

UNITED STATES OF AMERICA
COMMODITY FUTURES TRADING COMMISSION

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

Washington, D.C.
Thursday, January 20, 2011

1 PARTICIPANTS:

2 Commission Members:

- 3 GARY GENSLER, Chairman
- 4 BART CHILTON, Commissioner
- 5 MICHAEL V. DUNN, Commissioner
- 6 JILL SOMMERS, Commissioner
- 7 SCOTT D. O'MALIA, Commissioner

8 Presenters:

8

- 9 DON HEITMAN
- 9 Division of Market Oversight
- 10
- 10 DAN BERKOVITZ
- 11 Office of the General Counsel
- 11
- 12 ANANDA RADHAKRISHNAN
- 12 Division of Clearing and Intermediary
- 13 Oversight
- 13
- 14 RICK SHILTS
- 14 Division of Market Oversight
- 15
- 15 WARD GRIFFIN
- 16 Office of General Counsel
- 17 JOHN LAWTON
- 17 Division of Clearing and Intermediary
- 18 Oversight

19

20 * * * * *

21

22

P R O C E E D I N G S

1

2

(9:34 a.m.)

3

CHAIRMAN GENSLER: Good morning. This meeting will come to order. This is a Public Meeting of the Commodity Futures Trading Commission to consider issuance of I think it's two proposed rules today under the Dodd- Frank Wall Street Reform and Consumer Protection Act. One is with regard to agricultural swaps and commodity options. Secondly, a topic with regard to swap trading relationship documentation and that documentation related to termination provisions implicated under Title II of the Dodd-Frank Act which is the resolution provisions under the Federal Deposit Insurance Corporation.

16

Before we hear from staff I'd like to thank Commissioners Mike Dunn, Jill Sommers and Bart Chilton who I think is on the phone today, and Scott O'Malia, for all their thoughtful work implementing the Dodd-Frank Act. I think this is our tenth public meeting on these matters. I'd like to also welcome the public, market

22

1 participants and member of the media today and
2 those listening on the live webcast. Our next
3 meeting will be January 26 and we'll schedule
4 additional meetings in February. I think today
5 we'll vote on that. On the 26th, we'll be taking
6 up two rules, one a joint rule with the SEC. I
7 think they're calling is Systemic Risk Reporting,
8 but broadly speaking it's related to data
9 collection from hedge funds and we have a rule
10 side-by-side because we have something called
11 Commodity Pool Operations we'll consider. I think
12 the agenda for next Wednesday's meeting was posted
13 yesterday on our website. Staff has worked very
14 hard on these rulemakings. They'll present their
15 recommendations and we look forward to receiving
16 public comment and I think the rules that's
17 putting out today there is as usual a 60-day
18 comment period. With that I'd like to turn to my
19 fellow Commissioners for any opening statements.
20 Commissioner Dunn?

21 COMMISSIONER DUNN: Thank you, Mr.
22 Chairman. I want to thank everyone for us today

1 for this important meeting regarding the
2 implementation of the Dodd-Frank Act. Today's
3 meeting will address proposed rules regarding
4 commodity options and agricultural swaps and swap
5 trading relationships, documentation relating to
6 the termination provisions implicated under Title

7 II of the Dodd-Frank. The proposed rule regarding
8 agricultural swaps is of particular importance to
9 me. In September the Commission published an ANPR
10 requesting comments regarding rules governing the
11 trading of swaps in agricultural commodities. The
12 comments received by the Commission were nearly
13 unanimous in their support for treating
14 agricultural swaps under the same regulatory
15 scheme as other categories of swaps and the rules
16 proposed today do just that.

17 Among other things, I found the comments
18 of the National Council for Farmers Cooperatives
19 particularly helpful and useful. The rules we
20 promulgate must not diminish the ability of farmer
21 cooperatives to provide their products with
22 risk-management tools -- their producers with

1 risk-management tools. I look forward to
2 receiving comments on today's proposed rule so
3 that we can be certain that the ultimate rule
4 regarding swaps in agricultural commodities
5 provides an appropriate framework for those
6 important transactions.

7 The proposed rule regarding
8 documentation relating to termination provisions
9 is also vitally important. The events of 2008
10 demonstrate that our financial regulatory
11 authorities lacked an orderly mechanism for
12 resolving the insolvencies of certain large
13 financial companies. Congress has sought to
14 address that issue through the Dodd-Frank Act. It
15 is important that swaps be included as part of the
16 orderly liquidation process envisioned by the Act
17 in the event the insolvency of a systemically
18 important swap dealer or major swap participant.
19 Today's proposed rule provides a mechanism for
20 including swaps in this orderly liquidation
21 process. I especially look forward to the
22 public's comment on this proposed rule

1 particularly in regard to whether there are any
2 unforeseen anticompetitive consequences that may
3 arise from this application and that is one of the
4 questions that we specifically ask.

5 I would like once again to thank staff
6 of the CFTC for all their hard work in regard to
7 these very important rules. They have been
8 working late at night and weekends in order to
9 implement Dodd-Frank while simultaneously working
10 to fulfill their existing duties under the
11 Commodity Exchange Act. They do this against the
12 backdrop of a budget crisis currently facing the
13 CFTC. We continue to operate under a continuing
14 resolution with funds insufficient in my opinion
15 to implement and enforce the Dodd-Frank Act. In
16 essence, we face an unfunded mandate, a situation
17 where the CFTC has been given enormous
18 responsibilities without the corresponding
19 increase in resources necessary to fulfill them.
20 My fear is that the only way to fulfill our duties
21 under the law with our current budget constraints
22 is to become a restrictive regulator rather than a

1 principle-based one. Such a change in our
2 approach to regulations may be detrimental to the
3 current swap industry. Our current staff knows
4 the existing futures industry. In order to
5 adequately understand the swaps industry at the
6 same level, we need more staff and resources.
7 Without adequate staff and resources, my fear is
8 that applicants from entities we are unfamiliar
9 with will take substantially longer than the
10 application from entities we are familiar with.
11 Once again, I would like to thank all of our staff
12 for the hard work they've put in on these rules.
13 Thank you.

14 CHAIRMAN GENSLER: Thank you,
15 Commissioner Dunn. Commissioner Sommers?

16 COMMISSIONER SOMMERS: Thank you, Mr.
17 Chairman. Good morning. I too would like to echo
18 my thanks to the staffs of the rulemaking teams
19 today, Don Heitman and his team for agricultural
20 swaps. They've had a couple of different
21 rulemakings with regard to these subjects and for
22 the second rulemaking Sarah Josephson and her team

1 being represented by Ananda and John Lawton today
2 in her absence. I've thanked Sarah before because
3 she has a big task in the issues that she has
4 under her, so thanks to her team for everything
5 they've done on these rules.

6 On the commodity options and
7 agricultural swaps proposal, I think that the team
8 did a find job working through the issues that
9 were set out in the Advanced Notice of Proposed
10 Rulemaking that the Commission voted on last fall.
11 I'm concerned though about how we will be handling
12 the agricultural co-ops, an issue that was raised
13 in the comments to the ANPR and by many
14 individuals and entities who have met with
15 Commissioners and our staffs over the last few
16 months. In this proposal the comments are
17 mentioned in the preamble but the issue is
18 disposed of as being outside the scope of this
19 rule. I have questions on that and whether the
20 issue is being considered by any other rulemaking
21 teams and intend to clarify that today.

22 On the second proposal, I'd like to

1 thank the team for separately addressing the issue
2 of the termination provision from the
3 documentation proposal relating to the orderly
4 liquidation regime under Title II of Dodd-Frank.
5 I know this was originally in one of last week's
6 proposal, but many of us on the Commission had

7 questions about it and needed more time to
8 consider the aspects of this part of the proposal
9 so that I want to say that it's presented now I
10 support it and appreciate the extra week that we
11 had to consider these issues. I look forward to
12 the presentations of the teams today. Thanks.

