UNITED STATES OF AMERICA
COMMODITY FUTURES TRADING COMMISSION

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

Washington, D.C.
Wednesday, December 1, 2010
PARTICIPANTS:

Commission Members:

GARY GENSLER, Chairman
BART CHILTON, Commissioner
MICHAEL V. DUNN, Commissioner
JILL SOMMERS, Commissioner
SCOTT D. O'MALIA, Commissioner

Presenters:

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Office of General Counsel

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CHAIRMAN GENSLER: This meeting will come to order. This is a Public Meeting of the Commodity Futures Trading Commission to consider issuance of the following proposed rules under the Dodd-Frank Act. We have two rules related to clearinghouses, one related to legal and compliance matters and a second related to recordkeeping and reporting. Thirdly, we have rules and guidance related to designated contract markets. Fourthly, recordkeeping and reporting relating to swap dealers. And fifthly, the much talked about and anticipated joint proposal with the Securities and Exchange Commission with regard to entity definitions.

Before we hear from staff, I'd once again like to thank Commissioner Mike Dunn, Commissioner Jill Sommers, Commissioner Bart Chilton and Commissioner Scott O'Malia for all their thoughtful work to implement the Dodd-Frank Act. I probably owe them a debt of gratitude but
a bit of an apology for even scheduling the
meeting right after Thanksgiving break because
everybody has thoughtfully done their best to look
through these documents but doing it through the
Thanksgiving holidays and into this week was quite
-- I also wanted to wish both Commissioner O'Malia
and John Riley, our Director of Legislative
Affairs, a happy birthday. I don't know what it
means that John Riley and Scott O'Malia have the
same birthday, but it's probably something cosmic
or otherwise, and I think we're going to have some
cupcakes a little later too. I didn't bake them.
You can thank me for that too.

I'd like to welcome members of the
public, market participants, members of today's
meeting as well as those listening on the phone
and the webcast. This is our sixth meeting to
consider Dodd-Frank rulemakings. Before we turn
to the staff for their recommendations I'd like to
chat a little bit about the agenda going forward.
We have two more meetings scheduled for December.
I think they've been already Federal Register
noticed for December 9 and December 16. In addition, we now anticipate that we'll have at least two meetings in January and we'll sort through those dates. I think your offices know what we're trying to get to on the dates. And we'll of course as we have been doing announce the topics of each of those meetings as we get I think 7 days in advance of each meeting.

In addition to the public meetings, these four rulemaking meetings that I've just mentioned, two in December and two in January, we have two more staff roundtables. One is tomorrow on disruptive trading practices and the other roundtable on capital margin is being coordinated with the Federal Reserve, the Securities and Exchange Commission, other regulators, bank regulators, and that one is scheduled for December 10. I think it's important that regulators hear from the public. Commissioner O'Malia had raised this and as we reached out to other regulators everybody signed on very quickly on the issues of capital margin and I thought I'd raise, and this
is from me and not from the Commissioners, some
questions that I certainly think it would be
helpful to hear.

Under the Act, the prudential regulators
and the Federal Reserve will be responsible for
capital margin for bank swap dealers so that's not
our remit here at the CFTC, but we along with the
SEC will be responsible for nonbank swap dealers.
These may be companies that aren't even parts of
financial institutions.

One question to us is on capital. How
should requirements in the context of nonbanks,
the things that we have to take a look at,
particularly if they're not a financial
institution? Capital requirements have
traditionally been set for banks and other
financial institutions, but as a result of
Dodd-Frank there may be a number of nonbank
entities offering swaps to the public that would
be subject to regulation. I still think there
will be more banks than nonbanks, but we'll have
some of them. And I think that we'll need to hear
from the public on how to account for the
differences between bank swap dealers and nonbank
swap dealers. For example, nonbanks generally
have different assets than traditional financial
institutions. Furthermore, the current regulatory
capital standards for banks and other financial
institutions are most likely not to directly to be
applicable to nonbanks so that that's a pretty
important topic and hopefully this roundtable will
give us some help on that.

As it relates to margin, the Dodd-Frank
Act says, and I'm going to quote, that margins
should be set to "offset the greater risk to the
swap dealer and the financial system from the use
of swaps that are not cleared and that regulators
should help ensure the safety and soundless of the
swap dealer and set margin requirements that are
appropriate for the risk associated with the
noncleared swaps." They certainly are speaking
about noncleared swaps, the bilateral swaps and
about risk not only to the swap dealer but to the
financial system.
There are two areas of questions that come to mind for me. First, what are the views of the public about appropriate margin requirements that might relate to both initial margin and variation margin, and I'm highlighting initial and variation, between financial entities, financial entities like swap dealers, major swap participants and other financial entity counterparties? Second, though I certainly can't speak for the Federal Reserve and I'm not speaking for the SEC or even my fellow Commissioners, my view is that uncleared swaps entered into between financial entities pose more risk to the financial system than those where one of the parties is a nonfinancial entity. As you know, this got quite a bit of debate doing the congressional process on Dodd-Frank. But interconnectedness between and among financial entities allows one entity's failure to cause uncertainty and possible runs on the funding of other financial entities, and that's because so many financial entities rely on short-term funding. It's just the very nature of
the financial system itself. So that risk, the
interconnectedness, can spread and economic harm
can go throughout the country. We know from the
AIG debacle that interconnectedness of financial
tentities through their swap books raises the risk
of bailouts. Transactions involving nonfinancial
tentities however do not present the same level of
risk to the financial system and financial systems
are the words Congress chose in the statute, that
the nonfinancial entities' interconnectedness does
not present the same risk to the financial system
as those solely between financial entities. The
risk of a crisis spreading throughout the
financial system is greater than more
interconnected financial companies are to each
other. So I think that Congress also recognized
the different levels of risk posed by transactions
between financial entities and nonfinancial
tentities when they said in their clearing
requirements that nonfinancial entity transactions
are exempt from clearing if they choose to be
exempt.
Consistent with this I believe that proposed rules on margin requirements should focus only on transactions between financial entities rather than those transactions involving nonfinancials, but I'd be very interested from the public on these views and their thoughts on these topics of margin, so I took a little opportunity here to talk about next week's roundtable. But I'd like to thank staff for all of their work in drafting what they're doing, their thoughtful recommendations, and before we move forward I was going to turn to fellow Commissioners.

COMMISSIONER DUNN: Thank you, Mister Chairman, and let me extend also to my colleague Commissioner O'Malia a happy birthday and I'm delighted that my term is up before my next birthday because is this is the kind of presents you're going to present, Mister Chairman, I don't want to be here.

CHAIRMAN GENSLER: But we want you to stay, Mike.

COMMISSIONER DUNN: I'd like to
associate myself with your remarks on the upcoming roundtable because I think the bottom line in what you're talking about here is the need for transparency in the financial service industry so that everyone understands where the risk is and how the interconnectivity sets them up to assume that risk. I applaud you on that and the upcoming meeting for the staff and the roundtables and getting them all together is great.

I want to thank everyone for joining us today on this important regulatory meeting regarding the implementation of the Dodd-Frank Act. Today we're going to talk about the core principles and other requirements for designated contract markets, general regulations for derivatives clearing organizations, information management requirements for derivatives clearing organizations, reporting, recordkeeping, daily trading records requirements for swap dealers and major swap participants and the definition of swap dealers, security based swap dealers, major swap participants and eligible contract participants.
I will support publishing these proposed rules in their current form, but I am concerned that the rules addressing DCM core principles as currently drafted may be too prescriptive. If this rule was before us today as the final rule, I would have reservations voting for its release based on my firm belief that the CFTC should remain a principle-based regulator and not a prescriptive regulator. However, after meeting with staff it is my understanding that many of the provisions in the proposed DCM core principles are actually already being followed by industry or have become best practices over time. In essence, my understanding is that this proposed rule simply codified what is already being done. It is my understanding that many in the industry desire the establishment of the safe harbor that will ensure that they are in fact meeting the intent of the core principles. However, I do not know this to be true and look to the public comments on this proposed rule to guide my decision-making process regarding the final rule.
Comments indicating that we are indeed merely codifying best practices already in use and that a safe harbor is needed for legal certainty will influence my vote on a final rule. The proposed rules also provide an extension of time for CFTC staff to review applications. Given the present staffing level, this may be warranted. However, it does not allow the agency to be responsive to industry developments as would be desirable to an efficient and effective regulator. I will be guided by the funding levels of the agency when making final decisions on these proposals.

I'm also very interested in reviewing the public's comments on our entities definitions. These definitions along with product definitions that will be discussed in a couple of weeks will finally let everyone know where they stand vis-à-vis the Dodd-Frank Act. Based on the interest on these definitions I have to date, I expect the proposed rules to receive a significant level of comment. I would like to remind everyone
that these are proposed definitions that with your
help we can write final definitions that work for
everyone. I would like to note, Mister Chairman,
the difficulty in arriving at mutually acceptable
definitions with other regulators and I would
commend you for your personal involvement in
moving this process forward.

Mister Chairman, I put a great deal of
faith in the process we follow under the
Administrative Procedure Act. Recent reports that
the agency is receiving forged comment letters are
a cause for alarm. I have today asked the
Inspector General to investigate these charges and
have further asked the Office of the Secretariat
to develop a procedure for verification of comment
letters sent to this agency. Again, I would like
to thank staff for all the hard work in getting us
here today.

CHAIRMAN GENSLER: Let me thank
Commissioner Dunn, and if I might say that we do
look forward to receiving all comments from the
public. Those are comments that are sent in and
are truly from the public. I will note as Commissioner Dunn said that the Commission recently became aware of some comment letters that were fraudulently submitted in response to a proposed rulemaking. We have removed the identified letters from the comment files and we've also referred the matter to the Department of Justice. We're working to ensure the integrity of the comment process which is so critical to moving forward and for the public's confidence in these matters. Commissioner Sommers?

COMMISSIONER SOMMERS: Thank you, Mister Chairman. I want to echo the Chairman and Commissioner Dunn's thanks to the staffs of all the teams. I know the hard work that you've put in on these proposed regulations, the long hours taking place at night and on weekends and over your Thanksgiving holiday, so that I want to let you know how much I appreciate your time and the efforts of all the teams that are presenting today.

In the end, I am not supporting all of
the proposed regulations we are regulations we are considering today. My vote against any of the proposals has everything to do with basic policy differences among the five Commissioners and nothing to do with the quality of work product before us. Each team has done an exemplary work and the quality of these documents is nothing short of excellent.

Today is the sixth Commission meeting to consider proposed regulations that the Commission has linked to Dodd-Frank. In each of our meetings we have all expressed great concern about Commission resources needed to perform our current responsibilities while keeping pace proposing these regulations and the pace that will be required next spring, summer and fall to attempt to finalize these regulations. Our concerns about those resources remain.

I would be remiss if I did not point out that a number of the regulations that we have already considered and a number of the regulations that we are considering today are not required by
Dodd-Frank. Commission staff has spent months and months drafting proposed regulations that are purely voluntary and all the while the Commission is expressing grave concerns about our level of resources. I suspect we will continue to spend months and months of our limited staff time proposing and attempting to finalize regulations that are not required by Dodd-Frank. This has been a mistake in my view and an unwise use of our limited resources.

Over the past few months I've been speaking publicly about a little-discussed provision of Dodd-Frank which gives the Commission the authority to abandon its successful principles-based regulatory approach in favor of a prescriptive rules-based approach. I have said that I think such a move would be a mistake. Today with these proposals before us, the Commission is in large part abandoning principles-based regulation. There does not appear to be a reason other than we can. Principles-based regulation has worked very well
in our industry and our industry has flourished because of it. Principles-based regulation did not cause or contribute to the financial crisis. Nonetheless, the Commission will be piling on regulations and restrictions in the wake of the crisis. This too in my opinion is a mistake. 

Even though we may only be codifying today's best practices, markets evolve and innovate and when our markets and market structures transform because of the requirements of Dodd-Frank, I think codifying today's best practices seems a bit premature. I have voted against proposed regulations at prior meetings when I thought among other things that the proposed regulations were too broad or where I believe they amounted to the Commission overreaching. Some of my votes today will be for those same reasons.

I have concerns about a number of the proposals, but I want to talk a little bit about the definitions proposal. In addition to my overall concern that the definition of swap dealer
is too broad and will likely capture entities that
do not functionally operate as dealers, I am
struck by another provision of this proposed
regulation that I think is bad policy and I would
like to publicly address. The preamble to this
regulation states that in connection with the
registration requirement, market participants are
in a position to assess their activities to
determine whether they function in the manner
described in the definitions. That seems
reasonable. Dodd-Frank allows a person to be
registered as a swap dealer or major swap
participant for a single type or a single class or
category of swap or activities and not be
considered a swap dealer or major swap participant
for all classes or categories of swaps or
activities. That seems reasonable as well.

These proposed regulations however state
that a person who is a swap dealer or major swap
participant for any swap or activity shall be
deemed a swap dealer or major swap participant for
all swaps it enters into. This does not seem
reasonable particularly in light of the statement from the preamble and the provision in Dodd-Frank. The regulations do allow a swap dealer or major swap participant to apply for a limited designation as a swap dealer. However, while the Commission is considering the application to limit the designation of the swap dealer or major swap participant however long that might take, the swap dealer or MSP will essentially be held hostage and must comply with all of the regulatory requirements for all of the swaps including the capital and margin. I believe this approach is wrong. If we believe that market participants can assess their own activity to determine whether they are a swap dealer or an MSP, surely they can assess whether or not they are entitled to limited designation. Our regulations should allow swap dealers and major swap participants to initially register in a limited capacity and not require them to full register and then hope that the Commission allows them to escape the full designation. I fear the construct in the proposed
regulation will needlessly impose onerous
requirements on market participants and I cannot
support it. Again I want to say thank you to the
teams today and I look forward to your
presentations.

CHAIRMAN GENSLER: Thank you,
Commissioner Sommers. Commissioner Chilton I
think is with us by phone.

COMMISSIONER CHILTON: Yes, I'm here,
Mister Chairman. Thank you. I'll try to be
brief.

CHAIRMAN GENSLER: Commissioner Chilton,
I don't know if you want to be closer to the
phone. We're not hearing you well.

COMMISSIONER CHILTON: I started to say
I was thinking last night as I was finishing the
Thanksgiving soup and my mother used to make that
and the meat would all fall off the bones and you
had this great aroma and great taste and I thought
we are doing exactly the opposite. We're putting
meat on the bones of this new law and as everybody
has said and continues to put in all these caveats
about what we do, we certainly don't want to end
up with a turkey. I don't think we will because
of the good work of the staff and because of the
public input that we're getting.

I did want to make a comment briefly
about two things, one that's not on the agenda
today, and that's position limits. We were
originally internally talking about doing this at
this meeting and I've yet to see a proposal. I
know staff is working very hard, but yet I still
don't have any papers. This thing didn't fall out
of the sky. We've had it for 4 months and we're
supposed to be implementing it in mid-January so
that I think it's time for us to do something.

Even at our December 9 meeting I think we should
try to get it done. We should certainly hold the
option when we publish in the Federal Register the
issues that may come up, position limits, in case
we have the opportunity to move forward on it. I
know everybody is working hard, but this is one
that Congress clearly wanted done earlier than
other things. I know there are issues that my
colleagues have raised about how we do it, but there's a way to get it done.

The last little point was I was really heartened with all the work that people were doing over the weekend. I had questions including one on position limits that were answered on Saturday so that staff was working over the holiday weekend and this talk that we've seen in the media about a spending freeze, et cetera, I think for us that doesn't make any sense. The people who work at CFTC aren't in it for the money. They could be making more money some place else. They're in it to be public servants and the good work they've done even on a holiday weekend warms my heart more than any soup could ever. Thank you, Mister Chairman.

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

You're going to make a mention about soup and turkey too?

COMMISSIONER O'MALIA: Why do I have to follow him? I should on my birthday at least be
able to go first maybe. That would have been fair. I just can't compete with this. I'll just read the thing. Thank you for the kind wishes.

Happy birthday to John as well.

Mister Chairman, I'd like to thank the teams who have worked so hard on the rules we will consider here today. Staff continues to seek input from the Commissioners and I appreciate that and they've worked diligently over the Thanksgiving holiday to improve these rulemakings.

I should have thought of sending them soup but I didn't. I would like to commend the various teams that will be presenting here today, teams headed by Phyllis Dietz, Nancy Markowitz, Sarah Josephson and Mark Fajfar. I appreciate your unwavering commitment to respond to staff's comments, concerns and criticisms with thoughtful and professionalism.

This is our sixth in a serious of proposed rulemakings under the Dodd-Frank Act and while the format has become routine, the content is anything but. I am concerned that these rules
will present a deluge of potential outcomes that we have not fully explored and that may have negative impacts on the markets we regulate. With regard to the swap dealer definition, while reasonable people will continue to debate who should ultimately fall under the regulatory category of swap dealer, for years after the final rules are promulgated, one thing we should all be able to agree on here today is that the rule should be clear as to who falls into the category and who does not. Unfortunately, the 145-page proposal does not provide the regulatory certainty that I believe many market participants are seeking, particularly commercial end users. In fact, I have concerns that many end users will be unintentionally swept into the dealer definition and will be subject to significantly higher costs to hedge their commercial risk. I commend staff for their attempts to characterize the activities of a dealer based on limited statutory direction. I would have preferred to see a more thorough discussion of a range of safe-harbor activities.
that end users will clearly understand. They need
to know whether or not their bilateral swap
activities will cross the line and earn them the
dreaded Scarlet Letter SD for swap dealer.

I strongly encourage the market to
comment on this proposal establishing what I
perceive to be a very limited de minimis standard
for swap dealing conduct that will result in few
exceptions. I hope that the public comments will
focus on this proposal and will provide guidance
as to the appropriate size of a de minimis
exclusion and whether it should be adjusted by
asset class. It is my hope that after reviewing
the public comments that the final swap dealer
rule can be significantly improved by providing
greater specificity to the dealer definition and
considerably narrowing the definition to focus
only on those entities that perform a traditional
swap dealer role. I know that the end users are
anxiously awaiting the publication of this
rulemaking. And Mister Chairman with regard to
the capital and margin rulemaking, I'd like to
thank you for your willingness to delay this
rulemaking which I recognize takes the Commission
off its schedule in order to conduct an important
hearing on this complex matter. I greatly
appreciate that and your willingness to
accommodate us.

I believe at the end of the day the
proposal will be better informed after receiving
public input prior to publication. I was
particularly pleased with the careful
consideration that Sarah Josephson and her team
gave to the technological advancements in recent
years that have lowered the cost and increased the
feasibility of capturing and retaining
communications regardless of their original format
in her rulemaking. Given that we have yet to
define the facilities upon which many of the
affected transactions will take place, it makes it
especially difficult to define the records and
associated costs of recordkeeping necessary to
conduct comprehensive and accurate trade
reconstructions as required by the Act. I do look
forward to receiving comments on this particular rulemaking.

