UNITED STATES OF AMERICA
COMMODITY FUTURES TRADING COMMISSION

OPEN MEETING ON THE 26TH SERIES OF RULEMAKINGS UNDER DODD-FRANK ACT

Washington, D.C.

Wednesday, April 18, 2012

PARTICIPANTS:

Commission Members:

GARY GENSLER, Chairman

BART CHILTON, Commissioner

JILL E. SOMMERS, Commissioner

SCOTT D. O'MALIA, Commissioner

MARK WETJEN, Commissioner

Presentation 1: Final Rule on Commodity Options

DON HEITMAN, Division of Market Oversight

RYNE MILLER, Division of Market Oversight

DAVE ARON, Office of General Counsel

RICK SHILTS, Division of Oversight

STEVE KANE, Office of the Chief Economist

Presentation 2: Final Rule on Further Definition of "Swap Dealer", "Security-Based Swap Dealer", "Major Swap Participant", and "Eligible Contract Participant"

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P R O C E E D I N G S

(9:37 a.m.)

CHAIRMAN GENSLER: This meeting will come to order. It's a Public Meeting of the Commodity Futures Trading Commission to consider final rules under the Dodd-Frank Act. I'd like to welcome members of the public, market participants and members of the media, as well as those listening on the webcast. Today is our twenty-sixth open meeting on Dodd-Frank rules and we will consider two final rules today, one the further definitions of entities. This is a joint rule with the Securities and Exchange Commission. I am very happy to have this meeting happening concurrently with the Securities and Exchange Commission that is also conducting its meeting this morning on this important joint rule. Secondly, a rule with regard to commodity options which we'll discuss first.

I want to thank Commissioners Sommers, Chilton, O'Malia and Wetjen for their significant contributions to the rule-writing process and of course the very hardworking and dedicated staff of the CFTC. I also want to thank the Securities

and Exchange Commission's five Commissioners, Chairman Shapiro, Commissioners Walter, Aguilar, Paredes and Gallagher. The two commissions worked hand in hand on the entity definitions rule and I really want to say it has been a true collaborative effort among 10 Commissioners and two hardworking and dedicated staffs.

I'm going to go a little long on my opening statement because I think this is such an important rule, so I ask forgiveness from the Commissioners. Today's rules both of them I think provide market participants greater clarity regarding key terms in the Dodd-Frank Act and the regulatory reach of the law. We received significant public comment on both of these proposals and I think the final rules that we'll vote on today greatly benefited from important public input.

With regard to the entity definition, regulating banks and other firms that deal in derivatives is central to financial reform. Leading up to the crisis, it was assumed that many swap dealers were largely regulated, but the 2008 crisis revealed the inadequacy of this approach.

While banks and securities firms are regulated for their lending and securities activities, there was no comprehensive regulation of their swap dealing activity. Furthermore, their affiliates trading swaps often had ineffective or no oversight. Exhibit 1, AIG, a regulated insurance company, but its swap affiliate brought down the company and as we all know nearly toppled the U.S. economy. The CFTC is well on the way of implementing reforms Congress mandated in Dodd-Frank to regulate dealers and help prevent another AIG and the Commission's finished rules with regard to swap dealers and their sales practices and their fair dealing with customers providing balanced communications and disclosures. In addition, the agency has finalized rules requiring swap dealers to establish policies to manage risk as well as put in place firewalls between their trading, clearing and research operations. Today's rule is critical to define who is a swap dealer and what we'll vote on today will further define these entities built on the significant progress in lowering risk that the swap dealers post to the

rest of the economy. I think the rule fulfills Congress' direction to define the terms swap dealer and of course major swap participant and eligible contract participant and appropriately addresses the many comments we've received. It will provide the essential direction to market participants on whether they're required to register. The final rule gives market participants guidance on the definition of swap dealer and I'm going to go through six or so things that I think were critical.

First, if does to by allowing market participants to draw on useful precedents developed by the Securities and Exchange Commission that distinguishes dealing from trading. There are a lot of things that have gone before us and I think we've built upon that good work over at the SEC. I see Annette Nazareth there who was an SEC Commissioner. Hi, Annette. Second, it does so by providing further clarity on the Dodd-Frank Act terms "makes a market in swaps." These five simple words have gotten a lot of discussion at this Commission. But by focusing these five words on entities that routinely seek

to profit by accommodating other market participant's demands for swaps I think we help give clarity.