13 CHAIRMAN GENSLER: Thank you,
14 Commissioner Sommers. Commissioner Chilton I
15 believe is on the phone.

16 COMMISSIONER CHILTON: Yes, I'm here,
17 Mr. Chairman. I don't have any opening statement,
18 but thank all of the staff for their work on these
19 endeavors and I look forward to supporting them.
20 Thank you.

21 CHAIRMAN GENSLER: Commissioner O'Malia?

22 COMMISSIONER O'MALIA: Thank you, Mr.

1 Chairman. Today we're considering our tenth
2 series of proposed rulemakings under the
3 Dodd-Frank Act and like my fellow Commissioners
4 I'm grateful for the hard work of staff to produce
5 these. I appreciate Sarah Josephson and her team
6 and Don Heitman, Ryan Miller and their team for
7 their work on these rules.

8 Mr. Chairman, Tuesday the President put
9 forward an Executive Order entitled "Improving
10 Regulations and Regulatory Review." Right here in
11 The Wall Street Journal on Tuesday there's a great
12 story and a great editorial about the goals of
13 what we were trying to achieve. I agree with the
14 high standards that the President has directed
15 federal agencies to comply with in setting the new
16 rules. I imagine the President proposed these
17 rules specifically to provide some direction to
18 the implementation of the Dodd-Frank Act including
19 improving our process. Unfortunately, staff
20 informed me that this Executive Order does not
21 apply to independent commissions like the CFTC. I
22 believe we should make it Commission policy to

1 implement this Executive Order to all of our
2 rulemakings, while I'll be asking the teams what
3 steps they've taken to ensure that at the very
4 least we're complying with the spirit of the
5 Executive Order. I hope the Commission will adopt
6 the standards embodied in the Executive Order
7 entitled "Improving Regulation and Regulatory
8 Review" as its own policy.

9 With regard to ag swaps, I'm pleased
10 that had put before us a propose rule that treats
11 ag swaps and commodity options in the same manner
12 it treats all other swaps. With that said, I'm
13 concerned that this rulemaking does not provide
14 sufficient clarity to the question of whether
15 agricultural contracts are eligible for a forward
16 exclusion. Today's proposal declined to answer
17 whether cash contracts based on agricultural
18 commodities or swaps and subject to regulation or
19 if they are forwards and therefore excluded from
20 regulation. Also many commenters asked this
21 Commission to address whether agricultural
22 cooperatives would be exempt from the definition

1 of swap dealer which my colleagues and I agree
2 with. In order to fully comment on this issue I
3 encourage that all commenters submit their
4 comments on the swap dealer rulemaking and
5 potentially the end-user rulemaking. With so many
6 overlapping rulemakings, it's understandable that
7 there may be some confusion about how all of these
8 new requirements will work together, but at the
9 very least it should be clear as to who is subject
10 to the rules and regulations of this Act.

11 With regard to the swap documentation
12 requirements, I have some serious concerns about
13 this proposal as the proposal seeks to put swap
14 dealer or major swap participant on notice that in
15 the event of a counterparty default or when there
16 is even the danger of a default that the ability
17 of parties to exercise certain rights under swap
18 agreements may be stayed under Title II of the
19 Dodd-Frank Act or by the Federal Deposit Insurance
20 Act, FDIA. It may have been the goal of this
21 rulemaking to reduce uncertainty and promote
22 predictability, but unfortunately this rulemaking

1 results in more confusion and more questions in my
2 mind. While neither Title II nor FDIA provides a
3 specific role for the CFTC when the FDIC exercises
4 its authority to address defaulting financial
5 entities, we have been asked to use our authority
6 under Title VII regarding swap documentation to
7 prop up the flawed process in Title II and FDIA.
8 If those were clear, there would have been no need
9 for the CFTC to put forward the proposals before
10 us today which leads me to believe that the FDIC
11 apparently has some concerns regarding its own
12 authority. I would also like to have a better
13 understanding of the CFTC's role in overseeing our
14 registrants under this new FDIC-led resolution
15 process.

16 With the numerous regulations that we
17 are required to propose under Dodd-Frank, I don't
18 believe it's in our best interests to adopt
19 unnecessary requirements under the guise of Title
20 VII authority that clearly exceed the broad
21 authorities that Congress decided to provide the
22 FDIC in Title II or FDIA. I believe this rule

1 would benefit from heeding the direction of the
2 President's Executive Order, specifically Section
3 2(c) entitled "Public Participation." This
4 paragraph directs agencies to consult with the
5 affected individuals before issuing a Notice of
6 Proposed Rulemaking. This vast new resolution
7 authority could have significant impact on
8 bilateral deals which I don't believe have been
9 properly considered.

10 In closing, I'd like to recognize staff
11 for its around-the-clock work to put forward a
12 staggering number of rulemaking proposals and I'm
13 grateful for their efforts. It is my hope that as
14 the Commission works toward trying to understand
15 the regulations and put them in place by the
16 deadlines included in the Dodd-Frank Act that we
17 don't put quantity before quality. To the end,
18 let's commit to doing our best to make sure that
19 the agency is complying with the spirit and the
20 letter of the law of the recently amended
21 Executive Order on rulemaking standards.

22 CHAIRMAN GENSLER: Thank you,

1 Commissioner O'Malia. I think with that I'm going
2 to turn it over to Rick and Don.

3 MR. HEITMAN: Mr. Chairman,
4 Commissioners, thank you. As is customary, I
5 would like to start out by thanking my team.
6 Unfortunately, however, we made an agreement at
7 the outset of this process that they would do all
8 the work and I would take all the credit.

9 Section 723(c)(3) of the Dodd-Frank Act
10 provides that swaps in an agricultural commodity

11 are prohibited unless permitted under a rule,
12 regulation or order adopted pursuant to Section
13 4(c) of the Act, the Commission's general
14 exemptive authority. Section 4(c) includes a few
15 more regulatory bells and whistles than an
16 ordinary and comment rulemaking, for example, a
17 public-interest test. This reflects the fact that
18 for reasons both historical and practical the Act
19 has always devoted special attention to the
20 agricultural commodities. Trading in those
21 commodities indeed laid the foundation of modern
22 futures markets.

1 This document includes a lot of pages
2 but not a lot of issues. The issues really boil
3 down to one primary question which the Commission
4 raised in the Advanced Notice of Proposed
5 Rulemaking that Commissioner Dunn mentioned last
6 September. The question in that rulemaking is
7 should swaps in agricultural commodities be
8 treated any differently than swaps in any other
9 commodities? With the exception of a couple of
10 academics, the commenters including general farm
11 organizations, commodity organizations,

12 agribusiness firms, the FIA, ISDA, the CME, the
13 commenters overwhelmingly favored treating ag
14 swaps the same as swaps in other commodities.

15 I think it was probably put best in a
16 joint letter from a number of agricultural
17 organizations who said, "We urge the Commission to
18 treat swaps for all commodities harmoniously. We
19 believe the comprehensive regulation should not be
20 based on distinction among commodity types. The
21 generally applicable protections under the
22 Dodd-Frank Act such as reporting mandatory

1 clearing, mandatory trading of standardized swaps,
2 minimum capital requirements and the CFTC's
3 authority to impose position limits, determine
4 which swaps are subject to clearing and trading
5 and to exercise emergency powers, will protect ag
6 swaps from fraud and manipulation."

7 Consistent with both the commenters'
8 recommendations and the staff's view of sound
9 public policy, these proposed rules would amend
10 the current rules governing the trading of
11 agricultural swaps to provide that, one, swaps in
12 agricultural commodities and, two, all commodity
13 options including options on both agricultural and
14 nonagricultural commodities other than options on
15 futures may transact subject to the same rules as
16 all other swaps.