With regard to the designated contract markets, the notice of proposed rulemaking codifies and interprets the core principles that applicant contract markets must comply with to become designated and they must continue to comply with on an ongoing basis was obviously quite an undertaking. I appreciate the team's hard work. I would like to thank the team for considering under Core Principle 4 different risk controls that DCM should employ to effectively manage market disruption. On November 19 after considerable discussion with Commissioner Chilton -- I know was supportive -- Commissioner Dunn and Sommers and the Chairman as well, I established a subcommittee of the Technology Advisory Committee chaired by Michael Gorham, the former Director of CFTC's Division of Market Oversight. I've asked Dr. Gorham and other subcommittee members to conduct a review and provide recommendations of applying pretrade functionality at the direct
access participant trading firms, clearinghouse
and exchange levels. As a baseline, the
subcommittee was advised to consider the FIA's
work with regard to market access risk-management
recommendations and risk control for trading
firms. It is my expectation that the
recommendations or regulatory guidance as the case
may be will provide a roadmap for an application
and implementation of best practices with regard
to direct market access and pretrade functionality
while appropriately steering the Commission in the
right direction regarding identifying and
mitigating disruptive trade practices.

I have serious concerns however with
many of the other provisions in this proposal.
The Commission's core principle regime has worked
good, providing flexibility to adapt to
innovations in our markets as both Commission
Sommers and Dunn have referenced. This notice
moves significantly away from our principles-based
regime by adopting several regulatory requirements
and interpreting core principles in highly
prescriptive ways instead of maintaining guidance as safe harbors in applicable practices. For example, the Dodd-Frank bill amended Core Principle 9 to include language that boards of trade must provide a mechanism for executing transactions in a way that protects the price discovery process of trading in centralized markets. At the same time, the core principle explicitly states that the boards of trade may authorize exchanges -- futures for swap trades. The statutory language of Dodd-Frank specifically permits the trading of swaps on DCMs as well as SEFs. Staff interpretation of Core Principle 9's language that the price discovery process must be protected, however, requires that 85 percent of the trading in a contract must be through a centralized market for the contract to continue to be listed on the DCM. The practical effect of that interpretation may very well be that few if any swaps will be executed on a DCM and the contracts known as EFSes will no longer be able to operate as futures and will be forced to trade
solely on SEFs. There are likely to be negative implications of this interpretation and because it is on its face contrary to the statutory language in the Dodd-Frank Act, I have great concerns about this proposal. Further, this proposal would likely create uncertainty for traders regarding the protections of the segregated funds with -- will receive if they are required to execute contracts solely on SEFs instead of DCMs and whether or not they will be able to continue to avail themselves of certain Commission-approved market efficiencies like portfolio margining pursuant to a 4(d) order and they 're able to use when they're trading on swaps and futures on a DCM. There are other examples where this proposal creates regulatory requirements that exceed the articulated core principles in Dodd-Frank. More specifically, Core Principle 9 has also been interpreted by staff to support a regulatory requirement regarding block trades. I hope the public will not overlook this proposal and will provide comment on it.
In closing let me thank my staff and the rulemaking teams for their hard work over the Thanksgiving holiday. I know everyone has made sacrifices by putting rulemakings ahead of their families on this holiday and I want everyone to know how important I think their work is and I appreciate their hard work on these rulemakings.

Thank you.

CHAIRMAN GENSLER: Thank you, Commissioner O'Malia, and I think all the Commissioners because we might have some differences but I think we're working extraordinarily well together. I think all the comments and the edits in these proposals are just proposals, but they're better for all of the comments from Commissioners' offices and their legal assistants. With that I was going to turn to Ananda Radhakrishnan, Jonathan Lave and Phyllis Dietz who are going to present both of the clearing rules. I can't recall if you're doing legal and compliance first. Phyllis Dietz is the team lead. Thank you, Phyllis.
MS. DIETZ: Thank you, and good morning, Mister Chairman and Commissioners. I am pleased to recommend that the Commission approve for publication in the Federal Register proposed regulations that would implement certain core principles for derivatives clearing organizations. These regulations would establish standards for compliance with DCO core principles relating to overall compliance, rule enforcement, antitrust considerations and legal risk.

The proposed rules would also implement the DCO chief compliance officer requirements under the Dodd-Frank Act, revise procedures for DCO applications, clarify procedures for the transfer of a DCO registration and add requirements for approval of DCO rules establishing a portfolio margining program for customer accounts carried by an FCM that is also a securities broker dealer. Additionally, the notice proposes amendments to the Commission's regulations to update certain definitions and to add other definitions for terms relating to DCOs.
I'd like to take a moment to thank the DCO core principles rulemaking team for their many valuable contributions, and I would like to add a special thank you to members of other teams who worked closely with us in developing and harmonizing the proposed requirements for chief compliance officers. Jonathan Lave has been the lead attorney on this rulemaking and he will present an overview of the proposed rules. Thank you.

MR. LAVE: Thank you and good morning. I will begin by discussing the proposed definitions.

The proposed rules would amend the definitions of clearing member and clearing organization in Section 1.3 to make the definitions consistent with terminology currently used in the Commodity Exchange Act as amended by the Dodd-Frank Act. The proposed rules are also proposing to add to Section 1.3 definitions for the terms customer initial margin, initial margin,
spread margin, variation margin and margin call.
In addition, the proposed rules would amend
Section 39.1 to add definitions of back test,
compliance policies and procedures, key personnel,
stress test and systematically important
derivative clearing organization. These changes
would provide clarity and legal certainty.

The proposed rules would also set forth
three procedural changes. First, the proposed
rules would amend Section 39.3 to streamline the
DCO application process by eliminating the 90-day
expedited application review period. The
Commodity Exchange Act does not set forth a time
period for the Commission to review the DCO
application. Currently the Commission allows for
two tracks, a 180-day review period or a 90-day
expedited review period. Over the past nearly 10
years however the Commission has determined that a
90-day period is not practicable. Accordingly,
the proposed rules would eliminate the 90-day
period and all applications would be reviewed on a
180-day schedule. Of course the Commission could
render a decision in less than 180 days.

Second, the proposed rules would clarify
the procedures to be followed by a DCO when
requesting a transfer of its DCO registration due
to a corporate change. The proposed rules set
forth the information that must be included in
such a request and require representation by the
DCO that the DCO is in compliance with the
Commodity Exchange Act and Commission regulations
and a representation by the transferee that it
will remain in compliance after the transfer.
Currently there are no rules on this topic and the
proposed rule would provide legal certainty.

Finally, Section 713 of the Dodd-Frank
Act allows for portfolio margining of futures and
securities. The Act imposes no deadline on this
rulemaking. Under proposed Section 39.4, a DCO
seeking approval to provide clearing and
settlement services for portfolio margining in a
futures account would have to submit its proposed
portfolio margining rules for Commission approval
under Section 40.5. This is a first step and the
Commission is actively consulting with the Securities and Exchange Commission regarding the additional rulemaking.

Turning to proposed regulations implementing statutory requirements for chief compliance officers, Section 725(b) of the Dodd-Frank Act requires each DCO to designate a chief compliance officer and further specifies the duties of the chief compliance officer. Among the chief compliance officer's duties are the preparation and submission of an annual compliance report to the Commission. Proposed Section 30.10 codifies the statutory requirements for the chief compliance officers and adds additional requirements such as an annual meeting with the board of directors or the senior officer. The proposed rules also would require the person designated as chief compliance officer to meet minimum ethical requirements and would establish the procedure for filing the annual report.

Finally, the proposed regulations would implement certain DCO core principles. Section
25(c) of the Dodd-Frank Act amends Core Principle A, compliance, to require a DCO to comply with each core principle set forth in Section 5(b)(C)(2) of the Commodity Exchange Act and any requirement that the Commission may impose by rule or regulation pursuant to Section 8(a)(5) of the Commodity Exchange Act. Proposed Section 39.10 would implement Core Principle A.

Second, Section 725(c) of the Dodd-Frank Act also amends Core Principle H, rule enforcement, to require a derivatives-clearing organization to maintain adequate arrangements and resources for the effective monitoring and enforcement of compliance with its rules and for resolution of disputes. The Dodd-Frank Act also requires a DCO to have the authority and ability to discipline, limit, suspend or terminate the activities of a clearing member due to a violation of any DCO rule. Proposed Section 39.17 would codify these requirements.

Third, Section 725(c) of the Dodd-Frank Act amends Core Principle N, antitrust
considerations, and conforms the standard for DCOs to the standard applied to designated contract markets under Core Principle 19. Proposed Section 39.23 would codify Core Principle N.

Finally, Section 25(c) establishes new Core Principle R, legal risk. This core principle is consistent with the legal risk standard recommended by the Committee on Payment and Settlement Systems of the Central Banks of the Group of 10 Countries and the Technical Committee of the International Organization of Securities Commissions. They concluded that if the legal framework of a clearing organization is underdeveloped, opaque or inconsistent, the resulting legal risk could undermine the clearing organization's ability to operate effectively and increase the likelihood that market participants may suffer a loss because the clearing organization's rules, procedures and contracts that support its activities, property rights and other interests are not supported by relevant laws and regulations. Proposed Section 39.27 would
implement Core Principle R and require a DCO to
address certain identified legal risks. Thank you
for the opportunity to describe this release.

CHAIRMAN GENSLER: Thank you for the
staff presentation. Do I hear a motion on the
staff recommendation on this rule?

COMMISSIONER DUNN: So moved.

COMMISSIONER SOMMERS: Second.

CHAIRMAN GENSLER: The motion being
moved and seconded, now we'll go to questions. I
want to say I support the proposed rule on legal
and compliance and I'll put a little statement in
the record for that, but I think that it is
consistent with the requirements of Dodd-Frank but
also importantly consistent with international
standards. I do have a question on that I want to
ask Jonathan, Phyllis and Ananda as to whether
you've consulted with the folks in Europe and so
forth with regard to this particular clearinghouse
rule and how it lines up against what's called the
CPSS-IOSCO standards. These are these
international standards for clearinghouses.
MR. RADHAKRISHNAN: The legislation of the Dodd-Frank Act is a mirror image of what's called the Recommendations for Central Counterparties issued in 2004. When staff provided technical advice to the committees in Congress, that's what we did. We took a look at the RCCPs and made sure that the language of the legislation was if not the same, very, very close. There is now an effort to modify it but the problem with that is all we have is drafts, number one. Number two, nobody has seen a proposal because there is no proposal yet so we're working with a moving target. What we have done is every time we come before the Commission we take a look at the latest draft and we make sure that what we are proposing conforms with the latest draft so that we are actively consulting with our colleagues both domestically and overseas.

MR. LAVE: I would add that the legal risks that are identified in the proposed rules are the legal risks identified by CPSS-IOSCO.

CHAIRMAN GENSLER: That's really my
question. So these are consistent with what the international standards are as we know them today?

MR. RADHAKRISHNAN: Yes, as we know them to be. Right. So that if you ask me what are the international standards, the international standards in existence today are the 2004 recommendations.

CHAIRMAN GENSLER: Right, but Jonathan also said these are consistent with what we know of the draft proposal.

MR. RADHAKRISHNAN: The draft to be, yes.

CHAIRMAN GENSLER: That even if it's moving it's consistent?

MR. RADHAKRISHNAN: We've made every effort to make sure that every proposal that the division makes is consistent with the latest iteration or latest version of a draft.

CHAIRMAN GENSLER: My other question is the chief compliance officer provisions that you have here, as I understand it Dodd-Frank had mandated chief compliance officers for
clearinghouses, for swap dealers and I gather also
maybe for swap execution facilities.

MR. RADHAKRISHNAN: For SEFs, yes.

CHAIRMAN GENSLER: So this is compliance
with that?

MR. RADHAKRISHNAN: Yes.

CHAIRMAN GENSLER: Thank you.

Commissioner Dunn?

COMMISSIONER DUNN: Thank you, Mister
Chairman. To follow-up on your first question
because they do say on page 8 of my draft, I'm not
sure which one they're working on in there, that
Section 25(c) of Dodd-Frank establishes new Core
Principle R, legal risk, which is consistent with
the legal-risk standards recommended by the
Committee on Payments and Settlements Systems,
CPSS, and the Technical Committee on International
Organizations of Security Commissions, ISOSCO.
What other international regulators have embraced
these two concepts?

MR. RADHAKRISHNAN: What we have been
told is that all of the participants in the 2004
committee, the people who have participated in those committees, have embraced the 2004 standards. The issue is some regulators don't have statutes. For example, the Federal Reserve doesn't have a statute that codifies this so that what they have done is they've issued a policy statement under which the Federal Reserve Board said they will comply with these standards, but there are other nations that have told us that they either have it in statute or this is what they do by regulation or by policy.

COMMISSIONER DUNN: Jonathan, you stated and it's also in the preamble that based on the experience in reviewing DCO applications over the past nearly 10 years the Commission is proposing to amend 39.3 to streamline the DCO application process by eliminating the 90-day rule. You're going to leave in the 180-day rule but you're going to streamline by eliminating the 90-day rule. That doesn't sound consistent to me.

MR. RADHAKRISHNAN: I think,

Commissioner Dunn, what we are proposing to do is
the 90-day rule really doesn't work because as you know the Commission has a policy or seeking public comment on DCO applications and the Commission usually grants a 30-day comment period. What we've found is despite their best efforts, the first cut is never enough and as Jonathan pointed out, this was if I may use the terminology, and forgive me for using it, shooting ourselves in the foot because there is no statutory requirement as to when we need to do this. I understand that we can't delay, we can't -- 4 years, but we thought that 90 days was in our experience really insufficient because what we've been doing in the 90 days is telling people how to do their jobs which we try not to do, but we want to make sure that the applications are as sound as possible so that that's why we thought that giving ourselves 180 days or giving the Commission 180 days is relevant.

Also we don't get funding. We've got three DCO applications right now. It used to be their day job and now it's going to be their night
job looking at DCO applications. So we can't do anything about the applications we have before us, but we really think that in order for the staff and the Commission to make sure that we do a thorough analysis of the application that 180 days is warranted. But as Jonathan pointed out, it doesn't mean that we will take 180 days. If staff finishes the analysis in a shorter period of time we will certainly forward our recommendation to the Commission for the Commission's consideration but we also don't want to jam the Commission.

MS. DIETZ: I would also like to address specifically your comment and I certainly understand about streamlining, how is that you streamline but you're taking more time? What we have found with the 90-day expedited process is because it isn't really enough time to evaluate some of these very complex and novel proposals that we get, there is an awful lot of back and forth between staff and applicant and in the past on a number of occasions we have ended up having to stay our review. We either bump it to 180 days
and even at that we may stay the review. So our
view has been if we can just all start out
understanding we've got 180 days, here are the
items we need to have to evaluate, here are the
standards that we're going to be looking for, we
can have a streamlined procedure, we don't feel
tied to rushing around in 90 days and we're not
saddled with the likelihood of the change in
scheduling the stay. This gives us what we hope
would be ample time and we can always make a
recommendation and approve in less than 180 days.
Along with this in the next rulemaking that we're
going to do for DCO core principles, it is staff's
hope that we can recommend adoption of an
application form with instructions that will be
more specific and will enable us to get uniform
submissions, complete submissions, and that too we
hope will contribute to streamlining the process
so that we can do away with a lot of this back and
forth that we've experienced in the past.

COMMISSIONER DUNN: I notice under the
procedures for transfer of DCO registration we
used the term as soon as practical. Is the same concept applying here?

MS. DIETZ: Yes. We don't want to be in the position of holding up a corporate event because we need to give approval for the transfer of a registration so that the goal there is to get notice sufficiently in advance, do our due diligence and be able to approve the transfer. We have recently done a transfer of registration for the Minneapolis Grain Exchange and that regulation in fact formalizes and codifies what we did in that situation and we think it's very helpful to put the public on notice if you intend to request a transfer, here's what has to take place and so that everybody on notice. Again it seems like we're adding something, but in fact we're streamlining what we already do.

COMMISSIONER DUNN: Mister Chairman, if I can summarize what I'm hearing from staff on this is that it's not unusual for an applicant to come in and provide a partially completed application and the assumption is that staff will
do the work telling here is where you're short, 
this is what you've got to do. In fact, they're 
asking the staff to do the work of the consultant 
or the attorney they may have hired to prepare 
this application. I submit, Mister Chairman, we 
no longer had the luxury of having staff that can 
do that type of job for those applications. If 
we're not getting fully funded then these 
applications are going to go into a queue in my 
opinion is where they should go and we'll get to 
them as soon as practical.

I have four sons and when they say 
they're going to take out the trash as soon as 
practical, one may do it right away, one may do it 
when they finish what they're doing, the third may 
do it the next day and the fourth may get it out 
in time for next week's collection. Industry 
should be aware that this process although it has 
been established over the years as a convenience 
to the industry, we no longer have the luxury of 
being able to do that and as a result of that 
there may be hold-ups on these applications being
processed. Thank you.

CHAIRMAN GENSLER: Thank you,

Commissioner Dunn. I think also what staff is
recommending meets a lot of what I know you've
been saying in many meetings for the last year and
half, to have the public have a little bit more
transparency into our process. So I applaud staff
on your thoughts that a couple weeks from now we
might have an application form and that everybody
would know what you think is important and then
we'll have to see if we vote for it. I think
that's a good thing that the public will see that
transparency. As you say, you've taken the
Minneapolis situation and you've put it down and
said this is the process. Commissioner Sommers?

COMMISSIONER SOMMERS: Thank you, Mister
Chairman. I have a question regarding the
portfolio margining program. It's been the
subject of interest to me since I've been here.
My question is to explain if we're asking a DCO to
submit their rules to us for approval of the
program before we've reached agreement with the
SEC on the requirements of the program, are we in a place to approve the rules or how is that going to work?

MR. LAVE: Right now we're talking about portfolio margining in a futures account and what the Dodd-Frank Act says is that the SEC may allow a futures commission merchant/broker dealer to put securities in an FCMBD if the portfolio margining program is approved by the Commission so that we are setting forth the rules for approval by the Commission. If the FCMBD wants to put securities in that account they're going to need to get approval from the SEC so that we're doing one piece of the rulemaking.

MS. DIETZ: To follow-up on that, as Jonathan said, in order for the SEC to grant an exemption to approve putting securities into the futures portfolio margining account, there's a reference here in the statute to pursuant to a portfolio margining program approved by the Commodity Futures Trading Commission. Right now we have two different tracks as you know for
filing rules, you could self-certify or you can get approval. Under our rules absent what we are proposing today, a portfolio margining program implemented through rules, could just be self-certified. That won't do the trick for the SEC's approval. So what we are doing is we are laying the foundation purely procedurally saying if you intend to do a portfolio margining program, you're put on notice that you must get prior approval or the other chain of events won't take place.

COMMISSIONER SOMMERS: Do we know if the SEC is in a place to propose their requirements for a portfolio margining program?

MS. DIETZ: They do have the portfolio margining program now under NYSE Rule 431 so we have had discussions with them, but I don't believe that either staffs are at a point where we're down to discussing substantive issues.

COMMISSIONER SOMMERS: Requirements for this?

MS. DIETZ: Requirements for either the
futures account, what would they require in order
to give the green light on the futures account,
similarly what we would require in order to permit
futures into the securities portfolio margining
account. For us this is a first step. On the SEC
side my understanding is that all rule submissions
of this type would have to be approved so that we
are the ones who now want to put this in place
because otherwise they would be certified.