Third, it does so by clarifying another set of key word that the statute uses, this time two words, "regular business" by focusing on whether a person really has an identifiable swap dealing business. Fourth, it does so by fulfilling Congress' mandate that swaps entered into by an insured depository institution, a/k/a bank, in connection with originating a loan are not be considered dealing activity. Fifth, it does so by proving direction on the distinction between hedging and dealing, and within this we went a little further where we provide a specific rule for swaps that hedge price risk associated with a physical commodity. Sixth, I think we provide clarity by clarifying that swaps between agricultural cooperatives or cooperative financial institutions and their members does not constitute dealing. Seventh, it does so by setting a di minimis threshold for swap dealing as directed by Congress. This threshold is $3 billion total in the final rule across asset

classes, subject to a phase-in level of $8 billion, but as we propose, the final rule would define a swap dealer as any entity with more than $25 million, that's million and not billion, of dealing activity with pension funds and municipals, so-called special entities. True to congressional intent, end users other than those genuinely making markets in swaps won't be required to register as swap dealers. I repeat. If you're not genuinely making a market in swaps, you're not going to have to register as a swap dealer. I think that's what this rule is about. The swap dealer definition benefits from many comments. As the dealer market is dominated by large entities though, I believe the final swap dealer definition will encompass the vast majority of swap dealing activity, I focus on the word activity more than I do by entities and I think this is what Congress intended.

For those who question the level of di minimis, we considered the di minimis threshold in the context of an overall $300 trillion notional swaps market. Further, the statute defines swap dealing by referencing making a

market in swaps, those five key words, and conducting a regular business, those two key words, in swaps. The $3 billion threshold just to put it in context represents $12 million of trading a day, and the phase-in number of $8 billion represents $32 million of notional trading a day. Those sound large to the American public, but let me put them in perspective if I may. The interest rate swap market transacts on average over $500 billion notional per day, so the di minimis of $32 million a day is in the context of a $500 billion notional a day market. As a further reference, this year the futures market in crude oil trading which of course has gotten quite a bit of focus and attention as there should be as of late, the crude oil market in futures trades $65 billion notional per day to put into context the di minimis that we may be voting on later.

During this phase-in period the commissions will also collect and analyze data to evaluate the appropriate di minimis and I think we will greatly benefit as we go along from learning and seeing how the markets evolve.

Another question that has been raised is whether the swap dealer definition should appropriately be activities based or relate to how an entity is classified. The final rule is consistent with congressional intent that we take up an activities-based approach. Though many of these large swap dealers are financial entities, Congress anticipated that some nonbanks would be registered as swap dealers. Congress provided in Dodd-Frank the capital margin for instance for bank dealers would be set by the bank regulators. But they also said that for nonbank swap dealers, capital margins would be set by the CFTC. So I think Congress already understood this would be activities based and there may be some nonbank dealers. Instructive further in this regard is a list of primary dealers kept by the International Swaps and Derivatives Association's website which includes a number of nonbank dealers. The association describes as meeting that designation is an entity that, and this is from their website, "deals in derivatives as part of its business," so that they include some nonbank dealers as well which is instructive.

I think Congress closed the so-called Enron loophole that lets traders evade oversight by using electronic trading platforms, but I think it's also important to recall that Enron was also a swap dealer, the Enron that failed 10 years or so ago. I think Congress did not intend to create a new type of loophole in its place.

The rule we'll consider today also further defines the term major swap participant, relying on Congress' three- pronged test. This category, I think it was congressional intent where we will finalize the rule, clearly is limited to only those entities with swaps positions that pose a risk large enough to threaten the U.S. financial system. The definition rule also will further define eligible contract participant which provides guidance regarding who is eligible to transact swaps off of an exchange. And based on the many comments received, we incorporated further guidance to ensure that small businesses and real estate developers can continue to have access to swaps to hedge commercial risk. The final rule also clarifies how this ECP definition applies to

certain foreign exchange transactions done by commodity pools.