17 The amendments included in this package
18 would affect the following regulatory sections in
19 order of importance, and Part 35 is the most
20 important clearly. That's the current ag swaps
21 rules. Current Part 35 is inconsistent with the
22 objectives of Dodd-Frank. For example, current

1 Part 35 prohibits clearing of ag swaps, whereas
2 Dodd-Frank strongly favors clearing of swaps where
3 feasible. The proposed rules would repeal current
4 Part 35 and replace it with a provision that
5 essentially says ag swaps are to be regulated the
6 same as other swaps, proceed directly to the
7 general swaps rules, do not pass go, do not
8 collect \$200.

9 Part 32 if the general authority
10 applicable to off-exchange options including
11 off-exchange option on agricultural commodities.
12 Because all commodity options other than options
13 on futures are now defined as swaps under
14 Dodd-Frank, the proposed rules would confirm that
15 all agricultural options, again other than options
16 on futures, would be regulated the same as every
17 other swap.

18 Two provisions of Part 32 deal
19 explicitly with options on agricultural
20 commodities. Section 32.13 which governs
21 agricultural trade options in the enumerated
22 commodities is for the most part moot and would be

1 repealed since there are no registrants as
2 agricultural trade option merchants. The only
3 provision of Section 32.13 that currently has any
4 effect is the exemptive provision in 32.13(g)
5 which requires the buyer to be a commercial and
6 both parties to the ag trade option to have a \$10
7 million net worth. The exemption would
8 effectively be replaced by the less-stringent
9 requirement under the general swaps rules that
10 both parties to the ag trade option must be
11 eligible contract participants.

12 Under the Act's ECP definition, and
13 there are obviously a number of different
14 categories of ECPs, but the one most likely to be
15 used by agricultural interests provides that a
16 commercial entity that is hedging needs only a
17 million-dollar net work so that that give a
18 greater number of agricultural interests access to
19 ag trade options. And Rule 33.13 which is the
20 registration provision for Adams would likewise be
21 repealed as moot.

22 Section 32.4, the other part of 32 that

1 directly addresses agricultural commodities,
2 governs trade options in other physical
3 commodities including both the non- enumerated
4 agricultural, such as coffee, sugar and cocoa, as
5 well as other physical commodities such as energy
6 and metals. And 32.4 would also be amended to
7 clarify that such options would be regulated the
8 same as other swaps, thus only ECPs could
9 participate in such transactions.

10 Parts 32.8 and 32.9 dealing with options
11 fraud and misrepresentation would be retained to
12 apply to swaps that are options. The rest of Part
13 32 would include a scope provision in 32.1 and a
14 grandfather provision in 32.10 for preexisting
15 transactions. Other than those two, the rest of
16 Part 32 would be repealed and the repeal
17 provisions largely deal with off-exchange retail
18 options and much of that has been obsolete for
19 quite some time actually.

20 Then the third section that we're
21 amending is Part 33. Current Part 33 covers both
22 exchange-traded options on futures which are

1 excluded from the Dodd-Frank swaps definition and
2 exchange-traded options on physicals which are
3 swaps under Dodd-Frank and are to be regulated as
4 such so that the amendments to Part 33 would
5 remove references to exchange-traded options on
6 physicals from Part 33 making it clear that such
7 transactions are to be regulated like other swaps.
8 That's an overview and I'd be happy to answer any
9 questions.

10 CHAIRMAN GENSLER: With that I'd
11 entertain a motion to accept the staff's
12 recommendation on ag swaps and commodity options.

13 COMMISSIONER DUNN: So moved.

14 COMMISSIONER SOMMERS: Second.

15 CHAIRMAN GENSLER: Thank you. First I
16 want to thank the whole team but particularly Don
17 who was kind enough in the fall when he was
18 thinking about maybe retiring that he said, no,
19 and help us. I know it's several days a week
20 rather than full time, that you'd help get us
21 through all of this and it shows in the work.
22 It's just terrific work so that I wanted to extend

1 my personal thanks to you, Don.

2 I wanted to mention something that came
3 up across all of the Commissioners' statements
4 about agricultural markets. One of the things
5 that occurs is there are many cash-and-forward
6 contracts or forward arrangements that are entered
7 into this marketplace that are not regulated and
8 haven't been regulated since the 1930s nor do we
9 have the intention to regulate the
10 cash-and-forward markets. We're going to
11 specifically address that in the product
12 definition rule that we've much waited for, and it
13 is has also come to our attention that sometimes
14 participant enter into forward arrangements for
15 the delivery of milk products, dairy products and
16 other agricultural products through an ISDA
17 agreement, through a derivatives agreement, and
18 we're going to seek to clarify and put out to
19 public comment that even if you're using a
20 derivative contract if it still by its nature is a
21 forward delivery, that's not to be regulated as a
22 derivative and that seems to be consistent with

1 the intent of Congress, but we're still working
2 through all of that.

3 In terms of the issue with regard to
4 farm co-ops which all of us are pretty familiar
5 with, we really look forward to public comment
6 both to the definition rule that was put out, the
7 swap dealer definition rule where we had a whole
8 section of questions on that, but I think we'll
9 end up with another set of questions again in the
10 product definition rule. I know that in our
11 private conversations I've expressed that we
12 really want to get public comments and get this
13 right to ensure that producers, handlers,
14 merchants and processors all have the ability to
15 hedge using these products which I think this rule
16 today helps them along that path, but I agree with
17 the Commissioners that we want to get this thing
18 aligned with I would say the three rules. The
19 end-user rule I think is already proposed and is
20 out there and it's very clear that these
21 producers, handlers and merchants are as Congress
22 intended exempt commercial end-users, but we'll

1 look forward to public comment if we somehow
2 didn't get that right.

3 So I just wanted to comment about the
4 comments up here. I don't think I have question,
5 though, for you, Don. I'm going to just pass is
6 on to Commissioner Dunn.

7 COMMISSIONER DUNN: Thank you, Mr.
8 Chairman. We're going to make an Aggie out of you
9 yet.

10 CHAIRMAN GENSLER: I'm trying.

11 COMMISSIONER DUNN: You brought up the
12 importance of the product definition rule which I
13 think is incumbent upon participant who are
14 looking at this rule to look at this not in a
15 vacuum but holistically. Certainly we try to do
16 that in the Commission and staff tries to do that
17 as we're doing these things of what comes first
18 here. It becomes sometimes very, very cloudy but
19 it is important in that product definition rule
20 that folks pay attention to that and have their
21 comments in on it so that we can get the right
22 nomenclature that we need.

1 I'd like to take off where Commissioner
2 O'Malia has left off on this review of regulations
3 and how we go about it. I hate to spring this on
4 our General Counsel, but I have talked to him
5 about this in the past. Even though we are exempt
6 from Executive Orders as independent agencies,
7 there are other specific laws such as the cost-
8 benefit analysis requirement, the Paperwork
9 Reduction Act and regulatory flexibility analysis
10 that we are required by law specifically to
11 address. Is that not true?

12 MR. BERKOVITZ: That is correct,
13 Commissioner. Under the Commodity Exchange Act
14 and other statutes you have mentioned we have
15 specific regulatory and statutory obligations.

16 COMMISSIONER DUNN: As I read over the
17 Executive Order it impressed me that what we do
18 already by law encompasses a large part of that,
19 but then it really is incumbent upon us as
20 independent Commissioners at an independent agency
21 to embrace those same issues. I have as we've
22 gone on with this process said many times that I

1 think at some point in time we have got to do an
2 analysis of the efficacy of what we're proposing
3 here be it 12 months or 18 months down the line.

