural commodity. Such contracts
14 don't necessarily involve the potential for
15 physical delivery of the underlying commodity; for
16 example, basis swaps, calendar swaps or crop yield
17 swaps would all fall within this commodity based
18 contract category.

19 Category four would also include an
20 index based wholly or principally on a single
21 underlying agricultural commodity. For example,
22 the Minneapolis Grain Exchange corn and soybean

1 price index contracts, corn, wheat and soybean
2 price index contracts.

3 Likewise, any index made up of more than
4 50 percent of any single agricultural commodity
5 would fall within the definition. And basically
6 we're just looking at something that would, in
7 effect, be a proxy for a single agricultural
8 commodity. On the other hand, a contract based on
9 an index of the prices of multiple agricultural
10 commodities would not fall within that fourth part
11 of the definition. So if you had a swap based on
12 an index of equal parts, wheat, corn and soybeans
13 or even 50 percent corn and 50 percent wheat, it
14 would not be wholly or principally on a single
15 underlying agricultural commodity and would not
16 fall within the agricultural commodity definition.

17 Such index based swaps would not be
18 subject to special rules, if any, that might be
19 adopted for agricultural swaps, rather, they would
20 appear to fall within the excluded commodity
21 definition. So I'll be happy to take any
22 questions.

1 CHAIRMAN GENSLER: Just to help for the
2 public, because we know -- we talked about this a
3 little bit, so biofuels are --

4 MR. HEITMAN: Biofuels are not an
5 agricultural commodity, because they can't be used
6 or consumed. Ethanol, the way it's set in the
7 proposal, ethanol just -- it's pure alcohol which
8 can be used in an alcoholic beverage, or so I've
9 heard, would actually be an agricultural
10 commodity. But denatured ethanol, which is what
11 is used as fuel, is not used or consumed by humans
12 as food and it would fall outside the definition.
13 And the same with methane biodiesel. We do have a
14 question, we do have a specific question, in the
15 proposal that asks whether commenters would
16 believe that methane or biodiesel or ethanol
17 should be inside the definition, so we're asking
18 for comment on that.

19 CHAIRMAN GENSLER: Great. And then one
20 other category just because we've had in the staff
21 discussions, lumber, where it just -- again, for
22 the public.

1 MR. HEITMAN: Lumber is -- because
2 lumber or plywood, strand board, random length,
3 2-by-4s, all of which could be used in the
4 construction of human shelter, would fall within
5 the definition. But there are other products --
6 and likewise maple syrup, which is also a product
7 of trees, would fall inside the definition, but
8 there are other products of trees: Turpentine,
9 rosin, paper, pulp, cardboard, paper. Those are
10 -- generally we regarded those as industrial
11 inputs and they would fall outside the definition.

12 CHAIRMAN GENSLER: And again, the reason
13 that we're doing this is -- and we haven't done
14 this in 70 -- 80+ years, but the reason we're
15 doing this is because the Dodd-Frank Act
16 explicitly says --

17 MR. HEITMAN: It says as defined by the
18 Commission, so.

19 CHAIRMAN GENSLER: So we need to define
20 it.

21 MR. HEITMAN: Yes, and we need to have
22 the definition actually, not only for purposes of

1 establishing, you know, what would fall under the
2 agricultural swaps rules and what would fall under
3 the spec limits for agricultural commodities, but,
4 in fact, you need it even sooner than that because
5 the first speculative position limits rules are
6 going to be for the exempt commodities, and the
7 definition and the act of exempt commodity is
8 anything that's not an excluded or an
9 agricultural. So you have to know what an
10 agricultural commodity is to draw the line between
11 that and exempt. To know what an exempt commodity
12 is, you have to know what an agricultural is, too.

13 CHAIRMAN GENSLER: Thank you.
14 Commissioner Sommers.

15 COMMISSIONER SOMMERS: Thank you, Mr.
16 Chairman. My questions are primarily on
17 category four and how you treat indices with
18 regard to what you explained in the rule is to not
19 allow people to evade the limitations on trading
20 agricultural swaps. So if you have a swap that is
21 a broad basket of different commodities, it's
22 considered to be excluded.

1 MR. HEITMAN: That wouldn't be within
2 the definition.

3 COMMISSIONER SOMMERS: And a basket that
4 maybe is, although based on a number of different
5 types of commodities, if it's just on one, like
6 wheat --

7 MR. HEITMAN: Right, so if you had -- we
8 would consider if you had an index that was made
9 up of, you know, soft red winter wheat, CBOT soft
10 red, Kansas City hard red, and Minneapolis, you
11 know, if you had all -- an index made up of just
12 the different varieties of wheat, we would
13 consider that nevertheless an index that's
14 primarily -- or wholly wheat and that would be
15 within the definition. Or likewise, if you had an
16 index of the soybean complex and they mix it with
17 soybean, soybean meal, soybean oil, we would
18 consider that within the definition.

19 COMMISSIONER SOMMERS: If you could just
20 explain a little bit about your analysis of how
21 you decided where to draw the line, and especially
22 when it comes to the imposition of speculative

1 limits, if you draw the line at one or two
2 commodities being on the agricultural -- within
3 the definition, and if it's above that, it's
4 outside the definition, if it's potentially a way
5 for people to avoid speculative limits on those
6 commodities.

7 MR. HEITMAN: Well, the basic idea was,
8 we wanted to avoid somebody using an index as a
9 proxy for a single commodity. As far as
10 speculative position limits goes, we didn't --
11 we're not expecting that the definition will have
12 a great deal of impact on speculative position
13 limits because the limits are not going to be set
14 based on some -- on the big, broad definition.
15 They're going to be based on the characteristics
16 of each individual contract and the underlying
17 cash market and deliverable supplies and so forth.

18 COMMISSIONER SOMMERS: I have one other
19 question with regard to onions. In the
20 release, you talk about how onions are, of course,
21 prohibited, that the trading of onion futures,
22 because of the way the new law is structured, that

1 may not be the case for onion swaps. If you could
2 explain.

3 MR. HEITMAN: Yes, onions are a unique
4 case because in 1958, the onion farmers who were
5 concerned that the onion futures market was
6 creating unwarranted volatility in their cash
7 market got their congressional representative to
8 sponsor -- who was, by the way, Jerry Ford -- to
9 sponsor a legislation that put onions in a special
10 class, took onions out of the definition of
11 commodity, and also specifically prohibited the
12 trading of futures, of onion futures.

13 And there were two groups of people that
14 were happy about that, the first being the onion
15 farmers and the second being the economists, the
16 agricultural economists. And, in fact, a few
17 years after the ban went into effect, the two
18 different, very respected economists did studies
19 that showed that, in fact, there was more
20 volatility in the onion market, in the cash market
21 for onions, before and after the period of futures
22 trading than there was while there was an onion

1 futures market in operation.

2 In fact, one of the members of our team
3 found a magazine article by somebody who's an
4 onion farmer in Michigan, and he said, well, my
5 dad was an onion farmer and he was behind one of
6 the guys behind this move to get onion futures
7 trading banned, but now I'm not so sure it was a
8 good idea and I kind of wish we had an onion
9 futures market.