Swap dealers and major swap participants registered with the commissions, the SEC or CFTC, will also be looking forward to seeing us finalize the definition of swap and securities-based swaps. As the commissions work to complete this rule, the CFTC will issue for public comment a proposed extension of the temporary exemptive order regarding the effective date of certain provisions of Dodd-Frank. We've done this twice before. I've publicly been committed that we are not doing this against the clock. We're doing this against a balanced approach to get these rules right. I also anticipate that the Commission will explicitly seek public input on the cross-border application of Title VII and we may look for an appropriate approach to phased-in compliance for certain requirements for cross-border swap dealers. There is a lot of work here at the Commission to get this balanced and get it phased in appropriately.

I've gone on a long time, but I thought

these were important matters to cover. We're also going to be hearing from this excellent team in front of us today. We will consider the final rule on commodity options. I want to give a little shout out to Don Heitman. Don is completing 30 years at the CFTC and 37 years in government and was set to retire last year and we coaxed and convinced him to stay to complete several rules with us, so I want to thank you for an excellent job not only on this rule but your career here at the CFTC.

The Dodd-Frank Act includes commodity options with the statutory definition of swap so that today's rule has to look and see what to do with that, and it confirms that the same rules apply to commodity options as applicable to swaps just as the law directs. But in addition, we thought it appropriate to consider and seek comment on an interim final rule to provide that a trade option, that's a type of commodity option, has an exception from certain of the rules as these are physically delivered contracts. We received a lot of feedback from commercial market participants that commodity options used by

commercial entities to deliver and receive physical commodities in connection with their business don't need the same level of oversight as swaps. I will say I agree with that. However, the trade options will still be subject to certain rules, position limits, appropriate reporting and recordkeeping and antifraud and antimanipulation rules, but we will be seeking additional comment as we move forward.

After today we have a lot yet to do. We need to complete further rules with the SEC as well, but this is the first of the two significant definitional rules. I think it is now critical that we turn our attention to that which is so necessary to get implementation of position limits which are also critical to the markets. If we are to move forward today on these two rules, this will be finalizing 31 of the Dodd- Frank financial reforms, and though with today's final rules we will be more than halfway done, much work needs to be done to complete and fulfill the promise of Dodd-Frank reform and to protect the American public.

As the G-20 summit comes together here

in Washington this week, I'm reminded of a commitment made in 2009, 3 years ago at the summit in Pittsburgh, when the G-20 leaders agreed that by the end of this year, 2012, all standardized over-the- counter derivative contracts should be reported to trade repositories, cleared and traded on platforms as appropriate. The goal was that these reforms would be in place by the end of the year and the CFTC is on track to meet this goal that our President made. I thank you and I'm going to hand it over to Commissioner Sommers.

COMMISSIONER SOMMERS: Thank you, Mister Chairman, and I want to thank the rulemaking teams that are before us today for their hard work and diligence in crafting these rules.

We have before us a final rule on commodity options, an interim final rule establishing a trade option exemption and the critical, long awaited final rules further defining swap dealer, major swap participant and eligible contract participant. These entity definitions along with the upcoming product definitions are the key components of the

foundation upon which this new Dodd-Frank regulatory regime is being built. All of the team members deserve our gratitude, but I would specifically like to recognize the entity definition teams from both here and the SEC that have worked together over the past 18 months through many policy challenges to get this rule in a final form as well as being sensitive to the concerns of 10 individual commissioners. You've all done a tremendous job.

When compared with the December 2010 proposed rules, the final rules we consider today reflect substantial process toward crafting sensible, reasonable rules that have built-in flexibility where appropriate which at the same time providing much-needed certainty to market participants without being unnecessarily heavy handed. Are these the rules I would have drafted if I held the pen from the beginning of the process? No. Nonetheless, I recognize that the final rules are much better than the proposed rules and I am pleased that we have worked hard to try to build a consensus around these critical foundational rules.