4 CHAIRMAN GENSLER: I concur with that,
5 and I would say even further to Commissioner
6 O'Malia's point, it's only 2 days since the
7 Executive Order and the opinion piece so that we
8 haven't had an opportunity to get all together on
9 this. I do believe that the spirit of what was
10 there is something that this agency does embrace
11 and should continue to embrace. One key piece of
12 it is the review of all of our rules. We're
13 unique in a sense because Dodd- Frank just passed,
14 but we're going to have a series of what we call
15 conforming rules that look at the whole rule book
16 and ask where should be changes in it because of
17 the Dodd- Frank Act but also consistent with the
18 spirit of the President's Executive Order looking
19 through the whole rule book. In February,
20 hopefully, we'll start on that with regard to
21 intermediaries so that Part 1, Part 3 and Part 4
22 of our rule book which largely relates to these

1 intermediaries we'll do. I've had conversations
2 with the heads of the divisions already and have
3 said we need to go through the entire rule book
4 systematically. Today Don told me I think we're
5 repealing 68 pages of rule text.

6 MR. HEITMAN: We're repealing about 75
7 percent of Part 35 and 80 percent-plus of Part 32
8 and if you go with 250 words a page, it's like 40
9 pages-plus.

10 CHAIRMAN GENSLER: About 40 pages?

11 MR. HEITMAN: No, plus another 28 pages
12 of forms that are no longer necessary like the ag
13 trade option merchant forms. Those are in the
14 rule book, too.

15 CHAIRMAN GENSLER: I'm sorry. I
16 hijacked part of Commissioner Dunn's point so that
17 I want to hand it back, but obviously we're adding
18 pages, too. I think staff was already aware
19 before the President's Executive Order but I've
20 told them again that we need to go through the
21 entire rule book given the new law and see what
22 needs to be revised, changed, or is in the

1 circumstance like today, actually repealed.

2 COMMISSIONER DUNN: I'm thinking out
3 loud here, Mr. Chairman, but it might be well for
4 us to keep a running tab somewhere on our website
5 of how many pages we've added.

6 CHAIRMAN GENSLER: Definitely added
7 because we had a new law that says that we're
8 supposed to add, yes.

9 COMMISSIONER DUNN: Mr. Chairman, when I
10 served as under secretary for marketing and
11 regulatory programs I had the responsibility of
12 implementing the Regulatory Reduction Act which
13 required all the agencies to take a look at their
14 regulations as to which ones were superfluous and
15 needed to be taken out and which ones had been
16 done forever. To your credit, Mr. Chairman,
17 you've had these Clean Plate initiatives where
18 you've asked staff to go through and take a look
19 at no action letters, guidance, et cetera, some
20 that had been around for decades and update those.
21 What struck me when I was undertaking the
22 Regulatory Reduction Act and what it took for you

1 to do the Clean Plate initiative is that this
2 takes a great deal of time and effort by staff to
3 do that.

4 I hate to be harping on this all the
5 time, but the lack of sufficient funding is going
6 to have a great deal of an impact on our ability
7 to put out regulations that will allow the
8 industry to be as innovative and as quick to act
9 as they have in the past. We have to, I'm afraid,
10 by necessity, move from the principle-based
11 regulatory regime not only to one that's a
12 prescriptive regime, but, as I'm saying now, a
13 restrictive regime. And our ability to do the
14 types of things that I feel were captured in that
15 Executive Order, to a large extent, are going to
16 be based on what human and fiscal resources we
17 have to do that.

18 As you may not know or you may know, it
19 is incumbent upon the Chairman to run the
20 day-to-day operations of the Commission. The
21 other four of us simply make policy to make his
22 life miserable. It's a tough, tough job to do and

1 the policies that I think we want to do in this
2 particular Commission having worked with all four
3 members for some time now I think are in line with
4 what the President has asked for in that Executive
5 Order, it's in line with the principle-based
6 regulatory regime, but the reality is we may not
7 have the luxury to be able to do that.

8 CHAIRMAN GENSLER: Thanks, Commissioner
9 Dunn. You're getting off, Don. Commissioner
10 Sommers?

11 COMMISSIONER SOMMERS: You really are
12 because I'm just going to make a comment.

13 I want to say thank you to the Chairman
14 for clarifying and confirming that our concerns
15 about both ag co-ops being captured under the
16 definition as a dealer as well as the contracts
17 being forwards will be clarified in other
18 rulemakings, so I appreciate confirming that.
19 Thanks.

20 CHAIRMAN GENSLER: Thank you,
21 Commissioner Sommers, and thank you for working
22 together because I think we all want to get this

1 one right. Commissioner Chilton?

2 COMMISSIONER CHILTON: Thanks, Mr.
3 Chairman. To chime in briefly on the reg thing,
4 it is part of our standard operating procedure to
5 find the least-burdensome path so I don't think
6 that that changes. But the most paramount thing
7 is to make sure that the Chairman talks about a
8 lot is that we're doing what's in the public
9 interest and what's in consumers' interests. This
10 is a balancing act we have all the time and I'm
11 sure we'll continue to strive to reach that
12 balance and do the right thing. I don't have any
13 questions. Staff has done a good job on it and I
14 plan to support it. Thank you.

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

17 COMMISSIONER O'MALIA: I just have one
18 question, but before I get to that let me
19 reiterate my appreciation for your intention to
20 clarify both the products definition and the swap
21 dealer definition how these products and
22 participants will be treated. It's very

1 important.

2 One question, Don, I have for you is the
3 ECP issue. You touched on it briefly but I want
4 to make sure I'm clear on this. For those who
5 want to trade swaps, there is the ECP requirement.

6 MR. HEITMAN: Right.

7 COMMISSIONER O'MALIA: It comes with a
8 \$10 million or a million-dollar litmus test to
9 qualify. I want to ask you if you're confident
10 that these litmus tests, these requirements, will
11 not prevent small farmers who are not ECPs from
12 continuing to trade OTC swaps and options to hedge
13 their exposure to price volatility.

14 MR. HEITMAN: Small farmers can't use
15 agricultural swaps now because they come with a
16 \$10 million net worth requirement on both sides so
17 that the proposed rules before you would make it
18 easier for smaller farmers to use swaps but
19 clearly they wouldn't necessarily apply to
20 everybody. There are some who won't be able to
21 meet the million-dollar net worth test, and we
22 specifically have questions in the proposal to ask

1 are there people who would need to use these
2 hedging mechanisms who couldn't and should we do
3 something differently to address the interests of
4 those smaller producers.

5 COMMISSIONER O'MALIA: I assume that
6 small guys usually go to their co-op and if we
7 make the co-ops a dealer than we've made the
8 transaction price on this a lot more expensive I
9 would assume.

10 MR. HEITMAN: I would assume so. That
11 is beyond the scope of our rulemaking but we got a
12 number of comments from co-ops, from the Dairy
13 Farmers of America and from the National Council
14 of Farmer Co-ops and we're keenly aware of this
15 problem. The ag swaps team has had half a dozen
16 meetings with the definitions team and we have
17 shared our comments that we received that were
18 relevant to their issues so that I'm confident
19 that they're fully aware of this and that they
20 will address this in their rulemaking. When we
21 looked at it, even assuming that you could do
22 something in these rules to say that somehow an

1 agricultural swap when it's offered by a co-op is
2 some kind of a different instrument and give it
3 some kind of a different treatment, it still
4 wouldn't solve all the co-ops' problems because
5 they do swaps with their members for propane and
6 diesel fuel and so forth that clearly are not
7 agricultural commodities and there's nothing we
8 could do about that. So the appropriate way to
9 address this is through the product definitions
10 and the participant definitions and we've as I say
11 been cooperating with the definitions in making
12 sure that those issues are addressed.

13 CHAIRMAN GENSLER: If I could clarify,
14 on the ECP definition, producers, merchants,
15 processors, anyone in the agricultural space,
16 actually is moving down from just a \$10 million --

17 MR. HEITMAN: There's \$10 million on
18 both sides to ECP on both sides, and as you know,
19 there are a lot of different categories of ECPs.

20 CHAIRMAN GENSLER: So that it's a little
21 bit --

22 MR. HEITMAN: It lowers the bar right

1 now, yes.