CHAIRMAN GENSLER: Thank you,
Commissioner Sommers. I look forward to any work
staff can move forward with the Securities and
Exchange Commission on portfolio margining. I'm
guessing I'm speaking for all of us. I think we
all do. Commissioner Chilton?

COMMISSIONER CHILTON: I don't have any
questions. I support the rule and thank the staff
for their hard work. Thank you.

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

COMMISSIONER O'MALIA: I don't have any
questions. This is a very good rule. Thank you
for your hard work on this.

CHAIRMAN GENSLER: I think then I will call the motion. All those in favor of publishing in the Federal Register the staff recommendation on the proposed rule on legal and compliance for clearinghouses? I think I didn't read something earlier when I was going to do, a unanimous consent about putting all recorded votes in the Federal Register. I can't find the script. I wanted by unanimous consent to make sure that all recorded votes are put in the Federal Register. If I don't hear an objection then that passes. Then that sets you up to be able to ask for a recorded vote I think. I'm trying to follow Robert's Rules of Order.

COMMISSIONER SOMMERS: I understand.

CHAIRMAN GENSLER: All those in favor, if you can indicate by saying aye.

(Chorus of ayes.)

CHAIRMAN GENSLER: Are there any opposed? It appears that the yes have it.

COMMISSIONER SOMMERS: Mister Chairman,
I'd like to ask for a recorded vote.

CHAIRMAN GENSLER: Do I do this with Dave Stawik?

MR. STAWIK: Commissioner O'Malia?

COMMISSIONER O'MALIA: Aye.

MR. STAWIK: Commissioner O'Malia, aye.

Commissioner Chilton?

COMMISSIONER CHILTON: Aye.

MR. STAWIK: Commissioner Chilton, aye.

Commissioner Sommers?

COMMISSIONER SOMMERS: Aye.

MR. STAWIK: Commissioner Sommers, aye.

Commissioner Dunn?

COMMISSIONER DUNN: Aye.

MR. STAWIK: Commissioner Dunn, aye.

Mister Chairman?

CHAIRMAN GENSLER: Aye.

MR. STAWIK: Mister Chairman, on this vote the ayes are five and nays are zero.

CHAIRMAN GENSLER: Did we follow Robert's Rules?

MR. STAWIK: Yes, sir.
CHAIRMAN GENSLER: Thank you. With that, if we can turn to next up on the agenda is the notice of proposed rulemaking on the recordkeeping or information management of designated DCOs, again clearing organizations. Thank you, Jonathan. We have also Julie Mohr joining. Ananda and Phyllis are back for repeat. Jake, I don't want to garble the last name.

MR. PREISEROWICZ: Preiserowicz.

CHAIRMAN GENSLER: What's that?

MR. PREISEROWICZ: Preiserowicz.

CHAIRMAN GENSLER: Thank you. Team, you're up.

MS. DIETZ: I am pleased to recommend that the Commission approve for publication in the Federal Register proposed regulations that would implement certain core principles for derivatives clearing organizations. These regulations would establish standards for compliance with DCO core principles relating to reporting, recordkeeping, public information and information sharing. Jake Preiserowicz has been the lead attorney on this
rulemaking and he will present an overview of the proposed rules. Julie Mohr, our Associate Director for DCO Reviews, is also joining us from Chicago. She and other team members in Chicago have contributed enormously to this rulemaking initiative. I'd like to take a moment to thank all of our team members in D.C. as well as Chicago for their many important contributions to the development and drafting of this proposed rulemaking. Thank you.

MR. PREISEROWICZ: Thank you, Phyllis.

Good morning, Mister Chairman and Commissioner. As Phyllis mentioned, this rulemaking covers the reporting, recordkeeping, public information and information sharing core principles. The proposed rulemaking implements these core principles and expands on the regulatory and statutory language primarily for the reporting core principle and to a lesser extent recordkeeping. While it proposes to adopt the statutory language of Core Principles L and M, public information and information sharing, they are more or less the same form.
I would first like to address Core Principle J, reporting. The proposed regulations have been divided into two types of reporting requirements, one being periodic reports and two being event-specific reports, meaning the reporting requirement would be triggered by a current specific event. There is still regulatory language which would continue to allow the Commission to obtain additional information not specified in the regulations as necessary.

First, periodic reporting, which has been divided into three different timeframes, daily, quarterly and annually. Daily reporting requirements would require certain information regarding margin, cash-flows and end-of-day positions to be reported to the Commission on a daily basis by the following business day morning. These margin and other information reporting requirements provide essential information to the Commission which a DCO has readily available as part of its regular business activities. Also several DCOs already provide such data to the
Commission on a regular basis. By making this a uniform requirement for all DCOs, Commission staff will receive a more complete set of data on a timely basis which lead to more effective oversight of DCOs and assist with the early detection of any issues.

Next, the quarterly reporting requirements which simply restate the quarterly reporting requirements which have already been proposed in the financial resources for DCOs' rulemaking back in October where certain reports related to financial resources are required on a quarterly basis. Next, annual reporting requirements addressing DCOs' annual compliance report as required by the Dodd-Frank Act is simply a cross-reference to DCO report that Jonathan had just discussed. The other annual reporting requirement is for each DCO to file annual financial statements at year end with the Commission.

Next are event-specific reports, the second category of reporting requirements.
Generally the reporting requirements are minimal. When more extensive reports are required by the proposed regulations, it will generally be in situations where the DCO has this information readily available in the ordinary course of its business or in connection with other regulations. Most of the event-specific reporting requirements can be categorized into two different categories, either relating to significant financial changes at the DCO or problems arising with a clearing member. In staff's experience, these are situations which rarely occur and will be expected to rule in only a handful or reports from all DCOs over the course of the year. The first example of a significant financial change would be an ownership equity decrease of 20 percent or more which would require the filing of pro forma financial statements no later than 2 business days prior to the anticipated decrease. This type of decrease is generally due to a planned corporate event such as a dividend payment which the DCO generally has advanced knowledge of and has all
the information necessarily which it would have to provide to the Commission as part of that transaction and other such reporting requirements where there is a sudden drop in financial resources or a deficit in the 6-month liquid asset requirement for DCOs that was also proposed in the financial resources proposed rulemaking. Both are situations where the DCO is already required to have such information readily available to them and the reporting requirement is a simple notice to the Commission. The second category of event-specific reports with clearing members requires a report to the Commission when there are issues ranging from a clearing member delaying initial margin payments to a clearing member default. These are rare occurrences and would require the DCO to notify the Commission of the event. I also wanted to point out two other event- specific reporting requirements which don't fit into these two categories. The first is certain organizational or corporate changes to the
DCO. Staff proposes advanced notice. These are planned events that a DCO will know about far in advance. Here too the reporting requirement requires information that is readily available to the DCO as a result of this planned change. Next is the requirement to report intraday initial margin calls. This requirement goes hand in hand with the daily reporting requirements and supplements daily information. If there are certain clearing member positions that could affect the ability of a DCO to meet its end-day-financial obligation, receiving the data the next morning sometimes may not be soon enough. Having this data would almost immediately alert the Commission to positions that compose greater risk. This especially important given that intraday initial margin calls are unusual and are often due to increasing position size.

The next core principle that staff is proposing to codify is recordkeeping. The proposed regulations codify the statutory language with some additional clarification. The
recordkeeping requirement is intended to require maintenance of all records generated pursuant to Part 39, and for additional clarification the proposed rulemaking also specifies requirements to maintain records related to swaps. The rulemaking also includes a cross-reference to the Commission's technical and procedural recordkeeping requirements in Regulation 131.

The third core principle staff is proposing to codify in this rulemaking is public information. The proposed regulations codify the core principle language also with some additional clarification. There are two additions to the core principle language in the proposed requirements. A DCO would be required to publicly disclose its rule book and a list of its clearing members. Although both are already done by both many DCOs, this requirement furthers the core principle mandate that a customer be able to fully understand the risks associated with a particular DCO. The clearing members of a DCO and its rules are a critical component of this in understanding
the financial integrity of a DCO.

The final core principle addressed by this rulemaking is information management. The proposed rules would essentially codify the statutory provisions of Core Principle M, information sharing, in substantially the same manner. The language affords each DCO the appropriate level of discretion regarding the necessarily information-sharing agreements to enter into and staff does not perceive the need to articulate more specific requirements. This concludes my presentation and I'll be happy to take any questions.

CHAIRMAN GENSLER: Jake, I thank you. Before I'll entertain a motion I'm going to ask to clean up what I just did. I'm going to ask unanimous consent that all final votes for publishing proposed or final rules to implement the Dodd-Frank Act conducted in a public meeting of this Commission be recorded votes. Not hearing any objection, it's unanimous consent that they're all recorded votes if they're on Dodd-Frank in a
public meeting. Now I'll entertain a motion on staff's recommendation on information management of clearinghouses.

COMMISSIONER DUNN: So moved.

COMMISSIONER SOMMERS: Second.

CHAIRMAN GENSLER: I support the rule and I'll have a short statement that will go in the record. One of the pieces of the rule that I think I wanted to highlight and confirm is that Congress mandated that clearinghouses on a daily basis publish settlement prices and open interest on all of their contracts. I think this is a really important feature. Congress did it and we're putting it in the rules to promote transparency in the marketplaces that the public can actually see. Of course there is a lot in this rule for regulators to see that will help us help the markets be safer because we'll know what's happening in the clearinghouses. I think that largely happens now. I have two questions. One is am I right about the first part, public transparency on settlement prices and open
interest on a daily basis?

MR. RADHAKRISHNAN: Yes. Everything that's critical.

CHAIRMAN GENSLER: Secondly, most of the rest of it relates to transparency to regulators and not to the public though more of this may be brought into specificity, but that's consistent with what you as staff of a regulator already receive from the best regulated clearinghouses. Is that right?

MR. RADHAKRISHNAN: Yes.

CHAIRMAN GENSLER: Commissioner Dunn?

COMMISSIONER DUNN: Thank you, Mister Chairman. I support this proposed rule. Ananda, I would like you to tell me what are you going to do with all this information and who is going to plow through it?

MR. RADHAKRISHNAN: I'll have Julie talk about that.

MS. MOHR: The Risk Surveillance Group and the DCO Review Group in Chicago are the groups that are going to be primarily looking at the
information on a daily basis. We'll be enhancing our existing financial surveillance of the marketplace and we're going to be able to help identify proactively issues that might be occurring in an effort to try to mitigate or ask questions before the issue blows up and becomes something that's more newsworthy. We think this helps protect market participants and the general public as a whole. It will also allow us to look at the health of the DCO and ensure that it is following all the procedures that they said they were doing on a daily basis.

COMMISSIONER DUNN: Can you do that with existing staff?

MS. MOHR: Right now we think with the existing rules in place that are proposed we would need one additional person who would help us out who would be looking at all the data coming in daily.

MR. RADHAKRISHNAN: But the unknown factor is once swaps clearing goes full steam ahead, then the answer is no. That's why we asked
for more staff.

CHAIRMAN GENSLER: Thank you,

Commissioner Dunn. Commissioner Sommers?

COMMISSIONER SOMMERS: I don't have any

questions. Thank you.

CHAIRMAN GENSLER: Thank you.

Commissioner Chilton?

COMMISSIONER CHILTON: No questions.

Thank you.

CHAIRMAN GENSLER: Thank you.

Commissioner O'Malia?

COMMISSIONER O'MALIA: I have one

question. Rule 39.19(c)(4)(xiii) requires the DCO

to provide the Commission with a notice of its

initiation of a rule enforcement action against a

clearing member or imposition of sanctions against

a clearing member no later than 2 business days

after. This occurs to me maybe as a result of our

becoming more perspective that we're trying to

define dates and times and as a result we may

delay the process in which the Commission receives

information during an investigative stage. It
appears to be that this rule would require 2 days after sanctions of a clearing member. Will that impact our ability to work during the investigative process to share information and cooperate with clearing members or because we're being prescriptive they're going to say it said 2 days after so we're not going to talk to you until then? I'm a little concerned that we're being too rigid and that might undermine our ability. How will we get over that to make sure that we have good communications and we see these things in the investigative stage as opposed to some back-dated arbitrary date that we've set in these rulemakings?

MS. DIETZ: To clarify, as to the provision, there are two parts to it. It's when they initiate rule enforcement and then when they impose the sanction.

COMMISSIONER O'MALIA: So there's an earlier trigger that they have to notify us?

MS. DIETZ: Yes.

MR. RADHAKRISHNAN: If we get notice of
the imposition of the sanction, we would have
already received notice of the initiation of the
action against the clearing member because they
are obliged to do both.

COMMISSIONER O'MALIA: Thanks.

CHAIRMAN GENSLER: Let me ask does it say no later than 2 days or?

COMMISSIONER O'MALIA: It says no later.

MR. RADHAKRISHNAN: Yes, no later than 2 days.

CHAIRMAN GENSLER: If there are no further questions, I'm going straight for the recorded vote. I think that could work in Robert's Rules because we had unanimous consent earlier.

MR. STAWIK: Commissioner O'Malia?

COMMISSIONER O'MALIA: Aye.

MR. STAWIK: Commissioner O'Malia, aye.

Commissioner Chilton?

COMMISSIONER CHILTON: Aye.

MR. STAWIK: Commissioner Chilton, aye.

Commissioner Sommers?
COMMISSIONER SOMMERS: Aye.

MR. STAWIK: Commissioner Sommers, aye.

Commissioner Dunn?

COMMISSIONER DUNN: Aye.

MR. STAWIK: Commissioner Dunn, aye.

Mister Chairman?

CHAIRMAN GENSLER: Aye.

MR. STAWIK: Mister Chairman, aye.

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

CHAIRMAN GENSLER: We'll send it to the Federal Register. Thank you all, clearinghouse team. We see you again I believe on December 16 if we can get through all of this and in clearinghouse land it will be risk-management rules and there may be some other things beyond risk management on the 16th. Is that right, Phyllis?

MS. DIETZ: Some procedural matters.

CHAIRMAN GENSLER: Some procedural things, but primarily related to risk management for the clearinghouses and for the systemically
important clearinghouses. For those listening, we're giving a moment for one group of staff to move out and another group to come in, but we're going to be reviewing staff recommendations on designated contract markets. These are the exchanges is what most people would call them in public, but they've been called designated contract markets I think since the 1920s and certainly the 1930s in our regulations.

Next up from the Division of Market Oversight we have Nancy Markowitz who is the team lead, Rick Shiltz who is the head of the division and Nadia Zakir who has been every present, but there are probably 10 or 15 other people on this team as well. Thank you and why don't you present your recommendations?

MS. MARKOWITZ: Thank you. Good morning, Mister Chairman and Commissioners. Today staff is recommending for publication the rulemaking entitled Core Principles and Other Requirements for Designated Contract Markets. I first want to thank all the members of this team
particularly my deputy Nadia Zakir and everybody else who read the 252 pages of this rulemaking.

Current Section 5 of the Commodity Exchange Act sets forth eight designation criteria and 18 core principles that designated contract markets or DCMs are required to comply with as a condition of obtaining and maintaining designation as a contract market. Section 735 of the Dodd-Frank Act amended Section 5 by eliminating the eight standalone designation criteria, revising many of the existing 18 core principles and adding five new core principles thereby requiring applicants and existing DCMs to comply with a total of 23 core principles as a condition of obtaining and maintaining designation as a contract market. The Dodd-Frank Act also amended the Commodity Exchange Act to require that the execution of swaps subject to the clearing requirement must occur either on a DCM or on a new type of facility called a Swap Execution Facility or also referred to as a SEF.

The rules proposed today implement the
new and revised regulatory obligations of DCMs and also provide for the listing and trading of swaps on DCMs. To implement the provisions of the Dodd-Frank Act pertaining to DCMs, staff first undertook a comprehensive evaluation of existing regulations, guidance and acceptable practices associated with general designation provisions and core principles to determine which core principles would benefit from new or revised guidance or acceptable practices and which core principles would be better served by the certainty of regulation. Based on that review, staff proposes revised guidance and acceptable practices for some core principles and codification of new regulations in lieu of guidance and acceptable practices for other core principles. Staff also proposes new and revised regulations relating to the designation process for contract markets. The revised guidance and acceptable practices are based on staff's regulatory experience and also on industry practice and developments. The proposed regulations largely implement new statutory
mandates, are codified commonly accepted industry practices in order to provide greater transparency and regulatory certainty for applicants and existing DCMs. In many instances the proposed regulations are derived from the existing guidance and acceptable practices or codify requirements and practices that are commonly accepted in the industry today and that based on its experience in conducting routine surveillance and rule enforcement reviews staff has found to represent the exclusive or best means of complying with the core principle.

It should be noted that while these proposed regulations prescribe the compliance obligations of DCMs with respect to certain core principles, for the most part the proposed regulations preserve the flexibility for DCMs to determine the specific manner in which they may carry out their obligations. In the interest of time I will provide a general overview of selected aspects of the proposed rulemaking.

As an initial matter, staff is proposing
new and modified regulations in Part 38 pertaining to the process of applying for designation as a contract market and to certain other designation-related requirement. Staff proposes to eliminate the accelerated approval procedures for DCM applications, requiring instead that all applications be reviewed under the 180-day statutory review period. Since implementing the 90-day review process in 2004, staff has determined that the expedited timeline is inefficient and rarely feasible as applicants seeking to meet the accelerated approval line often file incomplete or draft applications. Under our proposed rule, all DCM applications will now be reviewed within 180 days.

With respect to the DCM application process and to provide applicants with greater certainty of the types of information that is required to support a DCM application, staff also proposes to include a new application form with comprehensive instructions and a specified list of documents and information that just accompany the
application. The majority of information required under the form application consists of information that historically has been required under the Commission's regulations or by Commission staff in its review of the DCM applications. Staff is also proposing new regulations associated with the DCMs listing and trading of swaps including reporting obligations and recordkeeping requirements as required under the Dodd-Frank Act. Staff also is proposing rules providing that a board of trade that operates a designated contract market may also operate a SEF provided that it separately registers the SEF, meets the SEF registration requirements and complies on an ongoing basis with the SEF rules and core principles under Section 5(h) of the Commodity Exchange Act.

For the 23 core principles, I briefly highlight some of the key proposals as related to their general regulatory requirements. There are five core principles that set forth a DCM's obligations to impose rules and ensure compliance with those rules in a number of areas. Amended
Core Principle 2, for examples, requires a DCM to establish, monitor and enforce rules relating to access requirements, terms and conditions of the contracts to be traded on its system and rules prohibiting abuse trading practices. The core principle also requires the DCM to have the ability to detect rule violations and sanction persons who violate the rules. To implement Amended Core Principle 2 staff proposes regulations that will require DCMs to prohibit a list of abusive trade practices all of which are already prohibited by DCMs to date or to prohibit those by statue or Commission regulation.

Another proposed regulation requires DCMs to maintain sufficient compliance resources and staff to carry out its obligations under this core principle. This is a flexible regulation that does not prescribe how large staff should be but provides a number of factors that DCMs must take into account in determining the correct size of their compliance staff. Staff also proposes regulations that codify existing industry
practices including those requiring automated
trail surveillance systems and their minimum
capabilities, real-time market monitoring and
regulations pertaining to investigations and
investigation reports.