10 Nevertheless, the law is clear and we
11 don't do anything to disturb that. Onion futures
12 trading will be prohibited. However, the -- under
13 Dodd-Frank, the definition of swap in Section
14 1(a)(47), is not limited to transactions based on
15 commodities as defined in Section 1(a) of the Act.
16 Therefore, under the Act as amended by Dodd-Frank,
17 a swap could be based on an item that is not
18 defined as a commodity. So, therefore, it would
19 seem that onion swaps would be permissible, even
20 though onion futures aren't, but they would not be
21 considered swaps in an agricultural commodity.

22 COMMISSIONER SOMMERS: Thank you, Don.

1 CHAIRMAN GENSLER: If I might, so you're
2 saying onion swaps would be allowed under
3 Dodd-Frank because that's the reading of the
4 statutory context?

5 MR. HEITMAN: That's what the general
6 counsel has said, but they wouldn't be a swap in
7 an agricultural commodity.

8 CHAIRMAN GENSLER: Dan Berkovitz, is
9 that -- do you want to go to the mic so he's not
10 just impugning? I mean, you're from Michigan, is
11 that right, Dan?

12 MR. BERKOVITZ: Indiana.

13 CHAIRMAN GENSLER: You're from Indiana?

14 MR. BERKOVITZ: Yeah.

15 CHAIRMAN GENSLER: You work for Carl
16 Levin from Michigan?

17 MR. BERKOVITZ: That's correct.

18 CHAIRMAN GENSLER: All right. I knew
19 there was a Michigan connection.

20 MR. BERKOVITZ: Don is correct, if an
21 onion is not a commodity, then it's not an
22 agricultural commodity.

1 CHAIRMAN GENSLER: That's going to burn
2 up the nightly news, I'm sure, on this subject,
3 but all right. And so you're defining an onion
4 swap as not an agricultural -- it's not an
5 agricultural commodity because it's not a
6 commodity?

7 MR. HEITMAN: Right.

8 CHAIRMAN GENSLER: I see, okay.
9 Commissioner Chilton is on the phone.

10 COMMISSIONER CHILTON: I'm just curious
11 if we've received any sort of general comments on
12 this proposal.

13 CHAIRMAN GENSLER: No, we haven't gotten
14 anything on the share point site about the
15 agricultural commodity definition. And, in fact,
16 we have -- we've only gotten one general comment
17 letter from the National Grain and Feed
18 Association that treats a number of different
19 things and has a paragraph about agricultural
20 swaps, and that's the only thing we've gotten so
21 far on the advanced notice of proposed rulemaking.
22 But again, the comment period closes on the 28th,

1 and so all the comments will be pouring in on the
2 27th or the 28th. We never seem to get them in
3 advance.

4 COMMISSIONER CHILTON: Okay, thank you.

5 CHAIRMAN GENSLER: If there are no
6 further questions, I guess it says I'm supposed to
7 go -- so do I need to vote now or just go forward?
8 Well, I think I just go forward.

9 The second set of proposed rules being
10 considered today -- what's that? I've moved to
11 the vote, that's great. All right. It's not
12 written there. All right, then I'll follow. So
13 do I hear a motion on this rule?

14 COMMISSIONER SOMMERS: So moved.

15 COMMISSIONER O'MALIA: Second.

16 CHAIRMAN GENSLER: All in favor.

17 GROUP: Aye.

18 CHAIRMAN GENSLER: And I have a proxy --
19 it's just a voice vote, but there is a proxy
20 there, okay. Nays? The vote being unanimous,
21 5-0, we'll be sending it to the Federal Register.
22 Thank you.

1 MR. HEITMAN: Thank you very much,
2 because I had sent a memo to the legal assistants
3 that said if there were three votes against this,
4 I was going to have to change my name and move to
5 Canada to avoid embarrassment.

6 CHAIRMAN GENSLER: Thank you, Don,
7 terrific work. We look forward, Don, to you being
8 back in front of us on agricultural swaps, as
9 well.

10 And I think the second set of proposed
11 rules being considered today prescribes a large
12 trader reporting mechanism with regard to physical
13 commodities. Bruce Fekrat from the Commission's
14 Division of Market Oversight will be presenting,
15 along with Steve Sherrod, who the public has
16 gotten to know a lot on -- who heads up our
17 surveillance part, are going to report on this
18 proposal on large trader reporting. So I'm going
19 to recognize Bruce and Steve.

20 MR. FEKRAT: Good morning, Mr. Chairman,
21 Commissioners. Today's staff is recommending the
22 Commission to approve a notice of proposed

1 rulemaking to establish position reports for
2 certain physical commodity swaps. The proposed
3 regulations would establish a reporting regime for
4 certain physical commodity swaps that is analogist
5 to the Commission's large trader reporting system
6 for commodity futures and options contracts traded
7 on the designated contract markets.

8 Under the proposed regulations, certain
9 firms would file reports with the Commission daily
10 for reportable positions in the physical commodity
11 swaps. The Commission's existing large trader
12 reporting system requires futures Commission
13 merchants to file reports with the Commission on a
14 daily basis for positions that are reportable.

15 There are two sources for position
16 reports under the proposed regulations. First,
17 for clear swaps, clearing organizations and their
18 members will provide reports. Second, for swaps
19 that are not cleared, the swap dealers would
20 provide position reports on their own positions
21 and also on the positions that are large enough
22 that meet the threshold for their reportable

1 counterparties.

2 Swap positions that are economically
3 equivalent to futures contracts are a part of this
4 proposed rulemaking, and we've listed 46 physical
5 commodity futures contracts in the proposed
6 regulations that are listed on DCM's. And the
7 swaps that are covered are swaps that are linked
8 to these 46 contracts. The list includes futures
9 with the highest level of open interest, as well
10 as other futures that staff believes may underlie
11 a significant number of swaps.

12 For reporting purposes, swap positions
13 would be converted into futures equivalence. A
14 reportable position is 50 futures contracts in a
15 single month. The proposal includes numerous
16 examples of how a firm should convert a swaps
17 position to a futures equivalent position. For
18 cleared swaps with an option component, the
19 clearing organization would also provide the
20 appropriate delta, that is, the risk factor would
21 suggest the futures equivalent position to account
22 for optionality. For swaps that are not cleared,

1 the swaps dealer would report on a gross basis and
2 on a delta adjusted basis.

3 Reporting, as I mentioned, would be on a
4 daily basis. However, the proposed regulations
5 would be only after a reasonable period of time to
6 permit firms to program or purchase software.
7 Staff envisions an effective date of between 6 to
8 10 months following the publication of the final
9 rulemaking.

10 Swap position reports would be filed
11 electronically with the Commission in a manner
12 similar to that of large trader reports currently.
13 The swap reports would give the Commission
14 visibility into the physical commodity swaps
15 markets and provide the Commission with
16 information on large holdings of physical
17 commodity swaps that are economically equivalent
18 to physical commodity futures contracts. Part of
19 this visibility is currently available to the
20 Commission by way of special call on persons
21 holding reportable positions in futures contracts.
22 However, the Commission lacks a regular,

1 consistent and comprehensive data reporting system
2 for swaps.

3 Staff will use the swaps data to improve
4 the process for surveillance of the underlying
5 futures contracts because the reportable swaps are
6 economically equivalent to exchange traded futures
7 contracts. The trader could attempt to distort
8 the price of a futures contract to cause favorable
9 payment under a related swaps contract.

10 Staff also envisions using the swaps
11 data to facilitate review of the need for position
12 limits on a trader's aggregate positions and cause
13 physical commodity futures contracts and physical
14 commodity swaps that are economically equivalent
15 to the futures contract.