Before I discuss the specific elements of the rules we consider today, there is a footnote in the entities definition rules that particularly caught my eye. Footnote 421 states in part, "It does not appear possible to demonstrate empirically let alone quantify the increase or decrease in the possibility that a financial crisis would occur at a particular future time and with a particular intensity in the absence of financial regulation or as a result of varying levels of types of financial regulation." This statement is an honest reflection of how we don't know what impact if any either positive or negative our regulations will have relative to a future financial crisis. And we certainly have not truly considered the possibility that all of our regulatory activity here may not prevent a future financial crisis. It is clear from this footnote that we cannot say with any degree of certainty that the American public will be better protected after we complete this multiyear regulatory exercise.

Two things are certain. We are not sure our regulations will result in tangible benefits,

and we know the costs associated with our regulations will be great. Embedded in the financial entities rules is an interim final rule that excludes from swap dealing activity those swaps that are used for hedging. The definition of hedging in this interim final rule is consistent with although not identical to the definition of bona fide hedging in the position limits rules and it is not consistent with the definition of the end user exemption proposed rules and the MSP final rules so that we will have at least three different meanings for hedging in our new rules. It is not clear to me why the hedging definition for swap dealers should be different than the hedging definition for MSPs and end users or diverge from the SEC's hedging definition for major security-based swap participants. There are a series of questions associated with the interim final rule asking for comment on the impact of those inconsistent hedging definitions. I urge the public to comment on this interim final rule and if we have it wrong tell us why and provide specific examples and analyses.

Two other important issues addressed in the swap dealer definition are allowing insured depository institutions to exclude from swap dealing activity commodity swaps entered into in connection with loan origination and the ability of proprietary traders who meet specific criteria to register as floor traders pursuant to CFTC Regulation 3.11 instead of registering as swap dealers. Allowing for registration as a floor trader recognizes the reality that certain proprietary traders with no customers who do not negotiate swaps with counterparties and who only interact with counterparties on a designated contract market or swap execution facility are traders and not dealers. Because the Commission has an interest in these traders and their market activity, requiring registration as a floor trader strikes the appropriate balance between our regulatory interests and the burdens associated with registering as a swap dealer.

I am also very supportive of the phase-in period for the di minimis level which will initially be set at $8 billion. I think it's important for the commissions to review the

relevant data, to issue a study, receive public feedback and then analyze the information before setting a final level. This data which is not currently available to us will be critical to the policy determination of how we define the appropriate amount of di minimis trading. With regard to commodity options, the final rule on trade option exemption interim final rule, I believe the final rule permits market participants to trade commodity options which are now statutorily defined as swaps subject to the same rules applicable to every other swap. This rule serves to clarify any inconsistency in the treatment of options in the pre-Dodd- Frank commodity option rules and current Dodd-Frank Act provisions. It provides some certainty to market participants who rely on commodity options. While I support this rule, I would have preferred to address this issue once we have tackled the product definitions rulemaking and had defined the term swap. It is my hope that the final product definition rules will sufficiently distinguish spot, forward and other transactions which may have an aspect of optionality from

swaps.

With respect to the interim final rule which sets out the trade option exemption, I must say that I'm pleased that the team took into account the public comments and incorporated a trade option exemption to ensure hedging opportunities for commercial entities regardless of their size or sophistication. Again if market participants do not think this trade option exemption is broad enough, I encourage them to comment. That is the purpose of the interim final rule. The interim final rule places Part 45 reporting requirements on parties are otherwise obligated to report. For entities that do not have Part 45 reporting obligations, the interim final rule proposes some recordkeeping and annual filing requirements. I do not want to put unnecessary administrative burdens on hardworking Americans who are trying to hedge their commercial activity. I believe that these reporting requirements strike an appropriate balance between providing the Commission with the information it needs and reducing the unnecessary burdens for commercial hedgers, but I welcome the

input and comments on this interim final rule. Again I want to thank both of the teams who are before us today and look forward to the discussion on the rules.

CHAIRMAN GENSLER: Thank you, Commissioner Sommers, and I particularly thank you for all of your hard effort that your work and your team has put into these rules and the joint effort we made on those two items that you mentioned, I mean all of the items, but particularly on the floor trader and the insured depository institution points that we did over the last, I know it's been a long time, six days of really constructive dialogue. Thank you.