Amended Core Principle 6 imposes
compliance obligations on DCMs with respect to
emergency actions. Under the core principle, a
DCM is required to have rules to provide for the
exercise of emergency intervention in the market.
Recognizing that DCMs may have different
procedures for taking emergency action, staff
believes that it is appropriate to maintain an
expanded version of the existing guidance that
includes provisions emphasizing cross-market
coordination of emergency action and to have
alternative lines of communication and approval
procedures in order to be able to address in real
time emergencies that may arise. Staff believes
that this is an important obligation given today's
fact-paced trading systems and the need for DCMs
to be able to react quickly to market events and
to intervene without delay. Over the years DCMs have developed certain best practices for emergency programs and staff is proposing those are acceptable practices.

Amended Core Principle 14 requires DCMs to establish and enforce rules regarding alternative dispute resolution. Staff proposes to maintain the guidance and acceptable practices with certain revisions to enable DCMs to structure their appropriate dispute resolution programs.

Amended Core Principle 9 requires that a DCM provide a competitive, open and efficient market and mechanism for executing transactions that protect the price discovery process of trading in a centralized market. The amended core principle recognizes that off-exchange transactions are permitted for bona fide business purposes if authorized by the DCM's rules. To implement this amended core principle, staff proposes among other things a regulation that updates the existing regulation with respect to the types of transactions that may be executed of
a DCM centralized market. Other new regulations
are being proposed to address the specific
statutory requirement under the Dodd-Frank Act of
protecting the price discovery function of trading
on the centralized market. New proposed
regulations impose minimum requirements for
trading on a DCM centralized market for contracts
that are listed on the DCM, mandatory delisting of
contracts if the requirements are not met,
specified procedures for treatment of contracts
existing prior to the effective date of these
rules and limited exemptions for contracts based
on petition to the Commission. In addition,
regulations are being proposed to codify already-
established practices and requirements for block
trades for futures and other off-exchange
transactions. The proposed rule sets forth block
trade requirements for future contracts and
options including who may enter into block trade
transactions, conditions for block trades between
affiliated parties, aggregation, recordkeeping and
reporting procedures. In addition, a new
acceptable practice is being proposed for DCMs in determining the minimum size of block transactions for individual contracts and the manner of pricing block trades and other off-exchange transactions. By proposing these acceptable practices, staff recognizes the need for flexibility as the appropriate minimum size and pricing of block trades varies among contracts and across DCMs.

Another group of core principle address requirements that must be met by contracts listed and traded on a DCM and the DCM's obligation to monitor trading activities. For Core Principle 3 dealing with contracts not readily subject to manipulation, staff proposes to maintain the existing guidance with necessarily revisions to provide greater detail to DCMs regarding relevant considerations when designing a contract including swap contracts. Amended Core Principle 5 dealing with position limits or accountability requires DCMs to adopt for each contract as is necessary and appropriate position limitations or position accountability and requires that this limit cannot
be higher than the position limitation established by the Commission for any contract. The proposed regulation in this rulemaking requires that each DCM comply with the Commission's regulations pertaining to position limits.

Amended Core Principle 4, prevention of market manipulation, was amended to require DCMs to take an active role not only in monitoring trading activities within their market but also in preventing market disruption. As to this core principle, staff proposes to codify relevant proposes of the current guidance on acceptable practices and to include new requirements that take into consideration the amended language and developments within industry. To comply with this core principle, a proposed rule requires DCMs to have the ability to conduct real-time trade monitoring and comprehensive trade reconstruction. In order to prevent market disruptions due to suddenly volatile price movements, the proposed rules require DCMs to establish and enforce trade risk controls including but not limited to market
restrictions that pause or halt trading under certain conditions. Pauses and halts are just one type of risk control, and accordingly the rulemaking requests public comment as to the appropriateness of a variety of trade risk controls that may be necessary to reduce the risk of market disruption.

Two core principles impose financial integrity obligations on DCMs. Amended Core Principle 11 requires DCMs to establish and enforce rules and procedures for ensuring the financial integrity of transactions entered into on or through the DCM including the clearing and settlement of the transactions with a derivatives clearing organization. This core principle also requires DCMs to establish and enforce rules to ensure the financial integrity of any futures commission merchant and introducing broker. For the most part, the proposed regulations codify language in the existing regulations in Section 1.52 and application guidance for Core Principle 11 and the guidance for former Designation
Criteria 5. New Core Principle 21, financial resources for DCMs, requires a DCM to have adequate financial resources to discharge its responsibility and to maintain financial resources sufficient to cover operating costs for a period of at least 1 year calculated on a rolling basis. Staff proposes regulations including those relating to the types of financial resources available to DCMs to satisfy their financial requirements, valuation and need calculation requirements that the DCM must make but can use its own methodology and financial resources reporting requirements.

Finally, new Core Principle 20, system safeguards, establishes operational and system safeguard requirements for all DCMs. Among other things, the proposed rules require that DCMs establish and maintain a program of risk analysis and oversight to identify and minimize sources of operational risk and have emergency backup procedures. The proposed rules also require DCMs to notify Commission staff of various system
security-related events and to conduct regular
objective testing and review of its automated
systems. These regulations will provide certainty
and transparency to DCMs as to their system-
related obligations and more security to their
systems. Staff encourages and looks forward to
hearing from the public on all aspects of this
proposed rulemaking and in particular with respect
to the specific questions posed in the proposed
rulemaking. I'd be happy to answer any questions
at this time.

CHAIRMAN GENSLER: Thank you, Nancy.
With that I'll entertain a motion on the staff
recommendation on DCM core principles.
COMMISSIONER DUNN: So moved.
COMMISSIONER SOMMERS: Second.
CHAIRMAN GENSLER: I support the
proposed rulemaking to update rules and guidance.
I note that there is a lot of guidance in this,
that this is not just a proposed rule, but
proposed guidance with designated contract
markets. The Dodd-Frank Act updated language.
There were core principles that were put in place just 10 years ago and I think that there were if I recall 15 or 16 core principles -- 18 core principles, and now there are 23, and even amongst those 18 some of them were amended by Congress. So I think it's important to update our rules and guidance to reflect the changes that there are now 23 core principles and even amongst the original 18 there is changed language.

Further, I think that the Dodd-Frank Act for the first time allows DCMs, these contract markets, to also trade swaps or a market designated contract maybe to be affiliated with a swap execution facility as staff walked through. So I think it's important to update the rules and guidance of these contract markets to these two really important changes. One, there are now 23 core principles and not 18, and even 18 were changed. And two, that there are going to be some contract markets that want to trade swaps and of course they're going to be swap execution facilities. We will be considering I think
hopefully next week, I see Reva here -- I think we're going to try to consider proposed rules and guidance for swap execution facilities next week or at the latest 2 weeks from now so that I think it's also important that we have in place new rules and guidance on this one.

I do have a couple of questions to highlight a topic or two. I know that some people have mentioned that these rules are more prescriptive than we've been in the past and that may well be the case. There are now 23 core principles and there are not 18. But one area that's been I think important to this Commission is convergence in wheat contracts and convergence in other contracts. I think it's at the core of a well-functioning futures market. This is before you get to swaps. But I think it's at the core of a well-functioning futures market that market participates, farmers, ranchers, grain elevator operators, investors, even speculators, have confidence that this contract that we call a future which is just a derivative actually at some
point in time for even a short moment converges
with the actual price of the physical commodity.
I think that's at the core of this invention that
was about 150 years ago called futures. So I was
glad that staff recommended that in the rules that
it says that a designated contract market must
continually, and this is in Rule 38.252, monitor
the appropriateness of the contract terms and
conditions including the delivery instrument, et

cetera. So we're saying it is prescriptive, they
have to monitor. Then it says the designated
contract market must address conditions that are
interfering with convergence or causing price
distortions, et cetera. We don't say how they
have to address it, but we say they have to
monitor and address.

I'm interested in public comments on
this, but this is one place where I think it was
worthwhile to make a proposal, see what the public
things, convergence is the core of our futures
market. I use it as an example. I think it's
important that the public comments not only on
38.252, but on each of the pieces that staff I think thoughtfully put forward. I don't have questions.

MS. MARKOWITZ: I'll also add to that that we add in our preamble that one of the things people will get for convergence is delivery terms and we've asked the public specifically in looking at convergence factors what are other factors besides delivery standards should they look at to make sure that there is convergence.

CHAIRMAN GENSLER: I by the way don't think it's too much to say they need to monitor and they should address but it doesn't say how. They have to address.

MS. MARKOWITZ: It doesn't say ensure either.

CHAIRMAN GENSLER: It doesn't even say ensure convergence. That's why this is just a proposal and we'll see what others think about it.

One other question. I know it's not a percentage test, but how much of this is guidance versus proposed rules because I keep stressing that this
is both guidance and rules. Maybe you don't have a percentage.

MS. MARKOWITZ: I would say about 30 percent continued guidance or 35 percent continued guidance.

CHAIRMAN GENSLER: We already had some rules though.

MS. MARKOWITZ: Correct. Part 38 was all regulations.

CHAIRMAN GENSLER: Part 38 was all regulations.

MS. MARKOWITZ: Correct. And many of the regulations, and I could go through a number of them, are incredibly flexible in terms of how you comply with those, it's setting out what you need to do to comply but we leave a lot of flexibility in how one goes about doing it.

CHAIRMAN GENSLER: Commissioner O'Malia was very helpful in the language and I know Commissioner Chilton weighed in a lot on the language that says that contract markets should have mechanisms for market pauses and risk.
mitigants, but we ask a whole series of questions as to how to get this right for the final rule. We're going to have enormous input from our Joint Advisory Committee on the May 6 events, we're going to have enormous input from what's called the Technology Advisory Committee and through this 60-day public comment period. I think that's a really important feature of this. I know that you might be voting against it.

COMMISSIONER O'MALIA: That's a good part of this rule.

CHAIRMAN GENSLER: I think that's a really important piece and I do think that come the final rule we'll probably be prescriptive about some pieces of that. Commissioner Dunn?

COMMISSIONER DUNN: Thank you, Mister Chairman. I do believe that one of the most important parts of the futures market is price discovery and Core Principle 9 which zeroes in on that is an important aspect of this and I appreciate staff working on that particular area.

I do have concern as I said in my opening
statements about us moving to a more prescriptive rather than a principle-based regulatory regime.

I am looking for public comment on this from the industry that if in fact they're in fact saying we need a safe harbor and that's what you're providing us with, I can understand that. But if I hear what you're doing is giving us more problems and more hoops to jump through and we can't be as nimble as we need to be to be competitive, then I will have concerns. I notice, Phyllis, that there is also similar to DCIO you're doing away with the 90-day and asking for 180 days.

MS. MARKOWITZ: Correct.

COMMISSIONER DUNN: Is it a similar type of problem of incomplete applications coming in?

MS. MARKOWITZ: Absolutely, and it's like what you've said before that we become their lawyers and representatives and take them through the entire process and the back and forth. We've gotten applications that are not even close to complete and it's a back and forth and it's an
enormous amount of resources that takes us away from other things so that it's rarely feasible that they do this within the 90-day period.

COMMISSIONER DUNN: Thank you, Nancy. Rick, as I look at this, it's so important for core principles that we have adequate staffing to do the RERs. Do we have it at the present time especially as we're going in to assess other exchanges?

CHAIRMAN GENSLER: Rick, you might want to say what an RER is for the public.

MR. SHILTZ: An RER is what we call a rule enforcement review. It's an examination of an exchange's ability to comply with various core principles and their regulatory requirements, and I think the short answer is no. With the large number of SEFs that are expected to come in including SDRs and combine that with all of the existing DCMs and new DCMs to carry out reviews on any sort of a routine basis we would need more staff and that's what we've requested in the various budget requests going forward for fiscal
year 2011 and 2012. If we don't get that then somehow we'd have to prioritize which reviews we do and what adjustments we make in terms of some of the other missions of the division. But I would say that at the moment we don't have sufficient staff to carry out those reviews.

COMMISSIONER DUNN: I have suggested in the past that we have a couple of choices to make, one, that we can ask the SROs to do more and step up to the plate or we can become more prescriptive as some may say we're doing here already.

MR. LAVE: I'd like to make a comment when you brought up the rule enforcement reviews or the RERs, that in terms of what we looked at in developing these proposed regulations and guidance. In many cases they were derived from the conclusions that we made in doing these examinations, the thought being that if an exchange didn't have some sort of an automated surveillance system or some other program in place, we would come back and recommend to the Commission that they're not in compliance with the
core principles. To some extent what we were
trying to do when Nancy provide this clarity is to
say that if you don't have these provisions in
place or mechanisms for oversight then staff would
recommend that they're not in compliance reserving
whatever flexibility. That's the motivation
behind what we were thinking when we went through
the review.

COMMISSIONER DUNN: The RERs in fact
become a bellwether to the industry that says this
is what the Commission is interested in and they
are publicly published so that the industry can
say this is what they're looking at. My question
to you is how frequently do we do these RERs? Is
it once every 6 months? Once a year? Every 18
months? Or are we on a 3-year cycle?

MR. LAVE: I guess the short answer is
not often enough. I think if you go back about 10
years or so, the goal was to do each exchange
every 2 years and I think over the last 10 years
the frequency has declined because we haven't been
able to have sufficient staff to do that. I know
the Chairman has said and our goal is to ultimately be able to have sufficient staff to look at each exchange, at least all the major exchanges, on an annual basis and have some sort of a review ongoing. But again going back to your first question, it's a question of having adequate staff to do that.

COMMISSIONER DUNN: Thank you.

CHAIRMAN GENSLER: Thank you, Commissioner Dunn. I think the statistics are, and I see Rachel there who runs our RER program, her whole group of people who do it, is it once about every 3 years now at best? With the larger ones maybe a little bit more frequently and the smaller ones less. Commissioner Sommers?

COMMISSIONER SOMMERS: Thank you, Mister Chairman. I have some questions regarding Core Principle 9 and I think that although I realize that the amendments that were made to Core Principle 9 in Dodd-Frank are requiring us to adopt these subpart J proposals, I have questions about how we have interpreted the language. I
would respectfully suggest that although Congress put this language in that there may be some contracts that trade right now that actually may not perform a price discovery function. In us interpreting what that language said, I have many concerns about what we're doing in this particular area. One, in the requirements under this new 38.502, we are proposing minimum requirements for trading on the centralized market, and if you could go through with us because I'm not sure it's actually explained in here how we came to the 85 percent. If you could talk about the 85 percent and I would ask that people who are commenting specifically on this rule to let us know whether that is an appropriate number or if there are concerns in this area.

MS. MARKOWITZ: Thank you. I wanted to first note that your statement that there are contracts that trade that may not provide the price discovery function, that contracts that are really going to be impacted by this core principle never trade, there is 100-percent off-exchange
trading and that's what the proposed rule is trying to address.

COMMISSIONER SOMMERS: That's my point.

MS. MARKOWITZ: In essence what we did is we looked at the new provisions of the Dodd-Frank Act that said that there should be a competitive, open and efficient market and mechanism that protects the price discovery process of trading on the centralized market, obviously Congress recognized that there is a price discovery function from trading and that in order to implement this we thought that there had to be some trading on the centralized market to protect the price discovery process. We thought it would provide regulatory certainty and clarity if we gave a certain percentage number. What we did is we had our trade specialists in Chicago come up and do a survey of 570 contracts over a 3-month period. These are 10 different asset classes involving various levels of open interest, we provided a cross-market sampling of the types of contract and involved each contract market.
What we found was three categories of contracts; 410 contracts were mostly energy contracts that never traded on the centralized market. There was absolutely no trading over this period of time. There was a middle category of contracts that there was centralized trading. These are contracts like euro dollars, treasuries, agricultural commodities and there was healthy centralized market trading. Then there is a third, a middle ground, which I'll get to in a minute. When we looked at this middle category we thought it was a good barometer to say let's see how much off-exchange trading there is in these contracts and the off-exchange trading over this period was between zero and 15 percent. We thought that was a good starting point in saying that for it to have a healthy centralized market and still balance that with the other provision in the regulation, that you can have off-exchange trading. We thought 15 percent off-exchange trading was a good starting point.

I'll note that we feel comfortable with
that position initially. We note that the FIA has a policy that requires no more than 10-percent off-exchange trading so that we felt we were fairly with a good ballpark figure. FSA, I'm sorry. Did I say FIA? We do though as you have said ask for public comment as to whether there was another percentage that would be more appropriate and asking commenter specifically to say why that would. We also note that we asked for comments as to whether there should be a lesser amount if it is a price discovery contract but a lesser amount on the exchange and whether there should be an exemption for those types of contracts.

Let me say that there is a third category we came up with which was not the extreme of no trading but it wasn't up to 85 percent on-exchange trading and there's a middle ground. We recognize that there are contracts, particularly new contracts, that take time to get traction on the centralized markets, some that have 50 or 60 or even lower, and we do incorporate
a provision in our rules that says in those situations they could petition the Commission to allow these contracts more time to gain traction and get more trading on the centralized market so that they wouldn't have to go off the market before that time.

COMMISSIONER SOMMERS: Thank you, Nancy. I want to clarify that I was referring to those specific contracts that are contracts that don't trade often and that have specific terms that I don't believe have price discovery function that serves a public good, that everybody is going to specifically care about what the price of that little contract is. Those contracts are cleared now and listed in an exchange and I don't think we've had a problem with that so I have concerns about this interpretation.

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

COMMISSIONER CHILTON: Thanks, Mister Chairman. I think the team has done a great job, that Nancy has done a super job, on this. But I
was thinking and this was granted the eleventh
hour that these core principles are the Holy Grail
of our regulatory regime and with the advent of
high-frequency trading and robotic trading, there
is really no mention of that in these core
principles at all. There is a story I think
probably people read, that my colleagues read, by
Jeremy Grant in the "FT" this morning. The
headline was something "Super-Fast Traders Post
Risk to Clearing" and they talk about how in the
E.U., 50 percent of the intraday trading is
high-frequency trading. Even here our economists
at the CFTC say that high-frequency trading on the
traditional exchanges, what we regulate currently
as of this beginning of this year, now accounts
for at least a third of all on-exchange trading
and perhaps more, so a third here, 50 percent in
Europe. High-frequency trading is a big deal,
it's arrived and so I'm thinking that we should
add place in here perhaps in the General
Requirements 38.251 and in the Automated Trade
Surveillance System's Section 38.156, some
appropriate reference to high-frequency trading.
I'm wondering, Nancy, if you think that would
create and problem from your point of view.
MS. MARKOWITZ: I don't believe it will.
I also want to note that in our discussion of
having an Automated Trade Surveillance System we
do note that it's important to have an automated
system given the fast pace of trading including
the existence of high-frequency traders so that I
think a reference in this section would be very
helpful.
COMMISSIONER CHILTON: Mister Chairman,
I don't know if anybody wants to discuss it, but I
would make a motion that we let staff at the
appropriate place in the two sections I noted add
an appropriate reference to high-frequency
trading.
CHAIRMAN GENSLER: You're talking about
in the preamble?
COMMISSIONER CHILTON: I'm talking about
in Sections 38.251 where it says General
Requirements, and 38.156 where it talks about
Automated Trade Surveillance Systems.