16 If the Commission adopts aggregate
17 position limits, the swaps data will be essential
18 for staff to conduct surveillance and determine
19 compliance with such limits. Congress directed
20 the Commission to consider whether such position
21 limits are appropriate within 180 days of
22 enactment of the Dodd-Frank bill and 270 days for

1 agricultural commodities.

2 Finally, the proposal includes a sunset
3 provision. Staff envisions as swap data
4 repositories may eventually be capable of
5 processing positional data in a manner that could
6 potentially be redundant with the collection of
7 swaps positional data under the proposal. The
8 Commission at that time would issue an order
9 rendering the regulations for positional reporting
10 ineffective. However, to expedite the regular
11 collection of swaps data both for surveillance
12 usage and to facilitate the consideration of
13 establishing and enforcing aggregate position
14 limits, staff recommends that the Commission
15 publish the proposed regulations for comment in
16 the Federal Register.

17 I and Steve, we would be happy to answer
18 your questions.

19 CHAIRMAN GENSLER: I think I'm supposed
20 to actually entertain a motion before I ask
21 questions, now that I remember how we're supposed
22 to do this. So I'll entertain a motion on the

1 proposal and then we'll ask the questions.

2 COMMISSIONER SOMMERS: So moved.

3 COMMISSIONER O'MALIA: Second.

4 CHAIRMAN GENSLER: So now we'll ask
5 questions. What's that? No, I'm not voting, I'm
6 asking questions.

7 I'm supportive of this proposal, but I
8 just wanted to ask, there's this interplay of
9 timing between swap data repositories that are
10 supposed to have all swaps data at some point in
11 time and these large trader reporting. And as
12 Bruce just said, even this large trader reporting
13 will have some phase-in. Staff has not yet made a
14 recommendation, but it could be as much as, you
15 know, six months or longer. So how do you see the
16 interplay of this large trader reporting and swap
17 data repositories?

18 And I was glad to see there's a sunset
19 that we can, in essence, by Commission order,
20 relieve the marketplace of this reporting
21 requirement if and when swap data repositories are
22 up. But how do you -- just help us through that

1 timing. Is that sort of a one-year process, a
2 two-year process? I mean, how long do you
3 envision that we'll have this before swap data
4 repositories?

5 MR. FEKRAT: We've been -- the
6 Commission has been directed by Congress to set
7 position limits, as I said, within 180 days and
8 270 days for agricultural commodities. In order
9 to be able to do that while swap data repositories
10 are not available, the Commission would need some
11 reporting and visibility into the swaps market for
12 economically equivalent swaps. The interplay
13 between position reports that would be collected
14 under the proposal and swap data repositories are
15 dependent on the timing of when swap data
16 repositories would be up and functioning and
17 capable of collecting positional data. That could
18 be some time. It could be one year, two years,
19 maybe further out than two years.

20 So this would be an interim transitional
21 system to collect data. And certain aspects of
22 this position reporting proposal could be plugged

1 into the swap data repository. So we have
2 positional data that's being collected here, and
3 certain data may be difficult for swap data
4 repositories to collect, such as deltas and
5 futures equivalent calculations. So another
6 interplay is plugging that flow of data from a
7 large trader reporting system into swap data
8 repositories.

9 CHAIRMAN GENSLER: I think the staff has
10 done excellent work. I would be supportive when
11 the swap data repository team reports to us, which
12 I think is in November. It's now just made news,
13 but, I mean, I think they're scheduled up in a few
14 weeks, that include the delta equivalence that you
15 put here and the futures equivalence and the
16 really strong work that's here. So it's my hope
17 that ultimately swap data repositories would be
18 able to do this. I mean, I'm supportive of this
19 sort of as an interim, but I'm hopeful that, you
20 know, we can get to the point where swap data
21 repositories would do this.

22 MR. FEKRAT: I think we're definitely

1 supportive of that, as well, and we will -- we've
2 already started to communicate with the team
3 that's working on swap data repositories to make
4 sure that that happens.

5 CHAIRMAN GENSLER: Commissioner Sommers.

6 COMMISSIONER SOMMERS: I actually have a
7 concurring statement regarding this proposal.
8 Also I have questions, but I'll go ahead and read
9 my concurring statement.

10 I support this proposal to receive daily
11 position reports for physical commodity swaps and
12 swaptions because I believe it furthers our
13 continued effort to expand transparency into swaps
14 markets and because I believe it's critical that
15 the Commission receive this information as soon as
16 possible. I recognize that this proposal is a
17 precursor to the Commission moving forward with
18 its proposal on the imposition of position
19 limits.

20 That said, my vote in support of this
21 proposal today should not in any way be
22 interpreted as expressing support for moving

1 forward with the imposition of position limits by
2 the deadlines set forth in Dodd-Frank. In July and
3 August of 2009, the Commission held three public
4 hearings to discuss the imposition of position
5 limits in energy markets. Five months later, in
6 January of 2010, the Commission issued a proposed
7 rule imposing position limits in four enumerated
8 energy contracts.

9 I had grave concerns about moving
10 forward with position limits on those four
11 contracts and accordingly voted against the
12 proposal. My grave concerns about moving forward
13 with the position limits have not been eased, and,
14 in fact, have only been heightened by certain
15 provisions of Dodd-Frank.

16 Second 737 of Dodd-Frank states that the
17 Commission shall, by rule, regulation or order,
18 establish limits on the amount of positions as
19 appropriate that may be held by any person. This
20 section requires the limits to be aggregated
21 across markets and related products and to be
22 imposed within 180 days for energy and metals and

1 270 days for agricultural contracts.

2 In my view, no position limit is
3 appropriate if it is imposed without the benefit
4 of receiving and fully analyzing complete data
5 concerning the open interest in each market. Only
6 then is the Commission able to properly consider
7 the size of each market and calibrate a limit that
8 is appropriate for each market. Currently, the
9 Commission does not have complete data and will
10 not have complete data until swap data
11 repositories are up and running and all swap
12 market data is reported to swap data repositories
13 or to the Commission.

14 I believe that, optimistically, the
15 earliest this reporting can happen will be by the
16 end of 2011. Because of the 180- and 270-day
17 requirements in Dodd-Frank, as we sit here today,
18 the Commission is tentatively planning a November
19 30th public meeting to vote on proposed
20 speculative limits for exempt and agricultural
21 commodities. By November 30th, the Commission
22 will not have garnered any data from the proposed

1 rule we're discussing today because it or some
2 modified version of it will not be effective in
3 final form by November 30th.

4 In addition, by November 30th, swap data
5 repositories will still be about a year away from
6 operating. Even if the proposed rule we are
7 discussing today were effective by November 30th,
8 it will not provide complete information
9 sufficient to impose position limits. Under these
10 circumstances, when considering the imposition of
11 aggregate position limits on exempt and
12 agricultural commodities, I believe that the
13 Commission should find that imposing such limits
14 is not appropriate in the absence of full and
15 complete data and analysis of the open interest of
16 each market. I believe it is a mistake to
17 interpret the arbitrary 180- and 270-day deadlines
18 as somehow trumping the requirement that the
19 Commission make an appropriateness determination
20 before imposing any position limit.

21 This is a view -- an issue that I will
22 be following closely and I look forward to hearing

1 the views of the public and market participants as
2 they comment on this issue. Thank you.