COMMISSIONER SOMMERS: I appreciate the help and also the help of Commissioner Wetjen on all of these issues.

CHAIRMAN GENSLER: Commissioner Chilton?

COMMISSIONER CHILTON: May I defer for a moment to Commissioner O'Malia?

CHAIRMAN GENSLER: Commissioner O'Malia?

COMMISSIONER O'MALIA: Here is my

opportunity.

CHAIRMAN GENSLER: You're going before Commissioner Chilton.

COMMISSIONER WETJEN: Does that mean I'm still last?

CHAIRMAN GENSLER: Commissioner Chilton wants to be clean-up batter today.

COMMISSIONER O'MALIA: I too would like to start my remarks today by personally thanking the teams that are present, the great work of all the work that they've put in, tireless hours, days, months staff is dedicated to writing the rules. I am well aware that we have 700 pages of rules before us and it takes a lot to produce that, to go through that and all the edits. The Lorax would not be happy, but it is great work to have all their efforts to listen to us, comment and respond to us, so I appreciate their work on all of those things. They've also been responsive to the industry at hundreds of meetings and analyzing hundreds of letters is no small feat. Obviously SEC's staff deserves compliment as well. This is a joint rule, we're working with them so that we can't forget to mention their hard on this as

well.

The final rules that are before us today will establish the cornerstone of the Commission rules under Title VII. For that reason it's paramount that the Commission issue these rules in the right way not only in terms of the right policy, but in terms of sound legal analysis. One set of final and interim rules further defines principal participants in swap markets, swap dealers, major swap participants and eligible contract participants. Given the weakness in concentrations of the risks exposed in the 2008 financial crisis, it is appropriate that the Commission adopt final entities rules today. Unfortunately, however, I am unable to support the rule not because it fails to make positive policy choices, but it undertakes several unnecessary and astonishing contortions to achieve these rules, not to mention it will make compliance with these rules extraordinarily difficult and costly. I have a number of concerns with each definition in the final entities rule, but I will focus on the legal analysis described on the swap dealer definition.

Simply put, the Commission's rationale in the final rules defining swap dealer have ignored the basic canons of statutory construction by simply not excluding commercial end users as swap dealers. Today the Commission has erected the final entities rule on an infirm scaffold of the proposal. At the proposal stage and now, I have supported providing absolute certainty to commercial end users that their swap activities whether to mitigate financial or physical risks, will not deem them to be swap dealers. Not only have we misconstrued the statute, but we have also ignored congressional intent regarding hedging and providing certainty to end users who are not dealers. In addition, the final rule is silent on the matter in which the hedge definition in the interim final rule interacts with the end user exemption rulemaking. Therefore, if the Commission overreaches in defining swap dealer, it may narrow the end user exemption in a way that is incongruent with congressional intent. More specifically, I would have liked to have seen a consistent hedging definition in the interim final rule that would

allow commercial firms trading both financial swaps and physical commodity swaps not to have counted either in their swap dealing activities. The best approach would have been for the Commission to permit nonfinancial entities to use the same hedging definition as provided for major swap participants. The SEC has wisely adopted this approach. I think it is important to note that a great deal of Commission analysis was drafted in the days leading up to today's final meeting. Although I have strong concerns regarding the Commission's interpretive gymnastics, I think the industry can breathe a little easier today knowing that the Commission finally has seen the light by raising the di minimis threshold which masks many of the challenges commercial end users would have faced if the threshold had remained at a much lower level. The Commission has made many positive policy changes to today's rules. To enable these changes, however, the Commission engages in a series of statutory contortions. As a result, staff will likely spend several years issuing guidance and cleaning up obtrusive, obtuse

reasoning found in the final definition. Mr. Chairman, I have prepared a dissent that I will include in the record that will more thoroughly explain my views.