MS. MARKOWITZ: It's Principle 4 rules.

CHAIRMAN GENSLER: Nancy, could you help with Commissioner Chilton's question? Maybe I'm mistaken and it might be in the preamble, I thought we referred to high-frequency trading somewhere.

MS. MARKOWITZ: We do in the preamble but we don't in the rule. What we're proposing here is --

CHAIRMAN GENSLER: What the Commissioner is proposing?

MS. MARKOWITZ: Yes, what the Commissioner is proposing. I think what we had proposed is in 38.251.

CHAIRMAN GENSLER: Do you have a page number?

MS. MARKOWITZ: 164. The third-to-last line right after unusual trading volumes.

CHAIRMAN GENSLER: This is in the rule, that monitoring of intraday trading must include the capacity to detect abnormal price movements,
unusual trading volumes, impairments to market
liquidity and position limit violations.

                MS. MARKOWITZ: What I believe the
Commissioner is proposing is that the monitoring
of intraday trading must include the capacity to
detect abnormal price movements, unusual trading
volumes, the extent of high-frequency trading,
impairments to market liquidity and then the rest
of the sentence is the same, and position limit
violations.

                CHAIRMAN GENSLER: The words are "the
extent"?

                MS. MARKOWITZ: The extent of
high-frequency trading.

                COMMISSIONER O'MALIA: May I ask?

                CHAIRMAN GENSLER: Yes. The Chair
recognizes Commissioner O'Malia.

                COMMISSIONER O'MALIA: Thank you. I
know that Commissioner Chilton had circulated some
language before. How would the DCM do that to
detect the extent of high-frequency trading?

                COMMISSIONER CHILTON: I'll let staff
answer, Commissioner O'Malia, but when I spoke
with CME when we were in Chicago last month or
several weeks ago, they acted like they're all
over this already. They told me about their 18
years of experience looking at algorithmic trading
and automated trading and they say that they are
looking at this and they are well aware of what's
going on so that I don't really think it's
anything that would be novel to the exchanges and
of course that's why we get comments on it. But I
think it's something they already do and that it
would just be recognized by some insertion in our
core principles. Nancy, did you want to add
further?

MR. SHILTZ: We're not aware now or sure
whether the exchanges have those capabilities in
place to do that but it would be something if it
were required they would have to develop some
mechanism to monitor for that.

COMMISSIONER Chilton: Rick, let me ask,
you're not aware of whether or not they have
systems that monitor algorithmic and
high-frequency trading?

MR. SHILTZ: Yes, we're not whether all
the exchanges do now or not. They may be in the
process of developing tools to monitor for that
but I don't know off the top of my head and we're
not sure here.

COMMISSIONER CHILTON: That's an issue
too and even more reason for adding some of this.
By the way, I don't think that I circulated any
particular language as Commissioner O'Malia was
saying. However staff feels appropriate to
reference high-frequency traders, that's all I'm
trying to get at. I think it would be obvious
that we are missing something if we don't. I'm
not wedded to any particular language, I just want
to reference the high-frequency traders and it
seemed that those two spots made the most sense.

CHAIRMAN GENSLE: The two spots again
are 251, and what was the other one?

COMMISSIONER CHILTON: 156, the General
Requirement, and then 156 is the Automated Trade
Surveillance System, Mister Chairman.
CHAIRMAN GENSLER: I know we're doing this ad hoc, but would you be amenable because of the late moment that we ask a question regarding 38.156 which is Automated Trade Surveillance and with regard to General Requirements and we'd be asking whether it would be appropriate to require them to in 251 to have the capacity to monitor for high-frequency trading and the similar question in 156?

COMMISSIONER CHILTON: Are you suggesting that we put it in as a question, Mister Chairman?

CHAIRMAN GENSLER: Yes, and then depending on what people say. I'd ask the General Counsel, but we'd then put people on notice that we're seriously considering it.

COMMISSIONER CHILTON: To be honest, it seems incredible that we're not sure if whether or not all exchanges have systems to monitor high-frequency trading. It's 30 percent of our markets, a third of our markets, and 50 percent of the European markets. It seems to me that this is
something that's prima facie stuff we should be
doing. Mister Chairman, if you object to
inserting this, I'll withdraw my motion.

   CHAIRMAN GENSLER: No, I'm supportive,
but right now the words aren't in front of us so
that I'm trying to find a way to do it that best
accommodates getting the support of this
Commission. I'm supportive that exchanges have
some sense of what's going on. You and
Commissioner O'Malia worked hard, you were both
working on the risk monitoring and market pauses
that are really important. They're not isolated
to high-frequency traders, but it's broadly
applicable. I'm supportive, but I'm trying to
find a way through to get the document amended to
help on this point.

   COMMISSIONER CHILTON: We've given
staff, Mister Chairman, some discretion on various
things that we've done in our public meetings. If
folks aren't comfortable with giving them the
discretion, perhaps we could ask them to come up
with some suggested language before we conclude
here today. If that's not acceptable, we could do
it as a question, but I assume we'd want to see
that question also. But either way it seems that
if staff could come up with something, it would be
helpful. Mister Chairman, I'll do whatever you'd
like in this regard.

CHAIRMAN GENSLER: I'm looking at Dan
Berkovitz. I want to ask the question the right
way. What I'm suggesting is to capture
Commissioner Chilton's question in a way that we
appropriately put the public on notice that we're
considering this and that we find what the public
thinks on whether exchanges monitor and have the
capacity to monitor the amount of high-frequency
trading on their platforms.

MR. BERKOVITZ: Asking the question in
that manner would certainly be appropriate to get
public comment on that issue. What response the
Commission would take in terms of a new regulation
in response to such comments would have to be
related to the rule as it currently is proposed if
you're not actually amending the rule itself.
CHAIRMAN GENSLER: It's just a question of whether in this one section should they monitor the amount of high-frequency trading on their platforms. I think that's it as I understanding it.

MR. BERKOVITZ: And depending on how the final rule is crafted, the Commission may be able to do it.

CHAIRMAN GENSLER: Commissioner Dunn, do you have some help here? I'm going to ask one more question. Nancy, it may be page 150, but it's 38.251. I'm sorry. I had the wrong one. 251, does not already say that they have to collect and evaluate data on individual traders' market activity on an ongoing basis in order to detect and prevent manipulation?

MS. MARKOWITZ: Yes, it says that.

CHAIRMAN GENSLER: Doesn't that give a way to collect information on high-frequency traders? We've been maybe more prescriptive than Commissioner Chilton is suggesting, but this says they have to collect and evaluate data on
individual traders' market activity. I guess the
only additional question is whether they have to
aggregate a class of traders. Commissioner
Chilton, if you'd be all right, I'd suggest adding
a question that staff can draft but specific
even though such that would say the Commission is
considering and would like public comment on
whether we should add that they aggregate such
data so that they can monitor high-frequency
traders more broadly in the aggregate.

COMMISSIONER CHILTON: That's fine with
me.

CHAIRMAN GENSLER: I'll ask for
unanimous consent for that amendment. Not hearing
any objection, it's so moved. Are there other
questions? Commissioner Chilton was asking his
questions. Commissioner O'Malia?

COMMISSIONER O'MALIA: Thank you. By
coincidence I scheduled a meeting in Delaware on
the day before we had over 500 pages of rulemaking
to approve, but it was a helpful meeting. I was
able to go and join Commissioner Phil Moeller from
the FERC and to speak to the PJM board meeting and
the discussion built on our previous meeting that
Commissioner Moeller and I held here in this
hearing room on clearing in energy markets. I
want to build on what Commissioner Sommers has
said about the importance of Core Principle 9 and
the impacts this change will have on energy
markets. At the discussion, obviously these are
end users and these are people who are exempt from
clearing and the exchange trading mandate in the
bill but do find and have found for the past 8-1/2
years using the ClearPort system to clear trades
bilateral trades, energy trades. You mentioned
410 contracts, and the fact that we've created
this unique class is part of this exchange for
swaps, EFS. We have clearing but they don't
trade, but the nice thing about these products are
that they do manage risk through clearing,
bilateral risk, they're capital efficient as a
result of the netting arrangements they're able to
do with portfolio margining within their accounts
and on the CME platforms so that these end users
really found significant benefit. They're not
under mandate now and they won't be under mandate
in the future. Maybe you have the number. What
is the notional value? I've heard a massive
number of what these over 400 energy contracts are
worth.

MS. MARKOWITZ: I don't know the
notional value.

COMMISSIONER O'MALIA: Somebody
mentioned that it was multiple times, the futures
value of these similar energy contracts so that
we're talking a big collection of products here
it's all clearing which is the goal of this Act.
Now we have a rulemaking that I'm afraid will
jeopardize that and I think this 85 percent litmus
test and I think that if we're kicking them out in
90 days if they don't meet that is kind of
throwing the baby out with the bathwater. I'm
very concerned about the implications of what will
happen. I've asked staff to go through the rule
and see if we even asked this question, What are
the implications on portfolio margining and what
are the implications of the tax treatment of not treating these as futures but as swap? I understand that the bill provides a significantly different tax treatment. Did we include any questions specifically on portfolio margining and taxes as a result of this change assuming none of these are going to be EFSes?

MS. MARKOWITZ: Let me first say that under our proposed rules the end users will still be able to enter into these contracts as long as it doesn't exceed a certain percentage which would be the 15 percent. These contracts are entered into solely to take advantage of the clearing aspect of it in terms of using the segregated customer account, portfolio margining and tax benefits. These provisions, like I said, they will continue to be able to trade on the DCM, not trade, but actually list and then clear through the DCM as long as it doesn't exceed 15 percent. However, if it goes beyond 15 percent, they can execute on a SEF. It's SEF's understanding that there are going to be provisions proposed or I
know staff is thinking about having a segregated swap customer account that will provide bankruptcy protection as well as staff is thinking of propounding a rule allowing futures into the swap accounts so there will be portfolio margining. So there are alternatives.

COMMISSIONER O'MALIA: But if we don't change Core Principle 9, they get that benefit today, they may not get this benefit going forward. You've laid out a couple of options and things we may approve and consider, but betting that this will all fall into place and that they will not choose to use their end user exemption to go back into a bilateral space. They're end users. They're electricity companies and energy companies.

MS. MARKOWITZ: The difference post-Dodd-Frank is that they now have a clearing solution, that they can now have their contracts cleared which is why initially they opted to list through EFS process on the DCM, it was purely to get the clearing aspect of and now their contracts
can be cleared so that I'm not sure they're going
to be harmed in any way in terms of this
percentage requirement because they are going to
be cleared which is why they initially went on --

COMMISSIONER O'MALIA: But what is the
impact on taxes and portfolio margining as a
result of all of this?

MS. MARKOWITZ: As I said and as I
understand, staff is considering allowing futures
to be in the swap account which will allow
portfolio margining. And in terms of the tax
benefits, our rule implemented the Commodity
Exchange Act and we didn't deal with the tax code
and what the tax consequences are.

COMMISSIONER O'MALIA: But it is a
factor. It's got to be a factor.

MS. MARKOWITZ: It's a factor for these
entities I assume.

MR. LAVE: I don't know if it's a
factor. I don't know how we can take account of
the tax code in our regulations in implementing
the Commodity Exchange Act.
COMMISSIONER O'MALIA: Can we ask a question to find out? Do we ask the question?

MS. MARKOWITZ: No, we don't ask the question.

COMMISSIONER O'MALIA: We don't ask the question. I have asked staff to take the liberty of drafting two questions here and I think it's appropriate that I'll share with everybody else rather than read them. I'll pass this down the line here. I have two questions, one on what is the impact on portfolio margining in making these changes, and then one is the impact on taxes.

CHAIRMAN GENSLER: I would say I would support the first but not the latter. I don't think we're a tax writing agency and I think we have to comply with the Commodity Exchange Act.

COMMISSIONER O'MALIA: I don't disagree with either of those. We are not a tax writing agency and we will comply with this, but can we ask the questions of what the industry impacts might be? This could be a tax increase for a lot of end users potentially. I don't know.
CHAIRMAN GENSLER: I don't know how that would influence you, but it wouldn't influence me. I'm saying that I think that we have to comply with the Commodity Exchange Act and what you have here is Congress changed Core Principle 9. And by the way, on portfolio margining, I think that's subject to self-help. We can make futures swaps be in similar accounts, that is, the five of us can as long as we comply with the Commodity Exchange Act.

COMMISSIONER O'MALIA: In developing our enlightened rule, wouldn't it be helpful to have the input from the market now or as soon as we can get it within the next 60 days?

CHAIRMAN GENSLER: Absolutely.

COMMISSIONER O'MALIA: Let me circulate this. If you want me to read it, I'd be happy to read it. If you want to have staff take a look at it, by all means. I would like to have both questions asked and I will ask unanimous consent to do that. While you're taking a look at that, let me go on to the next question. Reconciling
Section 735 which allows boards of trade to have rules that permit EFS and then also 723 which is statutory language that allows swaps in futures to be traded on DCMs, those obviously provide for having EFS on these things and yet we've got a very strict limiting rule that would kick them out.

MS. MARKOWITZ: We have two mandates here in Core Principle 9. One is to protect the price discovery process of trading on the centralized market, and the other one is a recognizing that bona fide off-exchange transactions are allowed and to marry these two goals or try to balance them we've proposed the 85 percent with the 15 percent off-exchange, and again I say propose because we have asked the public if this is the right amount to do so. I do not think that requirement is inconsistent with the statutory requirement that clearable swaps should be either on a DCM or a SEF because we are not pushing swaps off the DCM. What we are saying is though if you are going to trade on the DCM
then you have to trade in an open and competitive manner and I think this is consistent with Dodd-Frank's overall purpose of having these swaps be transparently traded either on a SEF or on a DCM.

COMMISSIONER O'MALIA: You do recognize there is a conflict here, that we have a conflict that allows for this and yet we're being pretty strict about the priority of having the exchange trading requirement?

MS. MARKOWITZ: What staff tried to do is provide a balance with what we saw and based on --

COMMISSIONER O'MALIA: Trying to balance the two competing factors.

MS. MARKOWITZ: The two goals or recognitions I should say in Core Principle 9, one is to protect the price discovery process and the other one is the recognition that in certain situations bona fide off-exchange transactions should be allowed as long as they're allowed by the exchange. As I said before, we tried to come
up with a future. We thought an absolute figure of how much exchange trading should be allowed would be an appropriate way to provide certainty. We looked at statistics and based on those statistics came up with an 85-percentage based on what the data showed us. Again it was a proposal and we opened it up to public comment as to whether that's an inappropriate proposal.

MR. LAVE: To add something, the goal here isn't necessarily to say that these types of contracts can't be listed on the DCM, it's the manner of execution and I think the whole fundamental principle of Dodd-Frank with respect to swaps is that they're clearable and made available for trading and they're executed on a trading facility, a trading system like a SEF or they can be done on a DCM. It wouldn't necessarily mean they're not listed on the DCM, it's that the DCM could find a way so that these would be executed on their centralized market or some trading of a trading facility and not done bilaterally away from some sort of a trading
platform. And as I was saying, I think one of the fundamental goals of Dodd-Frank for swaps is that they if they're clearable and made available for trading that they be done on a SEF through a trading platform and that if they're going to be done on a DCM as a future then similar types of open and competitive trading should be required. And to some extent, many of these same contracts that have no trading are traded on EIS. A lot of those were the SPIDICs (?) that we determined so that it's not obvious that these could not be done on some sort of a centralized marketplace.

COMMISSIONER O'MALIA: I agree. That brings me to my next point. You have a requirement of mandatory delisting within 90 days and 90 days is a pretty quick turnaround after this determination is made. Should be maybe consider a longer period of time in order to get that liquidity once people understand that faced with this opportunity that they may decide that it would be better to go with an EFS proposal as opposed to going with a SEF, whether it's
portfolio margining or taxes?

MS. MARKOWITZ: Commissioner, the 90
days does not apply to the existing contracts that
are on the market. In fact, we have a fairly
generous I should say provision in there that
allows the existing contracts prior to the
implementation on the effective date of the
Dodd-Frank Act to remain listed on the DCM until
either their positions are closed or they
liquidate, and during any of those periods of time
if they start to trade, they can remain on the
DCM. In the past we've tried to encourage these
contracts to be traded by asking -- the contracts
can implement various programs to generate
interest in trading these like market-maker
programs or incentive programs and none of them
have used this. So during this period of time,
some of these contracts go off for 3 years and
we're allowing them to stay on the exchange, they
can try to get trading.

COMMISSIONER O'MALIA: I'm happy to make
the change on the language that takes out the word
tax and I would obviously ask any commenters if
they have an opinion on taxes, they may not, to go
ahead and offer them. We won't state specifically
tax treatment and I know we're running this by
Commissioner Chilton to make sure he's comfortable
with it, but until he's fully informed I'd ask
that we hold off on taking a vote until we get
this resolved somehow. I don't want to put him in
a difficult position somehow. I don't want to put
him in a difficult position.

CHAIRMAN GENSLER: Commissioner Chilton,
do you want us to read the suggested two questions
to you verbally? It was just sent to you
electronically. Why don't you take a look at it?
I was going to say a few words on this Core
Principle 9. Again I do this for the public.
There's a lot to learn when you get into one of
these jobs, but as I understand it some number of
years ago the energy markets and then some other
markets but it started in the energy markets
wanted to bring swaps to clearinghouses and the
way that that was facilitated was through this
exchange of futures for swaps or EFS mechanism. I don't know why it's not called ESF, exchange swap for future. And this mechanism actually helped lower risk in the marketplace where swaps were being cleared but the only way to actually clear them was to call them a future. That's in essence what happened 7, 8 or 9 years ago as I understand it in some of the markets.

COMMISSIONER O'MALIA: One important factor in all of this and why this took off was we had the meltdown or Enron and credit quality was a significant factor and clearing was a great solution.

CHAIRMAN GENSLER: I think Commissioner O'Malia is right. Now with the passage of Dodd-Frank we have a lot of changes. One is a full regulatory regime for clearing of swaps, a full regulatory regime for the trading of swaps on either swap execution facilities or designated contract markets and new Core Principle 9 about open and competitive markets on futures markets, designated contract markets I'm saying loosely,
brings these cleared-only products because most of them, 410, don't really trade, into focus. What the staff has recommended is that in compliance with Core Principle 9 since there really isn't any trading, it walks like a duck, it quacks like a duck, that it's a swap. The difference between swap and futures is in some economic way not anything different, but one difference Congress made was Core Principle 9 that says you've got to have an open and competitive market for the price discovery function and I'm supporting this because staff is saying when there's no trading it doesn't comply with Core Principle 9. I think you raised legitimate questions about portfolio margining. I think that's subject to self-help. I think that we can ask staff to come forward with very robust ways that these things can still be portfolio margined.