3 CHAIRMAN GENSLER: Thank you,
4 Commissioner Sommers. Commissioner -- did you
5 have questions?

6 Commissioner Chilton.

7 COMMISSIONER CHILTON: I'm actually
8 somewhat sympathetic to the predicament that we're
9 in that Commissioner Sommers described, sort of
10 putting the cart before the horse to some extent.
11 Even when we have talked about this, you know, a
12 year ago in our hearings and then in January, one
13 of the suggestions I had in general on limits was
14 that we do no harm, and that we, you know, sort of
15 err on the high side, and that we can further
16 calibrate in the future, and so I still think
17 that's the way to go forward. And given what, you
18 know, we've seen from the large trader reports,
19 which I think are very helpful and I don't want to
20 get rid of them until we are absolutely sure that
21 we're going to have what we need in the swaps data
22 repositories, that, you know, there is large

1 concentrations which I think are too high in
2 metals, in energy, and even in ags. And so, you
3 know, I think that we do need to go forward with
4 it. You know, it is the law.

5 That doesn't mean that I'm not
6 sympathetic to what Commissioner Sommers says, but
7 I still think we need to go forward. We just need
8 to be extra careful and find that right line to
9 walk. Thank you.

10 The only question I have is whether or
11 not we received any comments on this specific
12 proposal that we're going to be putting out today,
13 hopefully.

14 MR. FEKRAT: Whether we will receive
15 comment or have?

16 COMMISSIONER CHILTON: No, I know we'll
17 receive comments. Have we received any general
18 comments so far?

19 MR. FEKRAT: I believe we've received
20 one comment on this rulemaking.

21 COMMISSIONER CHILTON: Who was that from
22 and what did they say?

1 MR. FEKRAT: It was from a law firm, and
2 I believe it was on futures equivalence describing
3 some of the potential difficulties in converting
4 swaps into futures equivalence.

5 COMMISSIONER CHILTON: Okay. I think
6 you've done a good job on this. In general, I
7 want to make sure that everybody has looked at
8 every comment that comes in, even if it's before
9 now, and make sure that we've sort of addressed
10 it. But I think you've done a good job on this,
11 and I'll certainly support it. Thank you.

12 CHAIRMAN GENSLER: Commissioner O'Malia.

13 COMMISSIONER O'MALIA: Do you have
14 questions?

15 COMMISSIONER SOMMERS: I do.

16 CHAIRMAN GENSLER: I'm sorry.

17 COMMISSIONER SOMMERS: That's okay. My
18 questions are generally about assumptions that we
19 may be making about when we're going to get the
20 data. Do you know, or when do you think we'll
21 start receiving the position data, how quickly are
22 we going to require that they start reporting,

1 those kinds of issues, to give us a general idea?
2 And then, in addition to that, when we issued the
3 special call in 2008, we had a lot of, you know,
4 calibrations in the kind of data that we received
5 and making sure that it fit into the system. So
6 how long do you think it will take us or do you
7 think that we are, because of the special call,
8 already completely capable of receiving what we're
9 going to be asking for?

10 MR. FEKRAT: When we wrote this or when
11 we put together some of the recommendations in the
12 proposed rules, we took -- we put a lot of effort
13 into attempting to be very clear on the type of
14 information we would want swap dealers and
15 clearing members and clearing organizations to
16 provide. And we provided -- we have two
17 appendices. One is on futures equivalence, and
18 that is key, and we took quite a bit of time to
19 put that together. So on the front, we believe
20 that that will cut out a lot of time in
21 calibrating and conversion issues that may come
22 up.

1 In terms of how quickly we would get the
2 data, typically with something like this, once
3 it's proposed, and if it's something that will be
4 supported by the Commission, firms would probably
5 start getting prepared for it almost immediately.
6 And from the point that something is proposed to
7 the point where it becomes final, in those months,
8 there would be a lot of communication with these
9 firms, a lot of planning, a lot of preparation.
10 So hopefully, when this goes final, we would be
11 able to get -- to collect the critical data that
12 we would need for position reports.

13 COMMISSIONER SOMMERS: And are we
14 expecting that we will have that finalized before
15 we'll finalize the position limits? So within 30
16 or 60 days, we'll have this finalized?

17 MR. FEKRAT: No, we won't. We will not
18 have it finalized and it won't be implemented in
19 that short a time frame. With position limits, we
20 have to address that separately and consider all
21 these issues and consider what should be the base
22 of whatever the calculations are based on in the

1 absence of data on swaps, so we would consider
2 that fully, and we are.

3 COMMISSIONER SOMMERS: Thank you. I
4 guess I would just say that although I think that
5 the question that has been added regarding the
6 definition of a swap dealer and whether or not
7 this should be contingent on the finalization of
8 that definition, I think it's completely
9 appropriate to add that to this release. But that
10 being said, I think that a lot of the issues that
11 Commissioner O'Malia discussed in his opening
12 statement are also an integral part of making this
13 all fit together, so maybe not just the
14 definition.

15 CHAIRMAN GENSLER: Commissioner Sommers,
16 before I pass it on, I think that all five of us
17 are grappling with the timeline here. Congress
18 has mandated position limit rules in this 180- and
19 270-day period, so, as you said, we've calendared
20 a November 30th. There'll be other subjects, by
21 the way, in November, and it's not our only
22 November meeting. But we calendared a meeting,

1 and so between now and November 30th, the five of
2 us have to, in compliance with the Sunshine Act
3 and our little bilateral discussions, try to come
4 together with staff as to how we do that,
5 recognizing we don't have the data yet. I think
6 we all five know that.

7 This rule I'm supportive of because I
8 think it would also give us data for surveillance
9 purposes and, hopefully, it will sunset once the
10 swap data repositories are in place. But I gather
11 this rule really -- we won't be getting data until
12 next summer or next fall from, just because we
13 have to finalize it, people have to have time to
14 implement it. We might, in fact, make it
15 contingent on the swap dealer definition, that
16 question that's in there, so that the data from
17 this is probably, you know, next summer to next
18 fall, but still maybe before the swap data
19 repositories are giving us information.

20 So I look forward to the dialogue that
21 we're going to have between now and November 30th,
22 trying to thread all of this together as Congress

1 had mandated. Commissioner O'Malia.

2 COMMISSIONER O'MALIA: Thank you. The
3 rulemaking does a thorough job of kind of
4 estimating what the reporting burden is going to
5 be on industry. I think you have a number of over
6 \$30 million estimated annual cost for reporting on
7 swaps.

8 As I noted in my opening statement, the
9 OCR rule, which we believed and you all have been
10 working on diligently to make sure that we have
11 the fidelity in the futures market, we had a
12 roundtable and they thought by firm it would cost
13 at least \$18 million. Do we have a good sense of
14 what it's going to cost us to implement new swaps,
15 ISS, TSS repository, to take in the data developed
16 from large trader and then merge it and marry it
17 with the futures market data so we can see across
18 all markets, how long will that take and how much
19 money is it going to cost us? That is not in this
20 rulemaking and is a real concern of mine.

21 MR. SHERROD: You're correct that the
22 burden on the industry is estimated to be a little

1 less than \$40 million per year. From our side, we
2 will be programming, and our intention would be to
3 absolutely be prepared to accept the data from
4 firms in advance of any effective date. That
5 would allow firms for say a period of a couple
6 months to test their transmissions and for us to
7 walk firms individually, the larger firms, through
8 the reporting process.