The other set of interim final rules before the Commission today repeal and replace the Commission's current regulations concerning commodity options and incorporate the trade option exemption for physically settled commodity options. Unlike the first set of rules, I support the final commodity option rule and interim final rule. In particular, I support these rules because the Commission, one, has accurately interpreted the relevant provisions; two, is issuing a rule that will provide transparency in the commodity market; and three, has taken time to carefully analyze the costs and benefits of the final rule and the interim final rule. I applaud the work of Don Heitman and Ryne Miller and their team to include a thoughtfully crafted exemption that will allow end users and eligible contract participants to trade options on physically -- commodities subject to certain conditions. Of significant note in this

rulemaking is the cost-benefit analysis which sets forth a good template for upcoming rulemakings to follow. Specifically, it identifies alternatives. Second, it includes a robust discussion of the Section 15(a) factors. Third, it contains an appropriate baseline. Although the cost-benefit analysis on the interim final rule does not quantify the costs imposed on the trade option definition and the conditions to this exemption, the team provided an explanation of why these costs are not presently quantifiable in a series of detailed questions seeking public input and data regarding costs and benefits resulting from this rule, so I appreciate their efforts enormously.

In conclusion, I would like to thank the teams for their hard work in putting together these two rules, and in particular I'd like to single out one staffer for special recognition. Nancy Schnabel has been my counsel for the past years and has spent the last 3-1/2 years at the Commission working in what used to be Division of Clearing and Intermediary Oversight. I'm sorry to report that Nancy will be leaving the

Commission. Nancy arrived at the Commission just a week before the Lehman bankruptcy and has learned the clearing business inside and out. She has been rewarded for her excellent work by being named the team lead for the governance rulemaking which was one of the very first draft proposals considered by the Commission. Like her colleagues in DCIO, now the Division of Clearing and Risk, I have come to appreciate her keen legal analysis and depth of understanding of the Commission rules. Nancy has been a key resource in sorting out the facts as well on the MF Global bankruptcy and has untangled the complexity of the final entities rulemaking. Nancy is not going off to advise some client on the application of the end user exemption, but is extending her government service and expanding her knowledge on clearing and oversight matters with another government entity. I've benefited by her sound counsel and her friendship and I am sorry to see her go. I hope you will join me in wishing her the best of luck and her assistance. We wish her well going forward. Nancy, thank you very much. That's all I have, Mr. Chairman.

CHAIRMAN GENSLER: Thank you, Commissioner O'Malia. With regard to Nancy, it's been terrific. When I heard this in the last couple of days I was sorry, but glad you're ending up at another governmental agency. It was always a little better when you were on our side doing the team lead than when you were with Commissioner O'Malia. You're an enormously talented advocate for your principle, but I think the rules were always better for it and usually we got Commissioner O'Malia and me to get to the same place. We tried very hard today and we almost got there, Commissioner O'Malia, but I appreciate all that you've put into this entity rule because I think it's better for what you've put into it as well even if we didn't get you all the way there. Back to you, Commissioner Chilton or Commissioner Wetjen.

COMMISSIONER WETJEN: I was joking about that, but this is a happy occurrence for me not to have to be the last person.

I want to thank the Chairman for all your hard work on this rule and your nimbleness and flexibility in working with the rest of us

Commissioners these last few days. In particular, it's very, very appreciated and will result in us getting to even more consensus than what we had and makes the rule better. So I just want to thank you for that. I want to thank staff for your flexibility as well. There have been a number of last-minute changes which can be difficult to deal with at the staff level I know, but we appreciate it very much.

Congress gave the CFTC a critically important task to further define the term swap dealer and major swap participant or MSP. Congress intended that these entities be subject to a new regulatory regime in order to control systemic risk and to prevent fraud and other market abuses. Accordingly, entities that fall within these definitions will be subject to capital and margin rules to reduce the risk that they posed to the financial system. They will be subject to our recently adopted requirements to avoid material conflicts of interest, maintain proper documentation and ensure proper risk management and compliance. And they will be subject to standards to ensure fair dealing in

their transactions with counterparties generally and special entities in particular.

These new requirements address serious problems that have occurred in the over-the-counter markets and are designed to serve the public good. Yet if the final definitional rules sweep too broadly, some entities may conclude that they cannot run the risk of being a swap dealer or MSP and therefore determine to reduce their activities in the swap markets. The resulting decrease in liquidity could make it more difficult for commercial end users to manage the risks and this in turn could well mean higher prices to consumers for food and energy.