I think staff has also recommended a long phase period. If it's a 3-year contract, they can continue to list it, trade out of it and so forth for those 3 years or even if it's a
longer period of time. I'm supporting it because I think it promotes clearing but there will be called swaps probably instead of futures. I don't know if the 85-percent test is going to be in the final rule, but if there is some percentage in the final rule it's going to be more than zero percent and that's what they're trying to address.

COMMISSIONER O'MALIA: I appreciate that and I appreciate the explanation. I think you're absolutely right. My concern is something where we have a good advantage. It's a great opportunity and we've got billions or dollars that are being cleared.

CHAIRMAN GENSLER: I share you view that we want to keep that in the clearinghouses.

COMMISSIONER O'MALIA: I'm concerned that using the end user exemption which they're perfectly entitled to that they could walk away from it and we may not get exchange trading, but we may also lose clearing and I think that would be a big loss. One of the reasons why I will oppose this rule, but I have one more question if
I may so I can keep dancing.

CHAIRMAN GENSLER: Absolutely.

COMMISSIONER O'MALIA: The proposal for Core Principle 9 contains a regulatory requirement regarding block trades and the preamble notes that these requirements were noticed before in 2008 in a separate NOPR clearly predating my time here. I under that that NOPR didn't go forward, that we didn't implement it. What were some of the criticisms then that we should be mindful of today?

MS. MARKOWITZ: Many of the comments were against block trades and many of them were that the block trade sizes were too large, that there should be regulations as to block sizes. I would say that would be 95 percent of the comments that were against block trades or that there be a more prescriptive number or size. The feeling was that guidance in many respects was easy to get around and would be manipulated and they found a lack of liquidity on the market because of all the off-exchange trading.
CHAIRMAN GENSLER: Commissioner Chilton?

Commissioner O'Malia has two questions, one on portfolio margining and one on any other negative consequences.

COMMISSIONER CHILTON: I don't have any objection to adding the questions. I do think the proposal was intended to promote transparency as to what the goal of the bill and I think the proposal does that, but I don't have any objections to the questions.

CHAIRMAN GENSLER: I think there is a unanimous consent request to add two questions, one on portfolio margining and one on whether there's any negative consequences. It doesn't mention taxes anymore. Not hearing any objection, the unanimous consent motion is passed.

COMMISSIONER O'MALIA: I think my colleagues for their indulgence.

CHAIRMAN GENSLER: With that I will move the original question that had been properly made and seconded. Dave Stawik, will you call the roll?
MR. STAWIK: Commissioner O'Malia?
COMMISSIONER O'MALIA: No.
MR. STAWIK: Commissioner O'Malia, no.
Commissioner Chilton?
COMMISSIONER CHILTON: Aye.
MR. STAWIK: Commissioner Chilton, aye.
Commissioner Sommers?
COMMISSIONER SOMMERS: No.
MR. STAWIK: Commissioner Sommers, no.
Commissioner Dunn?
COMMISSIONER DUNN: Aye.
MR. STAWIK: Commissioner Dunn, aye.
Mister Chairman?
CHAIRMAN GENSLER: Aye.
MR. STAWIK: Mister Chairman, on this matter the votes are three ayes, two no's.
CHAIRMAN GENSLER: Thank you. Thank you very much, Nancy, Rick, Nadia and the other 15 people. This is a really important process. I think all of the Commissioners too because this one is going to be very important to get public comment and get it right come next spring or
summer. With that we're going to invite up the
next team unless the Commissioners want to take
any breaks or we just keep moving. For the
public, we're going to take a 5- or at most
10-minute break as the teams are switching out.

(Recess)

CHAIRMAN GENSLER: Thank you for coming
back today. These cupcakes are small and I don't
want you think it's because we don't have much
funding. Is Commissioner Chilton with us as well?
Make sure he knows we're back on.

Sarah Josephson from the Division of
Clearing and Intermediary Oversight will now
present the staff report on the proposed rule
relating to reporting, recordkeeping, daily
trading records, requirement of swap dealers and
major swap participants, and Ananda Radhakrishnan
who runs the division. Sarah, we thank you
because this is your second time in the chair and
in terms of scheduling, on the business conduct
rules we have the External Business Conduct Rule
team with Phyllis Cela. I think you are going to
be up in the chair next week. Again, this could be 2 weeks away, but we're hopefully scheduling that for this December 9 meeting. I think we're looking to do the SEF rules also December 9 and the end user piece, and there is also another price of governance. I think those are the four. Is Bart back on?

COMMISSIONER CHILTON: I'm here, Mister Chairman.

CHAIRMAN GENSLER: Great. Also on business conduct, the internal rules, Sarah and Ananda, you'll be back in front of us I guess on December 16 with some rules. We're going to do all the documentation rules then. We've decided now in the last couple of days maybe to delay some of the documentation because the capital margin is delayed until January and we thought as it related to documentation for what's called credit support agreements, master netting agreements and valuation and dispute resolution, that piece of it we're going to delay into January to get the benefit of any roundtable thoughts that come from
that. But on December 16 you are also in the
chair again on confirmations so that some piece of
the documentation piece such as confirmations and
portfolio compression. Why don't I now turn it
over since I've filibustered a bit there?

MS. JOSEPHSON: Good afternoon, and
while it's just Ananda and me at the table today,
I have an excellent team and there wouldn't be
enough chairs if we had brought them all up here.
They've all been incredibly helpful and it's been
a collaborative effort so that I wanted to
recognize them and also thank the Commissioners
and their staff people for very, very helpful
comments as we go through this process.

Today staff is presenting for the
Commission's consideration one notice of proposed
rulemaking for publication in the Federal Register
regarding reporting, recordkeeping and daily
trading records for swap dealers and major swap
participants. Section 731 of the Dodd-Frank Act
amended the CEA, Commodity Exchange Act, by
inserting a new Section 4(a). Today the rules
that we'll be proposing relate to Section 4(s)(F), a recordkeeping and reporting section, and 4(s)(G), the daily trading records section.

Section 4(s)(F) requires that swap dealers and major swap participants make reports regarding transactions, positions and financial condition of the registered swap dealer or major swap participant. This section also authorizes the Commission to set forth books and records requirements for, and I'm quoting here, "All activities related to the business of the swap dealer or the major swap participant regardless of whether or not that entity has a prudential regulator in addition to the Commission or if the Commission is the sole regulator of the swap dealer or major swap participant." All books and records are to be open to inspection and examination by representatives of the Commission and for records that relate to security-based swap agreements, those records must also be open to inspection by representatives of the Securities and Exchange Commission.
Section 4(s)(G) requires that swap dealers and major swap participants maintain daily trading records of their swaps and all related records including records of related cash and forward transactions. This section also requires swap dealers and major swap participants to maintain recorded communications including electronic mail, instant messages and recordings of telephone calls. Finally, Section 4(s)(G) requires that daily trading records for swaps be identifiable by counterparty and transaction and specifies that swap dealers and major swap participants maintain a complete audit trail for conducting comprehensive and accurate trade reconstructions.

Staff is recommending one NPRM, but it contains separate rules. Four of those rules relate to recordkeeping, only two of them are reporting requirements. The two reporting requirements are Rules 23204 and 23205 and those would require that swap dealers and major swap participants report in accordance with the
real-time public reporting rules and the swap data
rules, reporting to swap data repositories. The
substance of those rules was voted on and proposed
by the Commission at its November 19 meeting. In
essence it's a cross-reference. Those are the
reporting requirements, so that now I'll proceed
to describe the required records and I'll note at
the outset here that the first rule, 23200, is
just definitions for the rules that will follow
for this part. I'd like to highlight two of the
definitions and thank the Commissioners' staff for
these excellent recommendations. There is the
complaint definition where we elaborated on the
complains that swap dealers and swap participants
will be required to retain and that will be formal
or informal complaints, grievances or criticisms
communicated to the swap dealer or major swap
participant related to any trading conduct or
behavior. The other definition, and this is
important for the daily trading record, is the
definition of related cash or forward
transactions. There we're proposing a rule that
would define that category to be a purchase or sale for immediate or deferred physical shipment or delivery of an asset related to a swap where the swap where the swap and the related cash or forward transaction are used to hedge, mitigate the risk of or offset one another.

Proposed Rule 23201 is the required records rule. This relates to transaction and position information. Records would include and complete transaction and position information for all swaps including all documents in which the trade information is originally recorded. This would mean generally speaking documents customarily generated in accordance with market practice. The records would be required to be maintained in a manner that is identifiable and searchable by transaction and by counterparty. As to swap dealers and major swap participants, we are proposing the requirement that they keep general business records, things like board meeting minutes, organizational charts, audit documentation and general financial records,
although I'll note that this is not the financial condition reporting rule, this is just the recordkeeping rule, complaints as I mentioned before, a record of that complaint and how it was resolved and marketing and sales materials.

Finally, in Rule 23201 there is a section on keeping records that supports the reporting to a swap data repository or for real-time purposes. In particular I'd like to highlight that for the records that must be maintained for real-time reporting, that would include when the swap dealer or major swap participant has elected to use a less-specific data field to protect the anonymity of the market participants and then records relating to determinations made about block trades and large notional swaps.

Proposed Rule 23202 relates to daily trading records. The proposed rule would require swap dealers and major swap participants to ensure that they preserve all information necessary to conduct the comprehensive and accurate trade
reconstructions for each swap and that they
maintain each record as a separate electronic file
identifiable and searchable again by transaction
and counterparty. What we've done is we've
divided the rule up into preexecution data,
execution data and postexecution data which is
important for swaps because unlike some of the
derivatives that we're used to regulating, the
posttrade transaction data is especially relevant
and the preexecution trade data would include
records of all oral and written communications
that lead to the execution of a swap. This
includes records of all telephone calls, voice
mails, faxes, instant messaging, chat rooms,
email, mobile devices and other digital or
electronic media. This would require swap dealers
and major swap participants to maintain records of
telephone calls and other communications created
in the normal course of its business but would not
establish an affirmative new requirement to create
recordings of all telephone conversations if the
complete audit trail requirement can be met
through other means such as electronic messaging or trading. I would note here, and this is discussed at some length in the preamble as Commissioner O'Malia noted at the outset of this meeting, that many jurisdictions around the world require recordings of all telephone and electronic conversations including the United Kingdom, Hong Kong, Spain, Sweden and France among numerous other jurisdictions and that's to prevent or to be able to detect market abuse or fraud manipulation.

The execution trade data would include all terms of each executed swap and the date and time of execution to the nearest minute and that is similar to existing CFTC Rule 135 for designated contract markets. Postexecution data would include records of all terminations, novations, reconciliation, margining, a whole series of posttrade processing events that it's important to record. Sometimes these are referred to as life-cycle events but it's all the postexecution processing. Then there is a section of this rule on the records related to cash and
forward transactions and again generally we've followed the same preexecution, execution and postexecution requirements there. Staff believes that requiring one approach to recordkeeping will be simpler for swap dealers and participants to implement and will provide the Commission with the necessary information for its regulatory oversight.

The last rule is an retention and inspection rule, how you should keep the data. For the most part that references an existing Commission rule, Rule 131, and it says that you must retain them 5 years overall retention and 2 years readily available. Then there is an exception for swaps and related cash and forward positions which must be retained for a longer period of time and in accordance with Part 45, the data rules that again the Commission considered at the November 19 meeting.

CHAIRMAN GENSLER: Thank you, Sarah. The Chair would entertain a motion on this staff recommendation on swap dealer recordkeeping and
reporting.

COMMISSIONER DUNN: So moved.

COMMISSIONER SOMMERS: Second.

CHAIRMAN GENSLER: I support the proposed rule regarding reporting and recordkeeping and will have a comment for the record. I think it establishes important mandates that Congress recommended that swap dealers and major swap participants are required to maintain records. Most of this is for regulators and not for the public, in fact all of it, though with the information that might be available to the public would be reporting to swap data repositories or possibly through the real-time reporting rule that we had promulgated and are looking forward to public comment on. I do think it's important to promote transparency to the regulators and to promote market integrity so that I don't have any questions on it. Commissioner Dunn?

COMMISSIONER DUNN: Thank you, Mister Chairman. I too support those provision. Sarah, we say that the Commission recognizes that there
will be differences in the size and scope of the business of particular swap dealers and major swap participants. Therefore, comments are solicited on whether certain provisions of a proposed regulation should be modified or adjusted to reflect the differences among swap dealers and major swap participants. Could you amplify for me on what staff deems as differences?

MS. JOSEPHSON: This same paragraph appeared in the rule that we proposed the first time I appeared before the Commission on the duties and the goal is to address the concerns that have been expressed or to invite comment on the differences that may exist between swap dealers and major swap participants in terms of the scale of their operations and the extent to which they have particular operational capacities. It's a general invitation to comment specifically and there are some places in the preamble where we direct the public's attention to key areas. That's I think what we're thinking, give us the information we need to craft the final rule
proposal that would be responsive to the needs of
the marketplace.

COMMISSIONER DUNN: Thank you.

CHAIRMAN GENSLER: Sarah, while we're
not there yet, I'm hopeful that commenters will
share with us if you're a swap dealer and you're
doing hundreds of transactions a year, that might
be a different implementation phase than if you're
a swap dealer doing 200 trades a year. You're
still a swap dealer but maybe by scale the largest
among them would implement this rule a little
faster.

MS. JOSEPHSON: Right. I think that's
the other part, that in addition to tailoring the
rules themselves there could be an implementation
phased approach that some of the larger swap
dealers would have more timely implementation and
so that we'd consider and invite comments on the
implementation, the phasing or a tiered approach
is something that we would consider.

CHAIRMAN GENSLER: Commissioner Sommers?

COMMISSIONER SOMMERS: Thank you, Mister
Chairman. I have some questions about the collection of preexecution data. What do you believe is the relevance of getting all of that data and what is typically expected to be captured when we are asking for all of this? What exactly are we looking for?

MS. JOSEPHSON: I think this elaborated a bit in the preamble, but to highlight that, our understanding is that the Enforcement Division has been very successful in proving market manipulation and market disruption cases, false reporting cases where they've had better audit trails and it's the preexecution information that contributes to as is required in the statute the complete and comprehensive audit trail so that everything that gives rise to an execution of a swap or a transaction. That's what we're looking for, and in the rule itself for the daily trading records, reliable data or information about the initiation of the trade, the records of all of the conversations back and forth related to the prices, the bids, offers at which you would
ultimately execute a swap, but that back and forth especially for swap dealers and major swap participants who are executing bilaterally, that's what we're looking at and we think it would be very helpful for understanding market practice and also as part of the enforcement regime.

COMMISSIONER SOMMERS: I think I understand for enforcement purposes, but I do have some questions about if two counterparties are executing a bilateral swap how we can after the fact glean from preexecution data say they didn't accept the best offer or the best bid, how do we know that there weren't other factors being contemplated? I'm unclear about how that's helpful to us.

MS. JOSEPHSON: I think I would defer to my colleagues in Enforcement on how they would create a case. I think part of your question goes to the issue of how you would use the information.

COMMISSIONER SOMMERS: I understand for enforcement purposes, but besides that if there's any other reason why if we plan to audit
preexecution data for any other purposes besides
enforcement.

MS. JOSEPHSON: I think the primary
reason would be for enforcement purposes.

CHAIRMAN GENSLER: Thank you,
Commissioner Sommers. Commissioner Chilton? Is
Commissioner Chilton on?

COMMISSIONER CHILTON: Yes, I'm here,
Mister Chairman. We had a couple of questions in
the last rule and I wonder whether or not, Sarah,
this would be an appropriate one to ask the
question on whether or not swap dealers and major
participants should be required to report as a
separate category records relating to
high-frequency trading activity. Would you see
any issue with asking that question?

MS. JOSEPHSON: Commissioner Chilton, I
think the way that I would generally respond to
that is that at least my understanding right now
is that high-frequency trading is not prevalent in
the swaps markets and in the over-the-counter
derivatives markets and I think that I would
ultimately again refer to some of my colleagues who are actively working on these issues right now. But at least my understanding is that high-frequency trading, that sorts of algorithmic trading practices that are of concern in organized markets and the trading platforms are not prevalent in the OTC derivatives markets at this time. But it is something that we would continue to look at and as that work continues to be developed it could be a consideration for additional rulemaking on a particular reporting requirement, not reporting, sorry, this would be a recordkeeping requirement now.

COMMISSIONER CHILTON: Let me ask this then, and this is I guess a question for counsel. If we don't ask a question about whether or not, and I'm not disputing what you've suggested that high-frequency trading isn't as prevalent in the swaps market, I tend to agree, but the whole issue behind this legislation is that we don't know what's going on in some of these markets and so we're getting more information. The question is
if we don't ask such a question here specifically in this proposal, would we be precluded from inserting something if during the comment process we determine that maybe we did want to require reports that are separated by category? If we don't ask the question now, are we precluded from requiring it later if we determine a need?

CHAIRMAN GENSLER: Dan Berkovitz has come to the mike.

MR. BERKOVITZ: Commissioner, the question would be in the final rulemaking whether the final rule was a reasonable or logical outgrowth of the proposed rule so that it would depend on exactly how the proposed rule is worded in relation to the final rule.

COMMISSIONER CHILTON: It seems to me that we should preserve the option of doing something. Nobody is thinking that everything that we ask questions on we're going to do, but once swaps become traded on exchanges, it seems to me that high-frequency trading reporting might be something given the sorts of numbers I talked
about on the earlier proposals that we would want.
I'm not sure we would, but it seems like a
reasonable question. Mister Chairman, I'd like to
add that question to preserve the Commission's
options regardless of whether or not we end up
doing anything.

MR. RADHAKRISHNAN: Let me point out
something. Wouldn't that be covered by the
covered by the proposed regulations for DCMs?
There was some question on high-frequency trading
with DCMs so maybe that would be covered. Bart,
do you think they would be covered that way? I
think the point is, and correct me if I'm wrong,
you only get high-frequency trading when you have
a platform. If you don't have a platform there is
no such thing as high-frequency trading so that
maybe it would be covered by the DCM rules.

COMMISSIONER CHILTON: It could be,
Ananda. I'm not suggesting that we should
actually do this, but given the responses we got
earlier, it's clear to me we don't know enough and
so I want to preserve the Commission's flexibility
rather than forestall options given what our
General Counsel told me which was maybe perhaps if
you wrote it a certain way. I don't know why we
would tie one hand behind our backs to begin with.
It's a simple question to preserve the option. If
it's a duplicative question, Ananda, or it doesn't
matter, we can toss it out with the bath water.
Again, Mister Chairman, I'd like to ask the
question.

CHAIRMAN GENSLER: I'm asking if there
is any objection to unanimous consent to include a
question in this rule as Commissioner Chilton has
laid out. Not hearing any objection, we'll add
the question.

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

CHAIRMAN GENSLER: Commissioner O'Malia?

COMMISSIONER O'MALIA: Thank you.

Sarah, I'd like to ask you a question regarding
our existing recordkeeping rules. It's my
understanding that under Rule 1.35, FCMs, IBs and
members of contract markets do not an audit trail
for voice conversation requirement, yet this rule
does. Is that something we're going to fix or is
that under consideration for changing our existing
rule?

MR. RADHAKRISHNAN: I think the preamble
states that there is a DMO advisory that said that
1.35 applies to records that are created or
retained in electronic format including email,
instant messages and other forms of communication.