2 CHAIRMAN GENSLER: I see. With that,
3 Mr. Stawick, if you want to call the roll.

4 MR. STAWICK: Commissioner O'Malia?

5 COMMISSIONER O'MALIA: Aye.

6 MR. STAWICK: Commissioner O'Malia, aye.
7 Commissioner Chilton? Commissioner Chilton?

8 COMMISSIONER CHILTON: Aye, Dave. I'm
9 sorry.

10 MR. STAWICK: Commissioner Chilton, aye.
11 Commissioner Sommers?

12 COMMISSIONER SOMMERS: Aye.

13 MR. STAWICK: Commissioner Sommers, aye.
14 Commissioner Dunn?

15 COMMISSIONER DUNN: Aye.

16 MR. STAWICK: Commissioner Dunn, aye.
17 Mr. Chairman?

18 CHAIRMAN GENSLER: Aye.

19 MR. STAWICK: Mr. Chairman, aye. Mr.
20 Chairman, on this question the ayes are five, the
21 nays are zero.

22 CHAIRMAN GENSLER: Thank you. With the

1 vote appearing unanimous, we'll be sending it to
2 the Federal Register and also putting it on our
3 website when we send it to the Federal Register.
4 I thank the team for coming back yet for another
5 Business Conduct Standard. I guess we call it a
6 Business Conduct Standard. This is on
7 documentation, and specifically the documentation
8 that swap dealers including a provision related to
9 the orderly liquidation of the swap dealer itself
10 if a swap dealer ends up being a covered financial
11 institution and has to be for some reason
12 liquidated. Ananda, John and team?

13 MR. RADHAKRISHNAN: Thank you, Mr.
14 Chairman. The proposed rule is promulgated under
15 Section 4s(i) of the CEA which relates to the
16 timely and accurate confirmation, processing,
17 netting, documentation and valuation of all swaps.
18 What it seeks to do is to require swap dealers and
19 MSPs to include in their documentation with each
20 of their counterparties a provision that confirms
21 both parties' understanding of how the new orderly
22 liquidation authority under Title II of the

1 Dodd-Frank and the current Federal Deposit
2 Insurance Act may affect their portfolios of
3 uncleared over-the-counter bilateral swaps.

4 As part of this resolution authority
5 both under Title II and under the FDIA for insured
6 depository institutions, the FDIC is given a
7 one-business-day period in which to transfer swaps
8 and certain other contracts to a solvent
9 third-party financial institution, and for this
10 transfer authority to be effective, a one-day stay
11 on the ability of the counterparties to terminate,
12 liquidate or net is necessary. The proposed
13 regulation will ensure that both counterparties,
14 not just the swap dealer but the other
15 counterparty who may not be a swap dealer,
16 understand that under specified circumstances if
17 one of the counterparties defaults, the
18 non-defaulting party's positions could be
19 transferred to a new solvent counterparty by the
20 FDIC and the non-default party may not be able to
21 terminate its claims against the defaulting
22 counterparty until 5:00 p.m. Eastern Time on the

1 business day following the day the FDIC is
2 appointed receiver.

3 This stay would facilitate the FDIC's
4 orderly liquidation of the defaulting
5 counterparty's swap positions. Staff believes it
6 is critical because it will allow the FDIC the
7 requisite time to transfer the defaulter's
8 open-swap positions, claims and collateral with
9 the objective of avoiding widespread market
10 disruption in the form of fire sales and contagion
11 risk. The proposed regulations would also require
12 that each party in the documentation consent to
13 the transfer of swaps by the FDIC to a performing
14 third party.

15 This provision can only be invoked if
16 one of the parties to the documentation or to the
17 swap is deemed to be a covered financial company
18 under Title II of Dodd-Frank or is an insured
19 depository institution as defined by the FDIA and
20 the FDIC is appointed as receiver. So for our
21 purposes, a swap dealer or MSP that is registered
22 with the Commission could fall under Title II's

1 definition of covered financial company only upon
2 a specific determination by the Secretary of the
3 Treasury after consultation with the President of
4 the United States.

5 The inclusion of this type of provision
6 in the documentation for swap trading
7 relationships used by swap dealers and MSPs could
8 promote legal certainty for market participants
9 and lower litigation risk during times of
10 significant market stress. I must mention that we
11 had very heavy consultations with the FDIC on this
12 particular matter and we believe that what this
13 proposal making would do is clarify and state what
14 the state of the law is. Thank you.

15 CHAIRMAN GENSLER: Thank you, Ananda and
16 team. I'll entertain a motion to accept the
17 recommendation of staff on this documentation
18 rule.

19 COMMISSIONER DUNN: So moved.

20 COMMISSIONER SOMMERS: Second.

21 CHAIRMAN GENSLER: Let me start. I
22 support this proposed rulemaking and I'll have a

1 statement for the record. I think what it does is
2 establish through documentation a notice in
3 essence that counterparties know that the law,
4 this law, this is what Congress debated, has a
5 provision in Title II that says that there is some
6 circumstance that that swap dealer in a bilateral
7 swap might be in a resolution process with the
8 FDIC and that swap dealer if it's in a resolution
9 process with the FDIC, Congress decided, again
10 Congress made the decision, I happen to think it
11 was a good decision but nonetheless Congress made
12 the decision that these things can be resolved,
13 that we Americans will be less subject to the risk
14 of too big to fail, that the FDIC could go in and
15 take over these large institutions. This rule is
16 not about what Congress did. This rule is just a
17 documentation rule saying all the counterparties
18 need to be on notice that the Dodd-Frank Act did
19 this and the related rules under FDIC. Is that
20 not correct?

21 MR. RADHAKRISHNAN: That is correct,
22 sir.

1 CHAIRMAN GENSLER: To me I think this is
2 a good thing because it puts everybody on notice
3 that if you're dealing with one of these swap
4 dealers, the swap dealer may at some point in time
5 be in this process where upon its liquidation, the
6 liquidation of the swap dealer, you might have to
7 wait one day until the FDIC either transfers the
8 whole book of business or then you can liquidate
9 net out the transaction. Is that correct?

10 MR. RADHAKRISHNAN: That's correct.

11 CHAIRMAN GENSLER: I think it lowers
12 litigation risk, I guess you would say in a sense
13 lowers overall risk, in the heart of a crisis as
14 to what happens in the midst of that crisis. I
15 remember from my own experience a dozen years ago
16 or so visiting Long-Term Capital Management and
17 wondering what would happen to their \$1.3 trillion
18 swap book. There was no resolution authority and
19 the Secretary asked me when I called him that
20 Sunday night after visiting Greenwich,
21 Connecticut, and he asked, What would happen? I
22 said, I don't really know, sir. I said, even

1 worse, it's under Cayman Island law and no one
2 knew at that moment what the swap book under
3 Cayman Island law would do. So I think what we're
4 doing here is saying it's under U.S. law because
5 Congress passed it and we're saying, by the way,
6 U.S. law says there's a one-day stay and you
7 should know that and be aware of it.

8 MR. RADHAKRISHNAN: That's right.

9 CHAIRMAN GENSLER: Thanks.

10 COMMISSIONER DUNN: Thank you, Mr.
11 Chairman. I think as you watch lawmakers go
12 through and make laws in the Dodd-Frank it was
13 carried on and on and on, but short of having us
14 set up an insurance package here similar to FDIC
15 or giving us authority to print off \$100 bills in
16 the basement, resolution has to take place when
17 this fails and this to me appears a logical way to
18 do it in providing that notification of the folks
19 who are under our law what will happen to them.

20 Ananda, how does this orderly
21 liquidation process compare to the liquidation
22 process of other nations?

1 MR. RADHAKRISHNAN: I'm not sure. I'll
2 check with the Office of International Affairs.
3 I'm not sure if they have a similar process in the
4 banking laws of other nations so that I'll have to
5 find out and get back to you on that.

6 COMMISSIONER DUNN: One of the things
7 that we have in this proposal is a definition even
8 though it's not under the Definition Rule and that
9 is the determination that swap dealer or major
10 swap participants under the Regulatory Flexibility
11 Act have a designation here similar to what we
12 have with DCMs. Could you elaborate a bit on
13 that?