It is therefore imperative that the Commission together with our colleagues at the SEC strike the right balance in these definitions. Under Dodd-Frank the statutory definition of a swap dealer is activities based. The Commission's proposal identified a number of activities that in general would constitute swap dealing, but as many commenters told us, these activities frequently are undertaken by entities

that are considered in other contexts to be traders or commercial end users. One person compared our task of defining swap dealers to understanding the wave particle duality present in visible light. In other words, just as light exhibits both wave and particle characteristics, those with a significant present in the markets often exhibit both dealer and trader characteristics. While certainly not as weighty as quantum physics, determining where the activities of end users and traders end and those of swap dealer being is difficult. In answering that challenge, I believe the Commission should be guided by the following three principles. First, we must provide clarity. Granted, it is not possible to come up with a bright-line test that easily addresses all circumstances and is not susceptible to abuse or evasion, but the line we draw much be bright enough. The businesses that do not come anywhere that line must be assured they are not swap dealers. In short, compliance should not a guessing game.

Second, we would err on the side of caution. We cannot predict how the swap markets

will evolve in a world of clearing requirements, exchange trading and mandatory reporting. In these circumstances and given the Commission's limited resources, it is prudent and responsible policymaking to cast the net in a carefully measured way.

Third, we should keep our attention focused on those activities that were the focus of Congress' attention. Among other things, Congress acted to protect our markets to make sure commercial firms can continue using them to manage risk and finance their businesses. But the focus of Dodd-Frank was not on regulating as dealers those commercial firms that only use swaps in connection with their manufacturing, producing or transporting of physical goods or commodities. Our focus therefore should be on regulating as dealers those firms whose activities pose risk to the uses of our markets and pose systemic risk to our financial system as a whole.

I believe the final rulemaking before us today adheres to these principles. It provides further guidance to market participants

concerning what is and what is not dealing activity. As a general matter, the rule makes clear that entering into a swap solely to serve an entity's own investment, liquidity or risk-management need is not swap dealing even if that swap also happens to serve the business needs of the counterparty. This general guidance is supplemented in two specific ways. First, the Commission is adopting an interim final rule that will exclude bona fide hedging activities from the swap dealer definition. A firm that enters into swaps to hedge its price risks in the physical markets will have clarity on the following point. These hedging activities will not be considered in determining whether that firm is engaged in dealing activity. The rule text explicitly permits anticipatory hedging of physical price risk, and the preamble also provides that portfolio and dynamic hedging are contemplated by the definition. But we are also seeking comment on this interim final rule and I look forward to hearing from the public on the application of the rule's hedging exclusion including whether it should be expanded to cover

other types of hedging activity as well.

Second, our final rule clarifies that the so-called dealer-trader distinction provides a useful framework for identifying swap dealers. The dealer-trader distinction has developed over the course of several decades as courts and the SEC have endeavored to define the term dealer under the securities laws. The public comments indicate that market participants are comfortable that they understand the contours of the dealer-trader distinction. To be sure, it is not a perfect fit for the swap markets, and in fact, the release notes that it is not a perfect fit for the security-based swap markets either. But it does inform our interpretation of all four prongs of the swap dealer definition and it provides a starting point for each person's analysis of its swap activities that are not explicitly excluded under the final rule. These activities could include, for example, other hedging that does not neatly fall into the rule's hedging definition. The rule's treatment of the statutory di minimis and IDI exclusions from the swap dealer definition also reflect the guiding principles

mentioned earlier. I have stated before my belief that the Commission should reexamine its rules on an ongoing basis and consider adjustments as additional data is obtained and the markets evolve. Consistent with this view, an initial di minimis threshold is set while the Commission collects comprehensive data on the swap markets. Staff will then analyze that data and recommend thresholds for the Commission's consideration. For now, I believe this is a sensible means of implementing this exclusion. It is appropriate to consider these thresholds once the Commission has a more informed basis to do so.