9 In order for us to be ready, we have a
10 substantial amount of database preparation. The
11 collection procedures would be essentially the
12 same process in the existing large trader
13 reporting system. However, in order to be able to
14 communicate with all the firms that are involved,
15 there will be substantial resources of staff
16 involved.

17 So if I were to make an estimate, it
18 would be somewhere on the order of about \$2-1/2
19 million per year in terms of our staff resources,
20 both on the front end to program and then on an
21 ongoing basis to be able to work with the firms on
22 the receipt of the data and analyze it

1 the intraday transaction data with the end of the
2 day, and this proposal won't address that; that
3 problem will still exist on the futures side. And
4 as I envision down the road, when we have swap
5 execution facilities with intraday transaction
6 data, we will need some way to try to marry that
7 up with the end of the day positions of the swaps.

8 COMMISSIONER O'MALIA: Is this going to
9 be the same model of receiving and bringing data
10 together as we -- through the swap data repository
11 or are we going to -- do you have in mind kind of
12 a radically new idea that would be a little more
13 mechanical or automatic using that data that comes
14 in to marry all data together?

15 MR. SHERROD: Well, the swaps data
16 repositories as they come online will be more
17 comprehensive than this limited collection. This
18 limited collection is designed for large traders,
19 that is, a swaps participant that has a position
20 equivalent to, at a minimum, 50 futures in a
21 single contract month. So we would be collecting
22 data on the large traders.

1 It's also limited to physical
2 commodities that are enumerated in the proposal.
3 The swaps data repositories will be gathering data
4 on all the different exempt and excluded
5 commodities because the swaps data repository, as
6 the chairman indicated, will include both the
7 transaction data from the swaps execution
8 facilities and, as we're likely to request in the
9 SDR rulemaking, the positions on all swaps at the
10 end of the day. And then the further data that
11 would be necessary to implement and do
12 surveillance for position limits, that would be
13 converting those positions to a futures equivalent
14 amount, including the appropriate risk factors,
15 the deltas for the option- laden swap, swaptions,
16 if you will. The SDR's may have a substantially
17 larger dataset, and so our way of accessing that
18 data would be different. In this case of the
19 current proposal, the firms would be reporting
20 directly to the CFTC on a daily basis. In terms
21 of the swaps data repository, those entities would
22 be receiving data on a daily basis, and then the

1 Commission staff would access information from the
2 swaps data repositories.

3 COMMISSIONER O'MALIA: Bruce, can you
4 walk us through kind of what end users might be
5 able to expect in this reporting requirement, the
6 large trader reporting requirement, and how swap
7 dealers are going to be doing the reporting on
8 behalf of the end users?

9 And Congress is very clear about
10 protecting the bona fide hedge position of end
11 users. How will that be taken care of and assured
12 that end users will still have their bona fide
13 hedge and will be able to, you know, accurately
14 protect them?

15 MR. FEKRAT: The current rulemaking
16 addresses reports, position reports, and is not
17 coupled with bona fide hedges. For the position
18 reports, the swap dealer, when they enter into a
19 swap, if they're a counterparty and they -- with
20 that swap dealer, if they can -- they would look
21 at all the similar swaps for that single month,
22 convert them into futures equivalent contracts,

1 and if it's above 50, they would submit a report
2 that identifies the end user as the counterparty.
3 They would also throw in that swap, the position
4 that's attributable to that swap, in the same
5 bulkhead as their own positions and report their
6 own positions. So the end user would not be
7 affected in that way. Anyway, they would not be
8 subject to reporting. It would be the swap dealer
9 who would be doing the reporting.

10 COMMISSIONER O'MALIA: But in protecting
11 their bona fide hedge position, you know, they're
12 doing commercial activities, how do we know that
13 we don't lump them up with a swap dealer and say,
14 well, I'm sorry, we didn't see that?

15 MR. FEKRAT: Well, we have an exemption
16 in the rule that if an entity falls within the
17 definition of a reporting entity, which is a
18 clearing member or a swap dealer, we would be able
19 to exempt them and make sure that that doesn't
20 happen.

21 COMMISSIONER O'MALIA: I just want to be
22 clear, to give the confidence to end users, how

1 they will be treated going forward in this
2 reporting regime?

3 MR. FEKRAT: We had end users in mind,
4 we didn't want to burden them with reporting at
5 this stage. They're not -- they don't have the
6 systems maybe in place and the sophistication with
7 reporting and compliance. You know, swap dealers
8 do an end-of-day risk analysis, and these things
9 may not be done at the same level of
10 sophistication by end users.

11 So we were -- we didn't want reports
12 from end users because we believe that the quality
13 of data may not be as good as the reports we would
14 get from swap dealers in the short amount of time
15 that we would be establishing this kind of system.

16 CHAIRMAN GENSLER: So if I can follow up
17 on some of the questions here. I pulled out the
18 statute, the 737 and the time limits and
19 everything, and so I just -- maybe Dan is going to
20 have to answer this one. But the team -- but it
21 says that we're supposed to, on exempt
22 commodities, the limits required under this

1 section shall be established within 180 days of
2 the date of enactment and then the 270, so it's on
3 page 355, Dan. That's what we'll be trying to do
4 in a proposal later in November and try to
5 finalize in these various dates.

6 Could we, if we chose to and if staff
7 recommended it, though, do proposals that are
8 finalized in these 180 and 270 days which are
9 formulas rather than actual numbers, so, you know,
10 X percent of the market, Y percent of this, you
11 know, et cetera, et cetera, such that -- and then
12 their effective date would be some subsequent date
13 when we actually have the data? I'm just trying
14 to think through whether we can skin this by doing
15 what Congress said in the 180 to 270 days, make a
16 proposal in some, I'm going to call them formulas,
17 but they don't really, you know, until we get the
18 size of the market, the formulas would have an
19 effective date based on the -- so that's my
20 question. As a legal matter, you might wish to
21 comment on the policy, too, with the legal
22 question.

1 MR. BERKOVITZ: I'll stick to the legal
2 issues. And without seeing the specific proposal,
3 it has a definitive --

4 CHAIRMAN GENSLER: It hasn't been
5 created, that's just a question.

6 MR. BERKOVITZ: Right. I think that the
7 Commission would have the flexibility. On the
8 effective date of the rules under this section,
9 the Commission would have flexibility. Typically,
10 inherent in the rulemaking authority is the
11 flexibility on the effective date. Also, the
12 phrase I think Commissioner Sommers mentioned as
13 appropriate, that if the Commission determined
14 that the effective date -- it was appropriate to
15 have a certain effective date based upon the data
16 or the other considerations, that it could be
17 under that authority, as well.

18 CHAIRMAN GENSLER: So you've answered
19 half the question, an important half, is the
20 effective date. But do you think that the rule
21 itself could be some formula to be applied to data
22 which we might get many months later, you know, so

1 that, you know, X percent or Y percent or whatever
2 formula the staff recommends --

3 MR. BERKOVITZ: I think that would be
4 one of the permissible avenues that the statute
5 would permit within the Commission's discretion to
6 do that, yes.

7 CHAIRMAN GENSLER: I'm not saying it's
8 the only way to thread this, but it may be one way
9 to thread it.

10 MR. BERKOVITZ: Subject to the -- if the
11 Commission were to establish a formula subject to
12 the future availability of the data to apply the
13 formula, that would go into that discretion as
14 appropriate to make the provision effective, yes.