14 MR. RADHAKRISHNAN: You're talking about
15 the RFA part of the rule?

16 COMMISSIONER DUNN: Yes, and the fact
17 that they are not entities engaged in a de minimis
18 level.

19 MR. RADHAKRISHNAN: I'll get
20 confirmation from our general counsel, but I think
21 the advice we got from our general counsel was
22 that previously the Commission had determined that

1 large traders are not small entities for RFA
2 purposes and I think the advice we were given is
3 that major swap participants and swap dealers are
4 not considered small entities for the purposes of
5 the Regulatory Flexibility Act, but I'll defer to
6 Dan as to what happens if you are.

7 COMMISSIONER DUNN: Good guess. Ananda,
8 in my opening statement I stated that I had a fear
9 that without adequate staff and resources that
10 applications from entities that we are unfamiliar
11 with will perhaps take substantially longer than
12 applicants with entities. Is that an unfounded
13 fear or do you share that concern?

14 MR. RADHAKRISHNAN: That is not an
15 unfounded fear, Commissioner Dunn. In the context
16 of swap dealers and MSPs, the registration process
17 will be a sort of demonstration of compliance with
18 the regulations and I think what we're proposing
19 to do is have the NFA do it for us. But what I do
20 fear is that if we don't get the resources, the
21 Commission will have a lot of registrants and we
22 will not know who they are meaning we will not

1 have any familiarity with these registrants. As I
2 mentioned to you privately, we're going to get
3 registrants certainly that DCIO will be
4 responsible for that we've never dealt with
5 before. We're familiar with FCMs, we're familiar
6 with DCMs, DCOs, CPOs, because the Commission has
7 been regulating them for a long time. This is the
8 first time we will be regulating swap dealers,
9 major swap participants, SDRs and so on and while
10 the concept of a dealer is not new, the concept of
11 a dealer in our space is new so that that is what
12 I'm worried about, that if we don't have the
13 resources and we're not able to examine them, we
14 will have a whole set of registrants that we have
15 no knowledge about and I don't think that's
16 satisfactory.

17 COMMISSIONER DUNN: Thank you.

18 CHAIRMAN GENSLER: Thank you,
19 Commissioner Dunn. I want to clarify. These are
20 just on the bilateral or non-cleared swaps. Is
21 that right?

22 MR. RADHAKRISHNAN: Correct.

1 CHAIRMAN GENSLER: Commissioner Sommers?

2 COMMISSIONER SOMMERS: Thank you, Mr.

3 Chairman. In the proposal there's a provision

4 that says that swaps appear to be subject to the

5 orderly liquidation regime under either Title II

6 or FDIA since the liquidation regime applies to

7 qualified financial contracts including swap

8 agreements, securities contracts, commodities

9 contracts and any other contract determined by the

10 FDIC to be a qualified financial contract. It is

11 also recognized that there could be a potential

12 for regulatory arbitrage if certain swaps are not

13 subject to this regulatory regime. Is the

14 proposal means to ensure that all swaps are

15 subject to the Commission's jurisdiction under

16 Title VII that they will meet the definition of

17 qualified financial contract and be subject to

18 this orderly liquidation regime?

19 MR. RADHAKRISHNAN: I don't think that's

20 the intention of this rulemaking but that's

21 certainly a question. The issue is this only

22 applies if the entity is either a covered

1 financial company or the President and the
2 Secretary that determination or it is what's
3 called an IDI, a back fall for want of a better
4 word. So if that's the case then I think it would
5 be not a good outcome if only some of their swaps
6 and not all of their swaps are covered and I think
7 that's what we're trying to get to. I think that
8 if you look at the definition of a qualified
9 financial contract, I think what staff believes is
10 that all of their swaps will be covered.

11 COMMISSIONER SOMMERS: How are we going
12 to make sure that all of those swaps are covered?

13 MR. RADHAKRISHNAN: The FDIC has to make
14 that determination. Is that correct?

15 MR. GRIFFIN: Right. The intent behind
16 this rule isn't to expound upon what should or not
17 be covered within Title II or within the Federal
18 Deposit Insurance Act. This is merely reflective
19 of what is already in existence there. To the
20 extent that there is any potential for regulatory
21 arbitrage or disconnect between our definition of
22 swap and the definition of swap agreement within

1 the context of Title II and FDIA, that would
2 probably be something that would be better suited
3 for the Definitions Team. But we do ask a
4 question in the proposal or in the preamble I
5 should say which asks, Are there any swaps as
6 defined under Title VII of the Dodd-Frank Act that
7 should not be considered to be qualified financial
8 contracts as that term is defined in Title II and
9 FDIA? Again trying to get at exactly that
10 question as to whether there is any disconnect
11 between the swap agreement definition under Title
12 II and FDIA and the swap definition under Title
13 VII.

14 COMMISSIONER SOMMERS: To confirm, we
15 will continue to work on this issue with other
16 teams and with the FDIC to make sure that there is
17 no regulatory arbitrage there.

18 MR. RADHAKRISHNAN: Yes.

19 COMMISSIONER SOMMERS: One additional
20 question. It is also noted that the inclusion of
21 the termination provision in swap-trading
22 relationship documentation could help bring about

1 equivalence in the treatment of swaps globally.

2 Could you explain what is meant by that?

3 MR. GRIFFIN: Again, we're not in any
4 way through this rulemaking attempting to -- the
5 Commission does not have rule-writing authority
6 under Title II so again what we're trying to
7 ensure is that our registrants, the swap dealers
8 and major swap participant, are incorporating
9 within their documentation sufficient notice and
10 agreement to provide the clarity on the front end
11 of the transaction so that all parties are well
12 aware of the statutory obligations under Title II
13 of Dodd-Frank and under FDIA so that again there
14 is clarity well in advance of when the problems
15 come up when there are high levels of market
16 stress that there isn't a scramble at that period
17 of time. To the extent that the global issue
18 comes up again, Title II does direct the
19 Comptroller General to examine that issue a bit
20 more fully and I think that is also something that
21 as we move forward will be an issue that the
22 Commission likely will want to continue

1 considering with respect to this rule and I
2 imagine in a variety of rule contexts.

3 COMMISSIONER SOMMERS: Thank you very
4 much.

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

7 COMMISSIONER CHILTON: Thank you, Mr.
8 Chairman. Ananda, you refer I think it's on page
9 13 to our role with respect to the potential
10 transferees of QFCs in the event of a default
11 resolution proceeding. How would we handle that?
12 As I understand it now, when an FCM gets into
13 trouble we work with the Futures Exchange to
14 transfer contracts to a healthy FCM, but I'm
15 wondering how the process might work for swaps,
16 for particularly non-cleared swaps and what the
17 plans in that regard?

18 MR. RADHAKRISHNAN: Thanks, Commissioner
19 Chilton. I think in the current environment for
20 futures, there is an insolvency regime in the
21 bankruptcy code that has worked well and the
22 Commission is authorized to write rules to augment

1 the provisions of the bankruptcy code. The
2 objective has always been to the extent that we,
3 we meaning the industry, can find a clearing firm
4 that's willing to take on the positions and the
5 participants from the firm that's going through
6 bankruptcy that our role has been to clarify what
7 the law is and to appear before the bankruptcy
8 court to support the arguments of the trustee that
9 the judge should order a movement of positions and
10 a movement of money. The last time we did this
11 was in 2008 when Commission staff appeared before
12 the bankruptcy judge in the Lehman broker-dealer
13 FCM liquidation.