COMMISSIONER O'MALIA: What about voice?

MR. RADHAKRISHNAN: The statute has a
specific requirement that the Commission
promulgate a regulation for voice communications
for swap dealers and major swap participants. I
don't know whether the CEA has a specific
requirement for FCMs but I do know that the
Enforcement Division was working on a proposed
rule and I can find out where that rule is.

CHAIRMAN GENSLER: Could I help out a
little bit? One of the things that's occurred,
and here I am revealing something, we now have a
thirty-first team. Everybody has heard about
these 30 teams. One thing that occurred to us some time ago is that the rules for futures commission merchants, the rules for introducing brokers, for commodity pool operations, for commodity trading advisers, other various intermediaries, may need to be conformed, it might be a lot of boring technical stuff, but conformed given the definition Act. In addition, there may be issues just like Commissioner O'Malia is raising. William Penner is heading that up. I don't know that it will be all in front of us in January, but all of what I'll call the intermediary conforming amendments, and particularly as Dodd-Frank included in the definition of introducing broker, commodity trading adviser, futures commission merchant and others, for the first time the word swap was inserted in each of these. William Penner is going through and I think this is a question that I would hope would be put into that team's efforts.

MR. RADHAKRISHNAN: We actually base
this language on that draft that I mentioned.

William has got that draft so it will probably be part of the package that will come to the Commission on these conforming amendments, and get ready for an avalanche because there are a lot of them when we do these conforming amendments.

CHAIRMAN GENSLESER: Ananda, we've already had that.

COMMISSIONER O'MALIA: Proposed Rule 23201 requires that records of each transaction be kept in a form and manner identifiable and searchable by transaction and counterparty. These records include everything from cancelled orders, warehouse receipts, to phone calls and instant messages. Correct?

MS. JOSEPHSON: Yes, both read together.

COMMISSIONER O'MALIA: From an interest in technology, how easy is that to do, to search by transaction and counterparty? Is that something they easily code? Is that more difficult than it sounds?

MS. JOSEPHSON: Our understanding is
that currently entities that have swaps on their
books and derivatives generally, they have
internal mechanisms for tracking those, that they
have a unique identifier that's internal that they
use to keep track of things and we're not
prescribing that. What I will mention is that the
rules do cross-reference to the extent the swaps
have to be reported to a swap data repository,
that hey will then use the unique identifier that
the data team is proposing. That might make
things earlier in a way if the counterparty, the
product and the transaction IDs that that team and
the Commission has already voted on if those are
in place. The rules work together in that way and
that's why we coordinated with the data team and
the SDR teams to make sure that they work
together.

COMMISSIONER O'MALIA: Now let me ask
the big question. We're going to feed it into
what machine here that will enable us to search
this and use this efficiently?

MS. JOSEPHSON: This is just
recordkeeping. This is not reporting. This is
telling them what they need to maintain, that
we're not requesting this. It is available to us
for inspection and examination when we need it.

COMMISSIONER O'MALIA: So if we choose
to inspect it and we desire it for only
enforcement purposes, what will we use to search
this stuff? Do we have technology in-house that
is readily available?

MR. RADHAKRISHNAN: I'm not sure whether
Enforcement has that. They may have at their
disposal tools that allow us to do this. I'm not
sure.

COMMISSIONER O'MALIA: I'll follow-up
with them.

CHAIRMAN GENSLER: If there are no
further questions, then Dave Stawik, all the roll.

MR. STAWIK: Commissioner O'Malia?

COMMISSIONER O'MALIA: Aye.

MR. STAWIK: Commissioner O'Malia, aye.

Commissioner Chilton?

COMMISSIONER CHILTON: Aye.
MR. STAWIK: Commissioner Chilton, aye.

Commissioner Sommers?

COMMISSIONER SOMMERS: Aye.

MR. STAWIK: Commissioner Sommers, aye.

Commissioner Dunn?

COMMISSIONER DUNN: Aye.

MR. STAWIK: Commissioner Dunn, aye.

Mister Chairman?

CHAIRMAN GENSLER: Aye.

MR. STAWIK: Mister Chairman, aye.

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

CHAIRMAN GENSLER: Thank you, Sarah, Ananda and Dan for your cameo. Dan, please stay at the desk though for the next one. I thank you very much for all your efforts. Sarah and Ananda, we'll see you back here in 2 weeks and back again in January I guess.

(Recess)

CHAIRMAN GENSLER: Next, Mark Fajfar and Dan Berkovitz from the Office of General Counsel will present an overview of staff's
recommendations on rules, further defining swap
dealer, major swap participant, securities-based
swap dealer, major securities-based swap
participant and eligible contract participant.
This is a rulemaking which is joint with the SEC.
I don't know what Robert's Rule say, but if we
vote it out it still has to go through the SEC and
I believe, and I'm not trying to get in front of
them, they've calendared it for Friday. I want to
compliment staff before we get into this and
compliment the Securities and Exchange Commission.
I think that we're working both tirelessly to get
these proposals out and to get the benefit of
public comment on them. They probably even have a
larger docket than we do if that's believable. I
thank the staff because it was even 10 o'clock
last night that they were getting some further
edits from our friends at the Securities and
Exchange Commission and I think the Commissioners
for their patience with that because we
distributed a couple of paragraphs this morning.
There are 10 Commissioners and dozens and dozens
of staff working. I know that we wanted to do this in the middle of November but here we are now. It probably highlights that on the other rules like product definitions that no matter what date we think we're going to do them it might slip. Mark and Dan?

MR. FAJFAR: If we had done the rule on November 19, we could have used Harry Potter's sorting hat to decide who are swap dealers and MSPs.

CHAIRMAN GENSLER: Sorting hat to do what?

MR. FAJFAR: Decide who our swap dealers and MSPs are.

CHAIRMAN GENSLER: Now we're on December 1.

MR. FAJFAR: I'd like to thank my colleagues on the Definitions Team including Terry Arbit, Julian Hammer, David Aaron and Rose Troya and my SEC colleagues including Josh Konz and his team for their contributions. I'd like to thank the Commissioners and their staff for their input
on the rules.

In developing this rule we reviewed more than 80 written comments in response to our advanced notice of proposed rulemaking. We met with market participants and other members of the public. We consulted extensively both with the SEC and the prudential regulators. We are very grateful for the input we've had so far and we look forward to continuing to meet with the public and our fellow regulators to develop and put the details on the final rules.

The Dodd-Frank Act defines swap dealer in terms of whether a person engages in certain activities, holding oneself as a dealer in swaps, making a market in swaps, regularly entering into swaps as an ordinary course of business or being commonly known in the trade as a dealer or market maker in swaps. The proposed rule follows the statutory definition closely.

Our interpretation of the proposed rule is guided by special aspects of the swap markets. Swaps are notional contracts. They're not bought
and sold. Because of this concept, use in the
cash markets for securities and commodities cannot
necessarily determine if a person is a swap
dealer. Instead, we propose to identify swap
dealers by their functional role in the swap
markets. They tend to accommodate demand for
swaps. They're available to enter into swaps in
response to interest from others. They enter into
swaps on their own standard terms or terms they
arrange or customize on request. Also swap
dealers tend to enter into swaps with more
counterparties than do nondealers and nondealers
tend to be a larger part of a swap dealer's
counterparties.

In general, a person who meets the
definition would be a swap dealer for all types,
classes or categories of swaps and be subject to
the swap dealer requirements for all of its swaps.
This requirement would apply to the legal person
who's designated as a swap dealer. However, there
may be some companies especially physical
commodity firms that conduct swap dealing through
a division. The proposed rule permits the
Commission to issue a limited designation as a
swap dealer with respect to only specified
categories of swaps or activities on an
appropriate showing by that person.

The statute includes a de minimis
exception dealing activity that is so minor that
it does not warrant registration. It requires
that a person's dealing over the period 12 months
be limited to swaps with an aggregate gross
notional amount of no more than $100 million of
which no more than $25 million could be with a
special entity which is defined in the Act as
certain governmental and other types of entities.
Finally, the person could enter into no more than
20 swaps as a dealer over the prior 12 months with
no more than 15 counterparties.

There is also an exemption for swaps in
connection with loans made by insured depository
institutions. We propose this would apply to any
swap related to the financial terms of the loan
such as an interest rate or a currency swap, but
it would not apply to swaps related to the borrower's other business activities even if the loan agreement required the swap.

To wrap up the discussion of swap dealer I'll point out that the release also discusses other issues such as how the definition should be applied to aggregators of swap positions of other parties, to the physical commodity markets and to the generation or transmission or electricity. We'd like to hear from the public on those topics and all the others.

Turning now to the definition of major swap participant or MSP, this is intended to encompass firms that are not dealers but whose swap positions are so large they pose systemic risk. There are three parts to the statutory definition. First, it covers and person who has a substantial position in a major category of swaps excluding commercial hedging and ERISA plan positions. For this we're proposing four major categories of swaps, rate swaps, credit swaps, equity swaps and other commodity swaps. The
second part of the definition includes any person
whose outstanding swaps creates substantial
counterparty exposure that could have serious
adverse effects on financial stability. Third,
the definition covers any nonbank financial entity
that is highly leveraged and has a substantial
position in any of the major swap categories not
including hedging or ERISA positions.

To define substantial position we
propose two thresholds that use objective
numerical criteria. One measures current
uncollateralized exposure only and the other
threshold combines both current exposure and
potential future exposure. A position that
exceeds either threshold would be a substantial
position. The current exposure threshold would
measure a person's total uncollateralized current
exposure determined by marking its swap positions
to market using industry standard practices. This
calculation would deduct the value of posted
collateral and would calculate exposure for each
counterparty on a net basis. The numerical
threshold of current exposure would be $1 billion in any major swap category expect that the threshold for the rate swap category would be $3 billion. The second proposed threshold for substantial position would account for both current exposure and potential future exposure. The calculation of potential future exposure is based significantly on bank capital standards. It discounts the total notional principal amount of a person's swaps by risk factors that are based on the type of swap and the duration of the position. The calculation also adjusts for netting agreements, clearing and margin posting. The second threshold would be $2 billion in current exposure plus potential future exposure in any major swap category except again the threshold for the rate swap category would be $6 billion. As I noted, the substantial position calculation excludes swaps that hedge commercial risk. The proposed definition of hedging would include any swap recognized as a hedge for accounting purposes or is bona fide hedging but would not be limited
to those categories. The proposal also covers
swaps that hedge any business risk and it applies
whether the entity is for profit or nonprofit, a
financial firm or nonfinancial. However, swaps
for the purpose of speculation, investing or
trading would not be covered. For the substantial
counterparty exposure part of the MSP definition,
we propose calculations that are the same as the
calculation of substantial position. Unlike the
first test, however, hedging or ERISA plan
positions would not be excluded and this test is
not applied by swap category. The threshold would
be current exposure of $5 billion or a sum of
current exposure and potential future exposure of
$8 billion across all of a person's swap
positions. The third part of the definition for
nonbank financial entities that are highly
leveraged uses the same substantial position
thresholds by major swap category as in the first
part but does not allow for the exclusion of
hedging or ERISA plan positions. To define highly
leveraged, we are proposing two alternatives. One
would allow at a ratio of total liabilities to total equity in excess of 8 to 1, the other alternative would set the threshold at a ratio of 15 to 1. We invite comment from the public on which of these is more appropriate.

To conclude again I'll point out that the release discusses a variety of other MSP issues including the application of a definition to manage investment accounts, registered investment companies, ERISA plans and sovereign wealth funds. Now that the public can review and consider our proposed rules in their entirety, we look forward to receiving their comments. Thanks for your attention and we welcome any questions you may have.

CHAIRMAN GENSLER: I will entertain a motion on the staff recommendation on the joint rule with the SEC.

COMMISSIONER DUNN: So moved.

COMMISSIONER SOMMERS: Second.

CHAIRMAN GENSLER: Thank you, Mark and everybody who's worked on this. I support the
joint proposed rule on entity definitions. I think it fulfills Congress' direction to further define these key terms, but it is just a proposal and it is going to be very helpful to get the public's comments on this proposal. The swap dealer definition I believe closely follows the criteria laid out by Congress. Those criteria as Mark said had four different aspects including whether an entity makes a market in swaps, holds itself out as a swap dealer, is commonly referred to as a swap dealer or regularly enters into swaps in the ordinary course of business. I think a key aspect that is in the proposal is whether a company makes itself available to people, receives demand from others in essence. I think that end users, and there have been hundreds of really well-thought out meetings I've participated in, I don't think it's our intent and we will hear from people, but it's not our intent to capture end users in the swap dealer definition and I think that that was a helpful add to this proposal that holding yourself out and accommodating other
people's demand which is in contrast of going to seek and hedging yourself. We'll certainly get comments on that and those comments will be helpful.

I think that the major swap participant definition relies on Congress' three-prong test and the category has been meant to be very clearly limited only to those entities that have very large risk, enough pose threat to the U.S. financial system, and it's for those parties that aren't swap dealer. This was meant to be a very small category that you're not a swap dealer and yet you might have such significant positions. It's a very complicated thing Congress gave us because there are three prongs. The first prong is only if you're not an ERISA plan and not hedging commercial risk and of course I've lightly internally called that the speculator's prong, but the first prong if you're speculating in these markets and have significant exposure, then Mark laid out the numbers. The second prong is all of your counterparty risk and I think staff did an
excellent job. This is not a rule that's directly
tied to notional amounts, it's tied to exposures,
current exposures after collateral and I think
Congress dictated that but a lot of end users and
others have come in and said I hope you're only
going to be looking at the sort of noncleared
swaps and after collateral. We didn't do that
quite but I think this important in that it does
say that it's net of collateral because cleared
swaps postmargin it's very different. The number
is large. It's $5 billion of current exposure or
$8 billion combined of current and potential
future exposure. I'll share a little bit of a
story. Then years or 12 years ago when long-term
capital was failing I had a $1.3 trillion
derivatives book but I'll never forget that Sunday
that I went up there personally and their current
exposures as I remember them but the spreadsheets
weren't kept perfectly, were in that $4 billion
range and I can tell you having lived it, that was
a systemic issue. As for the $5 billion and $8
billion, I don't how people will comment on
publicly. It will be very helpful to hear. But they're very large numbers and I think in a major swap participant definition there will be come, there will probably a handful or something, but it's meant to be only those people who aren't swap dealers and are very large. I support the proposal but very much look forward to public comments to help us get this appropriately done so that swap dealers are regulated as swap dealers but end users don't somehow get caught up in being a swap dealer and only the largest nonswap dealers would be ending up being major swap participants.

I don't have any questions. Commissioner Dunn?

COMMISSIONER DUNN: Thank you, Mister Chairman. Mister Chairman, I'm going to support this proposed rule simply because I think we need to get something out on the table. We've gone way too long for folks to try to figure out where do I stand in all this, am I in or am I out? This is our first cut at giving some clarity of where they stand, and I appreciate all the hard work that staff of both the CFTC and SEC did working through
that, Mister Chairman, your staff and your personal intervention in moving this forward so that we have at least something on the table that people can begin to comment on. This is unique since the SEC is going to be taking up a similar provision. It's like the House and the Senate working on a bill and we may have to have a conference later on to ensure that we come together with these definitions.

CHAIRMAN GENSLER: Are we the House or the Senate, Commissioner Dunn?

COMMISSIONER DUNN: I've always worked for the upper house, Mister Chairman. With this rule and the subsequent rule on product unity, could you elaborate a bit, Mister Chairman, on what happens if we cannot come to a conclusion and the role that FSOC may have in this?

CHAIRMAN GENSLER: You're absolutely right. There is the role of the Financial Stability Oversight Council if we can't. I don't think that's an acceptable outcome. I think the Securities and Exchange Commission and the CFTC
very much need to do that here, do that on product
definitions and also interestingly there is a rule
that we'll take up in January that's not related
to derivatives but it's related to hedge fund
disclosure and there's a piece of that that's a
joint rule. Maybe General Counsel Berkovitz wants
to give the exact role of the Financial Stability
Oversight Council if we for some reason we
couldn't come to an agreement.

    MR. BERKOVITZ: That's right. If the
two agencies cannot agree, it would be determined
by the Financial Stability Oversight Council.
I'll look up the exact timeframe or the exact
wording.

    COMMISSIONER DUNN: The clarification of
where this may end up if we can't, but I think
again it is probably is important as anything that
we've done that we get comments on these
definitions.

    CHAIRMAN GENSLER: I will say this.
Though this 3 or 4 weeks later than we calendared
it, I think SEC and CFTC staff and the
Commissioners, I know each of you talked to their Commissioners as I do sometimes too, that it's been a very collaborative process and it's been collaborative working through the May 6 issues. We've had the Joint Advisory Committee, we've had four or five roundtables together, and I'm sure we've probably approaching 200-plus staff meetings between the SEC and CFTC now. We share all the documents with them even the ones that aren't joint. I think it's been excellent. There are times where we disagree and you can probably if you're very clever look through this document and figure out through questions and footnotes where some of those disagreements are. But I think it's been working very positively so that again my compliments to SEC and CFTC staff.

MR. BERKOVITZ: As a point of clarification on the role of the council, Dodd-Frank provides that in the event that the CFTC and the SEC fail to jointly prescribe rules in a timely manner, then at the request of either Commission the Financial Stability Oversight
Council shall resolve the dispute so that either
Commission would have to request the FSOC to
resolve the dispute. I would also add what the
Chairman has just stated that we have had many,
many discussions but nothing has elevated to what
I would call the level of a dispute between the
two agencies and the fact that we're here today
and they're going to be where they are I think is
a testament to that.

CHAIRMAN GENSLER: Can we kick portfolio
margining upstairs too?
COMMISSIONER O'MALIA: Put it on the
list.

CHAIRMAN GENSLER: Commissioner Sommers?
COMMISSIONER SOMMERS: Thank you, Mister
Chairman. I'll start with questions about the
limited registration that I referred to in my
opening statement. Even though the statute
provides for limited registration for dealers, we
have decided that a person who satisfies the
definition of swap dealer or security-based swap
dealer would be a dealer for all types. And we go
on to say that because we think it would be
difficult to separate their dealing activities
from other activities, could you elaborate on why
that's difficult?

MR. FAJFAR: First of all, we're
starting from the premise that there are very many
different types of swap dealers active in very
many different types of markets. For some swap
dealers it might not be difficult, but we think
that most companies view their swap activity as a
whole, there hasn't been a designation of swap
dealer before the statute and so they view their
activities in swaps as a whole so that they don't
distinguish for example separate books of records
or separate compliance practices for swaps where
they're accommodating demand and responding to
demand from others versus putting on positions at
their own initiative. That's the main reason.

COMMISSIONER SOMMERS: If there are
dealers who can easily separate and they know
exactly what types or classes of swaps that they
are a dealer for, will we be able to provide for
them a limited registration for just those
categories?

MR. BERKOVITZ: Yes, Commissioner, the
proposed rule provides that the dealer in that
category may apply for limited designation and the
rule states that the Commission shall act upon
that application and that would be at the time of
the initial designation or subsequently
afterwards.