15 CHAIRMAN GENSLER: It's really the
16 Sunshine Act, where this was not a question they
17 were prepared for. Are there other questions? I
18 know we sort of -- again, I'm going to have some
19 comments as Commissioner Sommers and O'Malia did.
20 I don't know if yours was concurring, but, I mean
21 --

22 COMMISSIONER O'MALIA: We'll find out.

1 CHAIRMAN GENSLER: We'll find out. But
2 I've got a concurring statement, but rather than
3 reading through it, I'll just have it posted on
4 the web. So if there are no further questions,
5 I'd like to, of course, thank Bruce and Steve, but
6 call the vote. So all those in favor.

7 GROUP: Aye.

8 CHAIRMAN GENSLER: Any nays? It
9 appearing unanimous, we'll send this off to the
10 Federal Register and really seek public comment on
11 it. Thank you, Bruce and Steve, and for your
12 cameo, Dan.

13 I think that the next two rules, Carl
14 Kennedy from the Office of the General Counsel
15 gets to do two, and Harold Hartman. Harold is the
16 deputy general counsel for rules, and so, in some
17 way, Harold is working on all 30 rule sets.

18 Carl, you joined the agency, what month
19 was it?

20 MR. KENNEDY: In July.

21 CHAIRMAN GENSLER: In July. It was a
22 few days before July 21st, and we're honored that

1 you joined us and volunteered so quickly to be a
2 team lead. He's going to talk about some rules
3 that we needed to expand existing privacy
4 protections under Gramm-Leach-Bliley to include, I
5 guess, swap dealers and MSPs, but also to catch up
6 with some of the other federal regulators under
7 the Fair Credit Reporting Act for Privacy
8 Protections there, where the statute -- I guess
9 when the Fair Credit Reporting Act passed years
10 ago didn't include the CFTC under a section that
11 the bill now does. So if you can discuss the rule
12 and then we'll do as we did before.

13 MR. KENNEDY: Good morning,
14 Commissioners. Thank you, Chairman Gensler.

15 CHAIRMAN GENSLER: You have to -- you
16 can discuss it and then we do a motion, but we can
17 do it before, either one, okay.

18 MR. KENNEDY: Sure. Good morning,
19 Commissioners. Thank you, Chairman Gensler, for
20 the opportunity to present. Before I begin, I'd
21 like to thank my team for their assistance in
22 preparing the two rulemakings that we present to

1 you today for your consideration and vote.

2 The first rulemaking that I'll present
3 today is promulgated under Section 1088 of the
4 Dodd-Frank Act. This section sets out two
5 amendments to existing consumer protection
6 statutes: The Fair Credit Reporting Act and the
7 Fair and Accurate Credit Transactions Act of 2003.
8 Staff recommends creating a new Part 162 to
9 include both amendments under Section 1088.

10 Essentially these two rules are intended
11 to provide privacy protections to non-public
12 consumer information held by CFTC regulatees. One
13 rule sets out a regime for consumers to opt out of
14 affiliate marketing solicitations; the other rule
15 requires a CFTC regulatee to develop and implement
16 written disposal plans with respect to any
17 non-public consumer information in that entity's
18 possession.

19 Prior to Dodd-Frank, as you've noted,
20 Chairman, the Fair Credit Reporting Act and the
21 FACT Act required other federal regulators to
22 jointly promulgate affiliate marketing rules and

1 disposal rules. The FTC, SEC, FDIC and other
2 federal regulators have all promulgated final
3 rules to date. Staff believes that many of our
4 regulatees already may be complying with the
5 affiliate marketing rules and disposal rules of
6 other federal regulators, so we do not believe
7 that there will be a significant hour or cost
8 burden associated with this rulemaking.

9 The staff proposes that the following
10 types of entities be covered by this rulemaking
11 because of the increased likelihood that they
12 would come in contact with non-public consumer
13 information: Futures Commission merchants, retail
14 foreign exchange dealers, commodity trading
15 advisors, commodity pool operators, introducing
16 brokers, swap dealers and major swap participants.

17 Title 10 does not create a deadline for
18 this rulemaking. However, staff proposes that
19 these rules become effective no earlier than July
20 21, 2011, which is the effective date of Section
21 1088 of Dodd-Frank and the date on which the
22 Bureau of Consumer Financial Protection, which was

1 created as a result of Title 10, becomes
2 operational.

3 I will now briefly describe the
4 affiliate marketing rules. Our affiliate
5 marketing rule gives consumers the right to block
6 CFTC regulatees from using certain non-public
7 consumer information obtained from an affiliate to
8 make solicitations to these consumers.

9 The purpose of the affiliate marketing
10 rules is to help consumers deal with the
11 solicitations from businesses with which they have
12 no prior business relationship. The rule includes
13 a general notice requirement which provides that
14 affiliates can only make a solicitation to a
15 consumer based on that consumer's information if:
16 One, the consumer is given clear, conspicuous and
17 concise notice; the consumer is given a reasonable
18 opportunity to opt out of the use of their
19 information for marketing purposes, and the
20 consumer does not opt out. It is important to
21 note that this rule does not prohibit the sharing
22 of information among affiliates, but instead, only

1 prohibits the use of that information for
2 marketing purposes.

3 Our proposal places the responsibility
4 to provide an opt-out notice on the affiliate that
5 has the -- has or previously had a pre-existing
6 business relationship with the consumer. This
7 approach is consistent with the approach taken by
8 other regulators. Alternatively, a group of
9 affiliates may send a joint notice if at least one
10 affiliate has or previously had a pre-existing
11 business relationship.

12 Our proposal provides several exceptions
13 from the general prohibition against affiliate
14 marketing. Some of these exceptions include
15 situations where the consumer information is used
16 in response to a communication initiated by the
17 consumer and situations where the consumer
18 information is used to make a solicitation that
19 has been authorized requested by the consumer.

20 Our proposal provides that a consumer's
21 affiliate marketing opt-out election shall be
22 effective for a period of at least five years

1 commencing from the period of time that the
2 consumer receives the opt-out notice. A CFTC
3 regulatee may, however, extend the election period
4 beyond five years, even indefinitely.

5 Staff has followed the other federal
6 agencies in requiring that such notices be in
7 writing and must include, for example, the name of
8 the affiliate with the pre-existing business
9 relationship, the list of affiliates or types of
10 affiliates whose use of information is covered by
11 the notice, and a general description of the type
12 of information that may be used to make
13 solicitations.

14 The proposal also sets forth several
15 model opt-out notices in Appendix Part 162,
16 proposals in Part 162 that were meant to aid
17 entities that have to comply with these rules.
18 The proposal requires that a CFTC regulatee give
19 consumers a reasonable opportunity to opt out
20 following his or her receipt of the notice, and it
21 sets forth several examples on how a covered
22 entity can satisfy this requirement. Lastly, the

1 proposal requires a consumer be given a reasonable
2 and simple method to opt out. Again, the proposal
3 sets out many examples of what constitutes a
4 reasonable and simple method, including a
5 self-addressed stamped envelope, toll-free number,
6 and, if the consumer elects, electronic media such
7 as e-mail or the Internet.

8 I'll now provide a brief description of
9 the disposal rules. Section 1088 of the
10 Dodd-Frank Act also directs the Commission to
11 promulgate rules dealing with the disposal of
12 consumer information.

13 Our proposal requires CFTC regulatees to
14 reasonably dispose of any consumer report
15 information in their possession related to their
16 business activities. The rule is meant to provide
17 unauthorized access to consumer information.