14 I'll be honest with you, we're dealing
15 with a new world here because in the context of
16 Title II or FDIA resolution authority, it's the
17 FDIC which will be in the driver's seat because
18 the FDIC has resolution authority and we don't. I
19 think the FDIC, Commissioner Chilton, is required
20 to consult with us before the Commission and I'm
21 just trying to think what the conversation would
22 be like and I would imagine that part of the

1 conversation would be they may ask us, Do you know
2 who might be willing to take over these positions?
3 Because I think assuming that we have advanced
4 knowledge or notice that somebody is going to be
5 in financial trouble, we can call around and say
6 it's common knowledge this firm is going to be in
7 trouble. Are you willing to take over the
8 positions? That's what the conversation is all
9 about. Of course we have to make sure that we
10 don't disclose confidential information so that
11 there is a delicate balance there.

12 I see that as our role maybe identifying
13 possible white knights for want of a better word,
14 but I don't know whether our role can be further
15 than that because as I'd mentioned before, the
16 FDIC has the authority and I think the FDIC has
17 the money. They can create a bridge company and
18 all that kind of stuff. We just don't have that
19 kind of capability. I know that's not a very
20 satisfactory answer, Commissioner Chilton, but
21 that's the best I have.

22 COMMISSIONER CHILTON: Thank you.

1 COMMISSIONER O'MALIA: Orderly
2 liquidation is kind of the title of this thing.

3 MR. RADHAKRISHNAN: Yes.

4 COMMISSIONER O'MALIA: I think it's
5 obviously more aspirational since it's never been
6 done. Right? We haven't done this. The FDIC has
7 no experience in liquidating bilateral contracts.
8 Right?

9 MR. RADHAKRISHNAN: I'm not sure. I
10 know they have done a lot of liquidation of banks.
11 I'm not sure whether it involves swaps.

12 COMMISSIONER O'MALIA: We have a
13 proposal that puts Title II and FDIA, the Federal
14 Deposit Insurance Act, and you're saying we've got
15 this documentation and this is the state of the
16 world, but it's very unclear what the state of
17 that world actually looks like. I think a lot of
18 our swap contracts will say here is your orderly
19 liquidation. You have 24 and hours you can't do
20 anything with it. But what happens once this
21 bridge corporation or the FDIC gets ahold of it?
22 What's orderly about that? What does that state

1 of the world look like? Can they terminate
2 contracts? They could terminate a swap contract
3 under this authority?

4 MR. GRIFFIN: I believe the FDIC does
5 have some measure of repudiation capabilities and
6 there's a component I believe there for the award
7 of damages as well.

8 COMMISSIONER O'MALIA: So in the 24-hour
9 period if you're captured and it's totally unclear
10 who these people because it simply says covered
11 financial company --

12 MR. RADHAKRISHNAN: That is correct.
13 That is the statutory provision.

14 COMMISSIONER O'MALIA: What is a covered
15 financial company?

16 MR. RADHAKRISHNAN: First of all, you
17 have to be a financial company as defined in the
18 statute so that that's Section 201(a).
19 Essentially it's a bank-holding company, a nonbank
20 financial company supervised by the board so that
21 everybody knows what it is. Then number three is,
22 any company that is predominantly engaged in

1 activities that the board of governors has
2 determined are financial in nature or incidental
3 thereto for purposes of Section 4(k) of the Bank
4 Holding Company Act.

5 Then there's a further provision that
6 says no company shall be determined to be
7 predominantly engaged in activities that the board
8 of governors has determined are financial in
9 nature or incidental thereto if the consolidated
10 revenues of such company from such activities
11 constitute less than 85 percent of the total
12 consolidated revenues of such company.

13 COMMISSIONER O'MALIA: That seems
14 totally clear to me. In these swap agreements
15 will it say I'm a financial company?

16 MR. RADHAKRISHNAN: No.

17 COMMISSIONER O'MALIA: It will not say
18 that?

19 MR. RADHAKRISHNAN: It would not say
20 that. Essentially the FDIC has make a
21 recommendation to the Secretary of the Treasury
22 that in the FDIC's board's view they believe that

1 Company XYZ is a covered financial company and I'm
2 assuming that the FDIC will detail why they
3 believe it is a covered financial company. And it
4 asks the Secretary to take certain steps.

5 COMMISSIONER O'MALIA: The CFTC is not
6 mentioned in Title II or FDIA anywhere in that
7 statute based on what I've seen.

8 MR. RADHAKRISHNAN: Except with the
9 requirement that if we're the primary regulatory
10 to consult with us.

11 COMMISSIONER O'MALIA: Do we have a
12 memorandum of agreement on what involves? Do we
13 want to have a role in this responsibility? What
14 obligation do we have to our registrants that are
15 captioned under this?

16 MR. RADHAKRISHNAN: I think we would
17 want to find out what the FDIC wants to do and
18 we'll want to make sure that there is no
19 disruption in the market. We'll want to know
20 where the FDIC intends to send the contracts over.
21 Again I hate to be crass, we don't have the money
22 so that if we want to play a greater role, we

1 don't have the power nor do we have the money.

2 And Congress has decided that's not our role.

3 COMMISSIONER O'MALIA: Let me go back to
4 the point I started on earlier. Requiring
5 counterparties in their swap documentation to
6 agree that if a covered financial company defaults
7 then that non-defaulting party will not exercise
8 any right it has to terminate, liquidate or net
9 any swap seems to go beyond requiring parties to
10 document their relationship. We've all talked
11 about this as just a simple documentation, but
12 what this actually means and I hope parties doing
13 these bilateral deals will look at when this
14 regulation comes out or this proposal comes out,
15 what rights they have and do not have under this
16 agreement.

17 Obviously it says here that if they're a
18 party to this and we've given them some warning,
19 it does say that they can't terminate, liquidate
20 or net any swap within the 24-hour period. What
21 it doesn't tell you is what happens when you go
22 into the process and what the FDIC can do to you.

1 Shouldn't we have something in our regs saying the
2 potential that they could invalidate your contract
3 and terminate these swaps or transfer them, all of
4 these things, shouldn't that also be in this rule
5 so that people clearly understand, was it the
6 state of the world? I'm confused as to what these
7 people should expect going forward by simply
8 including this documentation into their swap
9 agreement.

10 MR. GRIFFIN: In this respect, rather
11 than restating everything that is in Title II and
12 FDIA that could impact a counterparty that's
13 affect here for a particular swap or in this case
14 swap agreement, again I believe the intent here is
15 to place the parties on notice and specifically
16 address the rights that they would potentially
17 otherwise have within their contract, again how
18 Title II and how FDIA could impact those rights
19 under operation of the statute under Title II and
20 under FDIA. But as far as other elements of Title
21 II or FDIA, hopefully those parties would have an
22 awareness based on this notice that there are

1 other statutory structures beyond just what we
2 have under Title VII that could impact their
3 rights with respect to this should a financial
4 company become a covered financial company by
5 virtue of the Secretary of the Treasury in
6 consultation with the President making those
7 determinations.

8 MR. RADHAKRISHNAN: And potentially the
9 FDIC issues regulations and we hope that this
10 provision would give them the notice that you've
11 got another entity out there that's got statutory
12 points so that you should be aware that they could
13 issue regulations as well.

14 COMMISSIONER O'MALIA: This title is
15 over 20 pages long. I understand we get you on
16 the hook with this page-and-a-half rulemaking, but
17 it puts you into a whole new universe and I'm not
18 sure everybody is that sophisticated. If you do a
19 deal with a covered financial and say you're a
20 co-op and now you have to have this documentation
21 in your rule, a small co-op, you should have an
22 understanding of what Title II is going to do to

1 you, or FDIA. Right? Because that's our new
2 regulator.

3 MR. RADHAKRISHNAN: Yes. I think what
4 it says is that it's like caveat emptor or a
5 derivation thereof. You should know who you're
6 dealing with and you should know that the person
7 you're dealing with, Mr. Co-Op, could be a covered
8 financial company under Title II.