COMMISSIONER SOMMERS: I guess I should
clarify. Instead of being categorized as a dealer
first for everything, can they just apply only in
a limited designation?

MR. BERKOVITZ: Yes. At the time
they're coming in with their registration, they
would say we want to be a limited designation so
that that limited designation could become
effective upon registration.

COMMISSIONER SOMMERS: I guess it was my
understanding that the registration rule that we
did didn't provide for that.

MR. BERKOVITZ: That's correct, but in
this rule we have provided for it by the manner in which we're defining a dealer so they wouldn't become a dealer with respect to these other activities.

COMMISSIONER SOMMERS: I misunderstood because it says here that if you satisfy the definition of swap dealer for one type, you are for all types unless you subsequent to that come in and apply for limited registration which seems a little backwards to me.

MR. BERKOVITZ: The current version of the rule provides that you come in --

COMMISSIONER SOMMERS: I'm not working off the current version.

CHAIRMAN GENSLER: Tell us what page.

MR. BERKOVITZ: It's page 144.

CHAIRMAN GENSLER: Tell us where on page 144.

MR. BERKOVITZ: It's at the bottom at "scope of designation" at the bottom of paragraph two.

CHAIRMAN GENSLER: Scope of designation?
MR. BERKOVITZ: Yes. It's 141 for the swap dealer. Excuse me.

COMMISSIONER SOMMERS: So that they will not be designated as a swap dealer in all classes if they apply for a limited designation?

MR. BERKOVITZ: The Commission shall make a determination upon such application so that if the Commission were to make the determination of limited designation, there would not be a time.

COMMISSIONER SOMMERS: Where they're considered a dealer for everything.

MR. BERKOVITZ: Correct.

CHAIRMAN GENSLER: If I can help because this is one place where I think Commissioner Sommers and I agree. If we get through all this and we have final rules, that somebody could some in and say I'm only a swap dealer for interest rate swaps, I do an occasional oil swap but we don't deal in that, or on the other hand, I'm a dealer in oil swaps but I occasionally do interest rate swaps, that we have the clear flexibility in statute to designate them a swap dealer in one
category and not the other and I'm hoping that we
maintain that flexibility and that the limited
dealer designation is something easy for us to
facilitate, easy because it's what Congress
directed us to do.

MR. BERKOVITZ: That's correct. We have
the statutory authority and the rule here if it
were adopted would provide for us to exercise that
authority upon application for registration and we
would so designate a person as a limited manner so
they would not be a swap dealer at all until they
received either the limited designation or the
full designation.

COMMISSIONER SOMMERS: I guess I would
suggest that's not clear. It says here that
they're subject to all regulatory requirements
applicable to dealers for all swaps into which
they enter.

MR. BERKOVITZ: That's correct, but if
they apply and said they would like a limited
designation, if they come in and say here's why we
think we should be limited, the rule says the
Commission shall determine whether indeed to do
so. So if they don't come in apply, the
presumption is they're for everything, but if they
come in apply and we agree, yes, indeed this
should be limited, then they will become a
limited-designation dealer.

COMMISSIONER SOMMERS: My next question
is with regard to the dealer/trader distinction
that the SEC will use that we have chosen not to
use. I do understand that there may be criteria
in that distinction that may not be applicable to
transactions that are not securities. However, is
it possible for us to add into our definition of a
dealer the concept that they have regular
clientele without adopting everything that we
don't believe is applicable? Again I would
suggest that if you don't have clients, you're
probably not a dealer.

MR. FAJFAR: I think that this is
something that we would be looking to address
during the comment period in the development of
the final rules. I'd like to make clear that
there was not a disagreement with the SEC about how the distinction applies, and we had a very useful working discussion with them about the different rules that we would apply and that they chose to apply some of their precedents because of the view of how the security-based swap market works. Again because of the diversity of the swap market and all the differences between the different aspects, we tried to start for this proposal as I think Chairman Dunn was saying with something that applies across the board in an even way to all parties in the swap market and they can look at it and identify the issues that arise for them. And if it were to turn out that as a means of defining who accommodates demand and who facilities entering into swaps, it may be that the role of clients or counterparties would be one of the factors that would be developed in the final rule. But it's difficult to say now because there are so many different ways that people enter into swaps and it could be different for some people.

COMMISSIONER SOMMERS: Let me make sure
I understood that. There could be people who
don't have clients who are still dealer? I guess
that's what I heard.

MR. FAJFAR: You'd have to think about
what the meaning of a regular client base is and
how they enter into swaps.

COMMISSIONER SOMMERS: What if you don't
have any clients ever?

MR. FAJFAR: I think we'd have to see
how the different factors would apply to the
different ways that people enter into swaps.

MR. BERKOVITZ: One of the factors is
whether they hold themselves out for a dealer,
whether they accommodate demand, so it may be a
factor in determining that whether they have a
regular clientele or not, but somebody may hold
themselves out and not have a regular base or make
a market without having a regular base of clients
so that it's a factor but necessarily
determinative either way.

COMMISSIONER SOMMERS: In this same vein
I have questions about how we define or how we
anticipate defining market maker because that is one of the prongs for definition of being a dealer and I'm not sure that it's real clear, and if you have anything you want to elaborate on about who exactly is a market maker and what do they have to satisfy in order to be considered in to be a market maker.

MR. FAJFAR: Through the process of developing the rule proposal and looking at the comment letters, obviously the preamble only says a little bit about what a market maker would be and that's what we were able to glean from the meetings we've had and the comments. We're certainly open to more input on that, but at this time from the information that we have it looks like the statutory definition of a market maker, the use of that word and what a market maker in swaps is, is what we have to present at this time and we're opening up to comment on that.

COMMISSIONER SOMMERS: I understand that, but do you anticipate putting more to that rule so that it's very clear?
MR. FAJFAR: I think that in general in these questions, we say right up front, it's on page 6 of this draft and there's a footnote addressing it, that we expect that the market for swaps is going to evolve and change including through the influence of the Dodd-Frank Act and we want to have the definitions in a way sufficiently flexible to address how the market changes and how people go about making a market in swaps for example. And we're specifically asking for comment on how the rules should be both flexible enough and determinative enough to give guidance on topics such as what it means to be a market marker for swaps.

COMMISSIONER SOMMERS: Thank you.

CHAIRMAN GENSLER: May I follow-up on Commissioner Sommers's question? It occurs to me that one of the categories that currently is not participating in any size in the swap market or high-frequency traders but as this moves into trading platforms and as Commissioner Chilton has raised a number of times, high-frequency traders,
if a high-frequency trader as we know them today
made bids and offers on a swap execution facility
and were active, did thousands of trades a year or
tens of thousands because they're high frequency
and they left resting orders and resting bids and
provided liquidity to the marketplace, would they
be under this definition of market makers and swap
dealers?

MR. BERKOVITZ: We haven't squarely
addressed that but I think that certainly could be
possible under the four-prong test. The
functional definition talks about making a market
or accommodating demand. Certainly making the
market or accommodating demand could be in a
number of ways. One would be by posting on the
website saying we're available for swaps, another
could be putting in a number of resting bids or
offers into the market.

CHAIRMAN GENSLER: Certainly the market
will evolve, but I think that it would be good to
hear from the public. It does strike me that
Congress said making markets. How many times have
I met with a high-frequency trader and said we're making markets to provide liquidity? They may not be doing it yet, but I think that it may well be that Congress decided this for us, but we'll get public comment. It sounds like we haven't squarely said that here but we'll get public comment and this may be related to Commissioner Sommers's question at least. Commissioner Chilton?

COMMISSIONER CHILTON: No, I'm good.

Thank you, sir.

CHAIRMAN GENSLER: Commissioner O'Malia?

COMMISSIONER O'MALIA: Thank you. In my little travels, one of the slides that they had at this PJM conference was they pulled up our commitment of trader's reports for a bunch of PJM trading contracts. I noticed this in a lot of these contracts because as end users they have our standard definitions of producer/merchant, swap dealer, manage money and then the producer/merchant plus swap combination to total it. In here I was struck by the high totals or
producer/merchant and relatively low totals of
swap dealer. In the PJM peak contract for example
there's 66-percent producer and 7-percent swap
dealer. And since I think people are relatively
comfortable with the way we bin these things and
we use a predominance test, could you explain to
me how this rulemaking might change the way these
people are categorized? Are we likely to see more
producer/merchants in a swap dealer category as a
result of this rulemaking?

MR. FAJFAR: First of all I'd say that
we met extensively with people involved in the
generation and transmission of electricity and one
of the things we learned on those meetings as we
know is that that market is very, very complex and
there is a lot of usage of what they call swaps
and other types of derivative instruments, even
managing next-day delivery or delivery this
afternoon and set this morning, so the approach
that we took in the release is to have a specific
paragraph pointing out that the electricity market
is very different. It's one of the things that I
was referring to in the variety of different markets where people use swaps. We are specifically interested in comment on how you apply a regulatory and statutory definition of swap dealer to a market where people are for example managing load on electricity lines. We couldn't predict right now how this definition will affect that market or how that market might evolve, but we are definitely very sensitive to that and want to hear specifically on that issue and continue to work with them.

COMMISSIONER O'MALIA: I appreciate your concern about that, but do you think it's going to change the way we bin these categories or are producers going to be in the swap dealer category in this market based on the extensive conversations you've had? I'll pulled up all the meetings we've had with a lot of energy companies and based on your conversations with them, is it going to be as cut and dry as our large-trader reports, our commitment of trader reports are?

MR. FAJFAR: I don't think it will be
cut and dry, no. At this point we haven't
developed a prediction where we could say what
we'll have.

COMMISSIONER O'MALIA: Subparagraph C of
the swap dealer definition excludes from the
definition "A person that enters into swaps for
such person's own accounts either individually or
in a fiduciary capacity but not as a regular
course of business. This language comes from the
1934 Exchange Act. And has not been subject to
extensive judicial interpretation and the SEC uses
a variety of factors to determine whether these
tentities are dealers. That being said, at least
one court in New York I believe has determined
that making money through buying and selling
securities is not conduct which in and of itself
makes someone a dealer. My question is what does
it mean for a person to enter into swaps as a
regular course of business?

MR. BERKOVITZ: We've interpreted the
third prong of the swap dealer test also in
conjunction with the exclusion from the definition
What the guidance in the preamble says is that in looking to whether they're entering into swaps as a regular course of business you have to look at whether they're doing the functions that we've talked about in connection with the other prongs, whether they're accommodating demand or whether they're entering into swaps in response to requests from other parties so that it really relates to the activities that are described in the other prongs. This is also an issue that we met with and discussed with a lot of the market participants and so we're hoping we're providing that clarity in the we've drafted it in this rule.

COMMISSIONER O'MALIA: But we're not falling back on some of these litigated terms so to speak in what is a regular course of business and the court found that buying and selling of securities does not make them a dealer necessarily. Would we use any of those definitions? You're going back to the activity I guess is what you're saying.
MR. BERKOVITZ: We're looking at it holistically in terms of the third prong with the exclusion in the Dodd-Frank and relating it to the other types of dealing activities that are described. That's the business that we're focused on.

COMMISSIONER O'MALIA: Maybe I missed it, but how is a market supposed to interpret the term accommodates demand? Do you want to explain that, Mark?

MR. FAJFAR: I think we can start from the premise that there is what you could call a demand for swaps. There's a need for swaps to hedge risk, there's a need for swaps to speculate. People need swaps. And when they want to enter into a swap they need to find a counterparty and it might be a one-off situation where they know a counterparty is available to them, but on the other hand they might go to a party who maybe goes so far as to advertise or is otherwise holding itself out as a dealer and is saying I'm ready to enter into swaps with people to take the other
side of that swap. When you do that you're accommodating demand, you're fulfilling the
demand, you're providing what the demand is asking for and we're starting with the premise that
that's a swap dealer.

COMMISSIONER O'MALIA: I think one of the other questions that was answered, not
answered but at least asked twice was this execution on a trading platform and if you accommodate demand by standing on the other side of that. I'm very interested to see how that's going to play out. It's clear in the statute that Congress intended for an entity with a de minimis amount of swap-dealing activity to be exempt from the swap dealer definition, but this exemption sets thresholds on the overall swap activity and not the swap dealing. Is that correct or is it the other way around?

MR. FAJFAR: No, it is for the dealing activity.

COMMISSIONER O'MALIA: For the dealing activity. That is definitely the subcategory of
the overall activity?

MR. FAJFAR: Right. The rule and the
preamble both limit to the person's dealing
activity.

COMMISSIONER O'MALIA: I know you
mentioned this or somebody mentioned this, but I'd
like a further explanation. Why doesn't the de
minimis exemption use a net notional calculation
or net uncollateralized risk similar to the MSP
rule?

MR. FAJFAR: First of all, with the
collateral if you said that you can enter into
swaps as long as they're collateralized, that
wouldn't measure your activity, that would be a
measure if anything would be a measure of risk so
that you could enter as the preamble says
virtually unlimited numbers of quantity of swaps
as long as you're collecting collateral. Then the
same principle, if it goes with a net basis
depending on how the netting applies, long versus
short, you could enter into swaps on one side of
the market and then bring down that total by
entering into swaps on the other side of the
market and again you could have extensive swap
activity and remain below a net level. That's why
we look at the gross level for the de minimis test
only.

COMMISSIONER O'MALIA: Thank you. How
do we treat voice brokers in this dealer
definition? Two commercials will bring together
on either a platform or through a telephone call,
are they dealers?

MR. FAJFAR: The first answer is that
the way the two people connect or they enter into
the swap, the manner that they do that, is not a
determinative factor in whether or not they're a
dealer. It's rather we're trying to look at their
overall functional rule in relation to their
counterparties and what role they're playing so
that in a simple case if you had two people who
deal with each other very rarely perhaps on the
basis of some other connection they have, then
that's not a dealing activity.

COMMISSIONER O'MALIA: To give the end
users the confidence that they will not get swept up in this, what page should they read in this
rulemaking to give them the confidence that there is a safe harbor for them?

MR. FAJFAR: In terms of safe harbors, that would have to be determined by the
Commission. We don't propose any safe harbors at this time. There is a paragraph where we say in conclusion what a swap dealer is in the discussion of the application of the test to swap dealers, and what we were trying to do is lay out a description of activities that would cause you to be a swap dealer with the presumption that you don't engage in those activities you're not a swap dealer.

CHAIRMAN GENSLER: What page is that?

MR. FAJFAR: It's on pages 12 to 14.

COMMISSIONER O'MALIA: Mark, I appreciate everything you'd done. This is not an easy definition. It's not the clearest statutory direction and I appreciate all the hard work you've put into this. I do think there is more
work to be done and obviously the comments

hopefully will provide a lot of assistance in

where we draw these lines and certainly hopefully

narrow this so that we actually capture the dealer

activities and protect end users. Thank you.

CHAIRMAN GENSLER: I think staff and I

thank the Commissioners. I think that this

proposal does strike the right balance, but again

it's a proposal that's trying as I think we're all

trying, that end users rather they're hedging or

even speculating, but that they're not swept into

to be swap dealers, but if you read the statutory

definition and add to it what the SEC and the CFTC

are jointly saying about accommodating demand and

Commissioner Sommers asked the question what does

that mean, but accommodating demand where somebody

can be coming to you and you say I'll fill their

order or something, facilitating the markets, that

that was helpful clarification for me

that the proposals might come forward. I also

think very importantly in the major swap

participant definition in what was called prong
one, prong is what I call the speculator's prong, but the noncommercial hedging, the rule does lay out that if you're hedging an asset, if you're hedging a liability, if you're hedging an input, if you're hedging a service, if you're hedging a future input or a future service, that's hedging or mitigating commercial risk as long as it's not "speculation," that the position itself, that the swap isn't, I think it's speculating or trading or vesting so that you can be hedging assets, liabilities, inputs, services or future inputs and services. Did I get the right list?

MR. FAJFAR: Yes.

CHAIRMAN GENSLER: Thanks. So it's not just relying on some narrow FASB definition even though we also said if you're relying on FASB, that's a commercial hedging. We didn't just rely on a narrow bona fide hedger definition even though we said that that would work too. So I think that we did it, but we'll see when we get comments. I do think some companies will end up being major swap participants, but Congress passed
the statute and I don't think we were supposed to
write something that nobody was a major swap
participant. We don't know for sure, but I should
ask how many people do we think might be major
swap participants under this rule and not major
securities-based swap participants, but major swap
participants?

MR. BERKOVITZ: We haven't done a
thorough survey on this, but we're estimating
based on the our interviews maybe a handful, at
most two handfuls, somewhere in the handful range.

CHAIRMAN GENSLER: And that from the
General Counsel of the CFTC.

MR. BERKOVITZ: I'm hedging, Mister
Chairman.

CHAIRMAN GENSLER: What school did you
go to? Mr. Stawik, do you want to call the roll?

MR. STAWIK: Commissioner O'Malia?

COMMISSIONER O'MALIA: No.

MR. STAWIK: Commissioner O'Malia, no.

Commissioner Chilton?

COMMISSIONER CHILTON: Aye.
MR. STAWIK: Commissioner Chilton, aye.

Commissioner Sommers?

COMMISSIONER SOMMERS: No.

MR. STAWIK: Commissioner Sommers, no.

Commissioner Dunn?

COMMISSIONER DUNN: Aye.

MR. STAWIK: Commissioner Dunn, aye.

Mister Chairman?

CHAIRMAN GENSLER: Aye.

MR. STAWIK: Mister Chairman, on this question the ayes are three, the no's are two.

CHAIRMAN GENSLER: I thank you, Mark and Dan and I thank the SEC again. We will not send this to the Federal Register until after Friday naturally depending on what the SEC does I guess. We'll have to see there. I'm supposed to though at this point ask for unanimous consent to allow staff to make technical corrections to the document voted on today prior to send it to the Federal Register.

COMMISSIONER DUNN: Mister Chairman, a question on that. If the SEC makes some minor
changes that is technical and clarifying in
nature, then it would allow the staff then to make
the decision of sending it forward?

    CHAIRMAN GENSLER: I think it would.

The unanimous consent suggestion is that there
would be changes. These are really meant to be
technical corrections. This is supposed to be
very limited.

    COMMISSIONER SOMMERS: On that subject,
does that mean that if the SEC does not adopt this
identical rule that we will have to pass it again?

    CHAIRMAN GENSLER: Dan, will you help
us? It's a joint rule.

    MR. BERKOVITZ: Both agencies have to
approve the identical text for it to be published
in the Federal Register, yes.

    CHAIRMAN GENSLER: That makes sense to
me so that we're not sending anything until after
Friday and subject to Friday. We're the upper
house, but we have to wait for the other house I
guess or we're the lower house. I don't know.

Whatever it is. Not hearing objection to the
unanimous consent, that's passed. I'll take a motion to adjourn. Is there any other Commission business? I'll take a motion to adjourn the meeting.

COMMISSIONER DUNN: So moved.
COMMISSIONER SOMMERS: Second.
CHAIRMAN GENSLER: All in favor?
(Chorus of ayes.)
CHAIRMAN GENSLER: We don't need a recorded vote on that do we? No. Thanks.
(Whereupon, at 1:40 p.m., the 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.

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