18 The disposal rules do not define what
19 reasonable disposal measures are. Instead, the
20 proposal sets forth a list of examples. We
21 believe -- staff believes that the proposal
22 provides our regulatees with a sufficient amount

1 of flexibility to develop and implement a plan
2 that fits the size and complexity of their
3 businesses.

4 This concludes my summary of the two
5 rules under Section 1088 of the Dodd-Frank Act.
6 Thank you for your time, and I'm happy to answer
7 any questions.

8 CHAIRMAN GENSLER: I think I'm going to
9 entertain a motion before we ask questions.

10 COMMISSIONER SOMMERS: So moved.

11 COMMISSIONER O'MALIA: Second.

12 CHAIRMAN GENSLER: Carl, I can't help
13 I'm, you know, in the midst of some of the news in
14 the last couple of days about Facebook and its use
15 of information, so I'm trying to analogize. This
16 is affiliate marketing that a consumer can
17 basically opt out of affiliate marketing.

18 MR. KENNEDY: Correct.

19 CHAIRMAN GENSLER: Does it speak to use
20 by vendors, suppliers? I mean, in that other
21 circumstance it's apps, so I don't know what the
22 analogy is here, but you follow my question.

1 MR. KENNEDY: Yes, it does include
2 specific rules relating to the use by service
3 providers of an affiliate.

4 CHAIRMAN GENSLER: And so -- so this
5 rule does. What we would be voting on potentially
6 today is a proposed rule that would also limit --
7 you can opt out of service providers marketing to
8 you, is that what you're saying?

9 MR. KENNEDY: Yes, the service provider
10 of an affiliate that doesn't have a pre-existing
11 relationship, you can opt out of that, as well.

12 CHAIRMAN GENSLER: So it's opting out of
13 affiliates and the service providers?

14 MR. KENNEDY: Yeah, the service
15 providers of those affiliates, as well.

16 CHAIRMAN GENSLER: I don't have any
17 other questions. Commissioner Sommers.

18 COMMISSIONER SOMMERS: Thank you. I
19 just have one question with regard to the part of
20 the proposal that we would be proposing to adopt
21 similar rules that other financial agencies have
22 already finalized, and in what kind of context we

1 have consulted with those regulatory agencies on
2 us adopting similar rules to what they've already
3 done, you know, if they may contemplate changing
4 what they've done with regard to Dodd-Frank and if
5 we're going to be completely consistent in how
6 those consultations have gone.

7 MR. KENNEDY: Yes, we have been in
8 consultation specifically with the SEC and the FTC
9 and FDIC on their rules, and none of those
10 agencies contemplate changing their affiliate
11 marketing rules or disposal rules in light of
12 Dodd-Frank. And we have shared earlier drafts of
13 our proposal with them, and to the extent that
14 they had comments and we were able and it was
15 appropriate to take those comments, we did.

16 COMMISSIONER SOMMERS: Thank you, Carl.

17 CHAIRMAN GENSLER: Commissioner Chilton.

18 COMMISSIONER CHILTON: We haven't
19 received any comments ourselves on this in the
20 general comments, have we?

21 MR. KENNEDY: No, we haven't received
22 any comments from the public prior to --

1 COMMISSIONER CHILTON: Well, I'm hopeful
2 that, you know, consumer groups that have been
3 involved in this -- Public Citizen, Consumer
4 Federation of America and others -- will comment.
5 I think it's a good rule, I'll support it. Thank
6 you.

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

9 COMMISSIONER O'MALIA: Carl, you
10 mentioned that consumers have an opt out that will
11 last for five years. What is the process for us
12 to extend that beyond that or make it permanent?

13 MR. KENNEDY: Well, the rule provides a
14 regulatee with flexibility. They can decide to do
15 the minimum, which is five years, or they can
16 extend it indefinitely. So if a regulatee decides
17 that they do not want to go through the process
18 every five years of determining which consumers
19 have opted out, they can just give a consumer an
20 option to opt out permanently and they wouldn't
21 have to monitor the phasing out of an opt out
22 election.

1 COMMISSIONER O'MALIA: But we leave that
2 to the regulatee, not the consumer?

3 MR. KENNEDY: Right, we leave that to
4 the regulatee. We do not give the consumer that
5 option.

6 COMMISSIONER O'MALIA: Should we?

7 MR. KENNEDY: Well, we do provide a
8 process for renewal of those opt-out notices, and
9 so if a consumer receives one opt-out notice, they
10 are instructed that they, regarding the duration
11 of that period and in a period of time, maybe six
12 months before the opt-out period -- it's to
13 elapse; the regulatee would have to provide
14 another notice. So it would be somewhat not
15 annoying or burdensome, but they would receive
16 another notice within a five-year period of time.

17 COMMISSIONER O'MALIA: No, that is
18 annoying, that's the definition of annoying. I'm
19 reminded when I get those -- when my five years is
20 up on the Do Not Call list because I begin to
21 receive a lot more calls.

22 MR. KENNEDY: Right.

1 COMMISSIONER O'MALIA: Maybe we should
2 consider that.

3 CHAIRMAN GENSLER: Can we add a -- I
4 mean, I assume that we could add -- I'd support
5 adding a question to that regard.

6 MR. KENNEDY: Sure.

7 COMMISSIONER O'MALIA: At least allowing
8 them to check the "don't call me again" box as
9 opposed to five years down the road.

10 MR. KENNEDY: Yes, we can add a question
11 to the rule.

12 COMMISSIONER O'MALIA: Thank you.

13 CHAIRMAN GENSLER: I didn't mean to say
14 that Facebook was a regulatee, but can I just
15 confirm are they a CPO, CTA, a swap dealer?

16 MR. KENNEDY: Not to my knowledge, I
17 don't believe so.

18 CHAIRMAN GENSLER: But if they were,
19 then they couldn't have their affiliates or
20 service providers market if somebody chose to opt
21 out?

22 MR. KENNEDY: Correct.

1 CHAIRMAN GENSLER: I see.

2 COMMISSIONER O'MALIA: (inaudible)

3 CHAIRMAN GENSLER: Yes, you never know,
4 a new SEF. So I think that -- are there any other
5 questions on the Fair Credit Reporting Act rule?
6 So then I will call the motion. All in favor.

7 GROUP: Aye.

8 CHAIRMAN GENSLER: Any opposed? The
9 ayes appearing to be unanimous, we'll send this to
10 the Federal Register with a new question as well.

11 MR. KENNEDY: Correct.

12 CHAIRMAN GENSLER: And then you wanted
13 to do the Gramm-Leach-Bliley?

14 MR. KENNEDY: Yes, thank you, Chairman.
15 There is a second rulemaking that my team is
16 presenting today, as I mentioned. This rulemaking
17 is promulgated under Section 1093 of the
18 Dodd-Frank Act. This section amends Title 5 of
19 the Gramm-Leach-Bliley Act to affirm the
20 Commission's authority to promulgate privacy rules
21 protecting consumer information.

22 I think it's easy to get the two rules

1 confused as to what they cover, so I think it's
2 important to know that this rule primarily covers
3 non-affiliate sharing of consumer information,
4 whereas the other proposed rulemaking presented
5 and voted on today related to affiliate use of
6 consumer information for marketing purposes. The
7 Commission's rules under Title 5 of
8 Gramm-Leach-Bliley are presently found in Part 160
9 of our regulations, and in general, Part 160
10 requires a financial institution to provide
11 initial and annual notices to customers about its
12 privacy policies and practices. Many of you may
13 receive similar notices from your credit card
14 companies and your banks because they have to
15 provide such notices.