9 CHAIRMAN GENSLER: Not the co-op. The
10 co-op can't be.

11 MR. RADHAKRISHNAN: That's right.

12 COMMISSIONER O'MALIA: But by virtue of
13 having this in their documentation they're in the
14 same process.

15 MR. RADHAKRISHNAN: It works both ways
16 because while the assumption is that the dealer is
17 the covered company, there may be an instance
18 where the non-dealer, the counterparty who is not
19 the dealer, could be a covered financial company.
20 Of course that's highly unlikely, but they could
21 be.

22 MR. BERKOVITZ: Excuse me. If I may add

1 to the discussion in response to the
2 Commissioner's question in terms of what rights
3 the parties may have and what the effect of this
4 language is, the language in the rule regarding
5 the parties may not exercise any right that such
6 counterparty that is not the covered party has to
7 terminate is essentially the statutory language,
8 that the language of the rule in the proposed
9 repeats the statutory language regarding the party
10 will not exercise any right that the party may
11 have.

12 COMMISSIONER O'MALIA: I get that, but
13 what it also presents is another 20 pages in Title
14 II that they ought to probably be aware of as well
15 as because this is their new state of the world I
16 guess are your words.

17 MR. RADHAKRISHNAN: Maybe we could look
18 upon it as at least we're giving people notice
19 that a particular law applies as opposed to they
20 don't have notice and the FDIC comes knocking on
21 the door and says guess what, I got this power.

22 COMMISSIONER O'MALIA: It's probably the

1 least we could do. There is an element in here,
2 this new romanette(iii) down at the very end of
3 the rulemaking says, "explicit versus implicit
4 consent." Where in the statutory language is the
5 requirement that the counterparty that is not the
6 covered financial company explicitly consents to
7 any transfer? This language in romanette(iii)
8 inserts FDIC interpretation of the "or incidental
9 to" language in their statutory authority but that
10 requirement is not in either statute. This seems
11 to go beyond what is in the statute that we just
12 discussed with Mr. Berkovitz.

13 MR. GRIFFIN: Yes, Commissioner, as you
14 alluded to in your question, that reflects what
15 the FDIC has communicated to us their
16 interpretation of the provision that we were just
17 discussing with respect to the impact of
18 termination rights within FDIA and within Title II
19 and within the FDIA context because again the FDIC
20 has been operating under that statute for some
21 time now. Again, our understanding from what
22 they're communicated to us is their long-time

1 interpretation of that provision reflects what is
2 in romanette(iii) of the proposed rule. To our
3 understanding it's not something that is expressly
4 stated in FDIA or in Title II, but the relevant
5 provisions in each of those statutes which again
6 are substantively parallel to the extent that it
7 is addressed in FDIA, the FDIC's longstanding
8 interpretation is that this is one of the results
9 of that language.

10 COMMISSIONER O'MALIA: I didn't think I
11 was going to quote from the President's Executive
12 Order today in terms of rulemaking, but this seems
13 appropriate: "Before issuing a Notice of Proposed
14 Rulemaking, each agency where feasible and
15 appropriate shall seek the views of those who are
16 likely to be affected including those who are
17 likely to benefit from and those who are
18 potentially subject to such rulemaking."

19 This kind of sounds like we should have
20 put this out as an Advanced Notice of Proposed

21 Rulemaking to warn companies and participants of
22 this new state of the world and what the new

1 orderly liquidation regime is before we come up
2 with a rulemaking because it says specifically,
3 "before issuing a Notice of Proposed Rulemaking."
4 I think we're getting ahead of ourselves here and
5 we need to work with the market a little bit to
6 make sure that they clearly understand what's
7 going to happen to them. That was from Section
8 2(c) of the President's Executive Order. I think
9 we're getting ahead of ourselves and I'm going to
10 vote no on this.

11 CHAIRMAN GENSLER: As I had said
12 earlier, I support this and I know there's a
13 difference here and I appreciate the full
14 discussion of it. I think this is a documentation
15 rule that does as Ananda said put people on
16 notice. Congress enacted, yes, 20 pages of Title
17 II which even if this rule never happened, for
18 some reason we didn't propose it and it didn't go
19 final, they're subject to Title II, they're
20 subject to the FDIC Act. I think this helps lower
21 risk in the system because at the point of crisis
22 it's right there in the documents if there's

1 support among the Commissioners and why I support
2 it. We'll put out for public comment and we'll
3 get comments on all of these including
4 romanette(iii), and to the President's Executive
5 Order I appreciate your point. We have had over
6 500 meetings, maybe not on romanette(iii), I know,
7 but we have so many people coming in to us and
8 they will continue to come in to us and we invite
9 that from the public.

10 COMMISSIONER O'MALIA: I have one more
11 question. May I? I see that we've added a
12 question about the use of swap and cross-default
13 provisions that reference affiliates and whether
14 to include these affiliates of entities that may
15 become covered financial companies under Title II
16 or the subject of FDIA in this regulation. Is
17 this proposed requirement anywhere in Title II or
18 FDIA? Ward, I think this might be up your alley.
19 And would the FDIC have the authority to propose
20 this requirement on their own either under Title
21 II or FDIA?

22 MR. GRIFFIN: I think at this point in

1 time at best that that is unclear. It's clear so
2 that at this point in time we thought it prudent
3 to include a question and see what kinds of
4 comments we get back and if need be down the road
5 address it as appropriate under the statute.

6 MR. RADHAKRISHNAN: That's why we asked
7 the question as opposed to putting it in the
8 language, because as Ward said, there is no
9 clarity. In fact, we also asked the question
10 whether the Commission has the legal authority to
11 do such a thing so that I think it would be very
12 illuminating to get comments on that.

13 MR. STAWICK: Commissioner O'Malia?

14 COMMISSIONER O'MALIA: No.

15 MR. STAWICK: Commissioner O'Malia, no.
16 Commissioner Chilton? Commissioner Chilton?

17 COMMISSIONER CHILTON: Yes, Dave. Yes.

18 MR. STAWICK: Commissioner Chilton, aye.
19 Commissioner Sommers?

20 COMMISSIONER SOMMERS: Yes.

21 MR. STAWICK: Commissioner Sommers, aye.
22 Commissioner Dunn?

1 COMMISSIONER DUNN: Aye.

2 MR. STAWICK: Commissioner Dunn, aye.

3 Mr. Chairman?

4 CHAIRMAN GENSLER: Aye.

5 MR. STAWICK: Mr. Chairman, aye. Mr.
6 Chairman, on this question the ayes are four, the
7 nays are one.

8 CHAIRMAN GENSLER: Thank you, Mr.
9 Stawick. With that I have one administrative
10 thing and one technical thing. I'll ask unanimous
11 consent to allow staff to make technical
12 corrections to the documents voted on today prior
13 to sending them to the Federal Register. Not
14 hearing objection, that's taken.

15 Then also we expect to hold two open
16 meetings in February, on the 11th of February and
17 the 24th of February, both of them beginning at
18 9:30 a.m. here at the CFTC. We'll entertain a
19 motion to publish in the Federal Register a notice
20 consistent with the Government's Sunshine Act
21 announcing such open meetings. Do I hear a
22 motion?

1 COMMISSIONER SOMMERS: So moved.

2 COMMISSIONER O'MALIA: Second.

3 CHAIRMAN GENSLER: All those in favor?

4 GROUP: Aye.

5 CHAIRMAN GENSLER: Are there any
6 opposed? We'll have two more meetings. Now I
7 think I need a motion to adjourn the meeting.

8 COMMISSIONER DUNN: So moved.

9 COMMISSIONER SOMMERS: Second.

10 CHAIRMAN GENSLER: All those in favor?

11 GROUP: Aye.

12 CHAIRMAN GENSLER: Are there any
13 opposed? I adjourn the meeting.

14 (Whereupon, at 10:57 a.m., the
15 PROCEEDINGS were adjourned.)

16 * * * * *

17

18

19

20

21

22

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

CERTIFICATE OF NOTARY PUBLIC

DISTRICT OF COLUMBIA

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

Notary Public, in and for the District of Columbia

My Commission Expires: January 14, 2013