16 Also, our Part 160 rules describe the
17 conditions under which a financial institution may
18 disclose non-public personal information to
19 consumers to non-affiliated third parties. And
20 also Part 160 provides a method for customers to
21 prevent a financial institution from disclosing
22 this information to most non-affiliated third

1 parties by opting out of that disclosure.

2 Prior to the Dodd-Frank Act, the term
3 "financial institution" included future Commission
4 merchants, commodity trading advisors, commodity
5 pool operators, and introducing brokers. As a
6 result of the issuance of the final Forex rules in
7 September of this year, the Commission recently
8 added retail foreign exchange dealers to the list
9 of entities that fall within the term "financial
10 institution." The Commission's proposal today
11 simply seeks to amend Part 160 to expand the scope
12 to include swap dealers and major swap
13 participants, which, as you know, were created as
14 a result of Title 7 of Dodd-Frank.

15 It's important to note that staff used
16 -- in our rulemaking, we use the statutory
17 definitions of the term "swap dealer" and "major
18 swap participant" as they may be further defined
19 by the Commission. In addition, we propose to
20 make other small textual changes to Part 160. For
21 instance, as I mentioned before, Title 10 of the
22 Dodd-Frank Act created the Bureau of Consumer

1 Financial Protection and transferred authority
2 relating to consumer financial protection from
3 several federal agencies, including the FTC. Our
4 current Part 160 rules make reference to the FTC
5 in several places, and so, accordingly, staff
6 proposes to remove those references in -- the
7 references to the FTC and replace those with
8 references to the Bureau of Consumer Financial
9 Protection. Like the previous rulemaking, staff
10 proposes that these rules become effective no
11 earlier than July 21, 2011.

12 And this concludes my presentation of
13 the second rulemaking, which is under 1093 of the
14 Dodd-Frank Act. Again, thank you for your time
15 and I'm happy to take any questions.

16 CHAIRMAN GENSLER: Do I hear a motion on
17 the 1093 rule?

18 COMMISSIONER SOMMERS: So moved.

19 COMMISSIONER O'MALIA: Second.

20 CHAIRMAN GENSLER: Carl, my question
21 just is, I note that we cover swap dealers and
22 major swap participants, but there's another

1 couple of new registrants, swap execution
2 facilities, swap data repositories and the like,
3 and could you just help us, why we're not covering
4 those. And I'm presuming we maybe haven't covered
5 designated contract markets in the past, but why
6 is that?

7 MR. KENNEDY: There are two reasons.
8 One, the Gramm -- we became a functional regulator
9 as a result of the CFMA to promulgate rules
10 relating to the Gramm-Leach- Bliley privacy
11 protections back in 2000. And it created -- CFMA
12 created a new Section 5(g), and it listed in 5(g)
13 Futures Commission merchants, introducing brokers,
14 CTAs and CPOs, but did not list any exchanges or,
15 you know, DCMs or FBOTs there. And so the rules
16 that were initially promulgated only listed those
17 entities that were in Section 5(g). Since that
18 time, the Commission, as a policy matter, has
19 added registrant regulatees to that list because
20 of the proximity or the point of contact. These
21 entities would have a first point of contact with
22 a consumer, or more likely to have a first point

1 of contact.

2 And so in promulgating -- or in
3 proposing today's rules and developing today's
4 rules, we've taken a consistent approach in adding
5 swap dealers and major swap participants because
6 staff believes that they would, again, have a
7 first point of contact, whereas a SEF, a DCM, and
8 even an SDR, in our view, would not have that
9 contact, and, in fact, a consumer would more
10 likely interact with the other intermediaries and
11 the SDR, SEF or DCM would just receive information
12 relating to the transaction, but not relating to
13 the consumer specifically.

14 CHAIRMAN GENSLER: I'm supportive, but
15 I'm hopeful as we consider swap data repositories
16 and SEFs and so forth that we have appropriate
17 confidentiality and privacy provisions which are
18 tailored for those platforms, but that consumers
19 still sort of get protection one place and then
20 find that it sort of, you know, slips out through
21 the swap data repository or elsewhere.

22 MR. KENNEDY: I've been in consultation

1 with some members of the data team and will
2 continue to do so as they move towards providing
3 more guidance and proposing their rules.

4 CHAIRMAN GENSLER: Commissioner Sommers.
5 Commissioner Chilton.

6 COMMISSIONER CHILTON: No, thank you.

7 CHAIRMAN GENSLER: Commissioner O'Malia.
8 I, too, will just have a statement that will just,
9 you know, a paragraph on the web, but -- all those
10 in favor.

11 GROUP: Aye.

12 CHAIRMAN GENSLER: Any opposed? The
13 vote being unanimous, we'll also send that to the
14 Federal Register.

15 I have one thing that I think will
16 probably be -- every time we meet, I'll be saying
17 the same thing, but I will be asking for unanimous
18 consent to allow staff to make technical changes
19 to the documents and the question that Carl will
20 be adding approved today prior to their
21 publication of the Federal Register.

22 COMMISSIONER SOMMERS: So moved.

1 COMMISSIONER O'MALIA: Second.

2 CHAIRMAN GENSLER: I guess we're all
3 saying aye because it's unanimous consent.
4 Without objection, it's so ordered.

5 So we've identified 30 topic areas for
6 rulemaking that must be implemented under the
7 Dodd-Frank Act. We're working very closely with
8 the SEC and the Federal Reserve and the other
9 federal regulators. Our next meeting is October
10 26th and we'll be covering those six topics. The
11 reason I announce the six topics is because we've,
12 I think, committed to do that seven days before
13 and that's what it is.

14 As Commissioner Sommers mentioned, a
15 meeting on November 30th. I'll say I think we
16 have three meetings scheduled for November, but
17 we'll appropriately put that in the Federal
18 Register and we'll notice the topics of those
19 usually seven days before.

20 And then we're shooting -- our current
21 internal plan is to have either one or two
22 meetings in December, I don't recall now, but

1 basically to finish this up before Christmas or
2 the middle part of December. And when I say
3 finish, it's just a set of proposals. We deeply
4 are committed to taking in the public comments and
5 then moving through the final rulemaking stage as
6 appropriate and taking into consideration the
7 public comments.

8 I didn't know if there were other
9 comments that any of my fellow Commissioners had.
10 Commissioner Chilton?

11 COMMISSIONER CHILTON: No, thank you,
12 Mr. Chairman. I appreciate all the work of the
13 staff.

14 CHAIRMAN GENSLER: So if there's not any
15 further business, Commission business, I would
16 entertain a motion to adjourn the meeting.

17 COMMISSIONER SOMMERS: So moved.

18 COMMISSIONER O'MALIA: Second.

19 CHAIRMAN GENSLER: All in favor.

20 GROUP: Aye.

21 CHAIRMAN GENSLER: The last unanimous
22 vote of the day. The meeting is adjourned. Thank

1 you all.

2 (Whereupon, at 11:05 a.m., the
3 PROCEEDINGS were adjourned.)

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CERTIFICATE OF NOTARY PUBLIC

DISTRICT OF COLUMBIA

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

Notary Public, in and for the District of Columbia
My Commission Expires: May 31, 2014