Importantly, the final rule provides a much lower notional di minimis threshold for swaps with special entities. This avoids undermining the Commission's protections for governmental entities, pension plans and endowments. Regarding the IDI exclusion in Dodd-Frank, we received extensive comments regarding the timing, purposes and scope of the exclusion. The final rule makes several adjustments to the proposal that I believe are appropriate and consistent with congressional

intent. I am aware that some would like the Commission to narrow the swap dealer definition and other areas, but our duty is to implement the statute that Congress enacted based on the words that Congress used in addressing the role that swaps and swap dealers played in contributing to the financial crisis. Further attempts to narrow or otherwise clarify this rule were by and large prevented due to the constraints of the statute, not necessarily disagreements on policy. I believe the swap dealer rule is faithful to the guiding principles I stated at the outset, are remaining true to the statute and therefore I will be supporting staff's recommendations.

I also will be supporting the MSP definition in this rule. In the interests of time I will now discuss each aspect of it, but a number of important changes have been made to the proposed MSP definition including a change to reduce the clearing discount factor which is consistent with Congress' focus on clearing as a means to reduce systemic risk. The final MSP rule also will ensure that firms having the potential to affect the stability of the financial system

due to their risk exposures or use of leverage do not escape appropriate oversight. We do not expect there to be many MSPs, but the final rule assures that there is no corner of the markets where extremely large positions can be held without safeguards.

The rule before us today also further defines the term "eligible contract participant" which will close a loophole that operators of foreign exchange Ponzi schemes could use to operate outside of the Commission's jurisdiction. Under the final ECP definition, fraudsters will not be able to combine funds into a large commodity pool in order to evade our retail Forex regime. At the same time, the final rule appropriately includes changes from the proposal to prevent untended consequences for the many funds that operate well within the law and that provide valuable foreign currency trading opportunities for investors and hedgers.

The final commodity options rule permits such options to trade like any other swap. We have heard the nearly unanimous view of commenters who stress the need for an exemption

for physically settled trade options which historically has been available for nonag commodities. The Commission is adopting a trade option exemption that retains certain requirements to enhance market oversight. It is an interim final rule in which the Commission is seeking comment and I look forward to receiving further public input on the availability and conditions of the exemption. To be clear, the Commission's final products rule will address whether a commodity option or other transaction with optionality such as a volumetric option meets the swap definition in Dodd-Frank. Today's rule applies only to option contracts that are swaps under our forthcoming definitions rule. Thank you again to the professional staff and my fellow Commissioners both here and at the SEC and I will address the few remaining issues through my questions. Thanks very much.

CHAIRMAN GENSLER: Thank you very much, Commissioner Wetjen for those thoughtful comments and for all the hard work that you've put in, always looking out for those three concepts that you mentioned which are very good concepts.

Commissioner Chilton? You're going last.

COMMISSIONER CHILTON: Thanks, Mr. Chairman and thanks for the indulgent Commissioner O'Malia and Commissioner Wetjen.

Both of these rules are good rules and I intend to support them both. The commodity options rule is good and I thank the team for that, and the entities rule is really part of the underlying architecture of our whole overview into the over-the-counter markets. The entities rule and our products rule are really the two pillars of that architectural foundation and I hope as you said that we get to that products definition rule sooner rather than later.

CHAIRMAN GENSLER: Absolutely committed.

COMMISSIONER CHILTON: Thank you. When I first came to Washington my wife and I took one of these tour mobile things and they talked about how no building could be higher than the Washington Monument, 555 feet. It turns out that's not true. It's an urban myth. There was something in the "Post" recently about it, that it's just the building code, that it's not the

Washington Monument. But if it were true that no building could be higher than 555 feet, it would really be arbitrary, an arbitrary architectural constraint. That's what we've tried to avoid in these rules, arbitrary constrains, that can say to a market participant you can't be taller than this. We've tried to avoid that and I think we've done a good job in general and particularly on the entities rule. What we've done is we've I think set out a rule that will actually help markets flourish and help grow the economic engine of our democracy. So essentially as my colleague said, we've defined what the entities are, we've got certain handholds on them, but they're not arbitrary. They're very thoughtful and we've worked hard to make them thoughtful.

Secondly, we've also said that we understand that there are some market participants who actually don't fit squarely into a definition like proprietary HFT cheetahs that are using their own money, that maybe they have a separate sort of definition. So those guys who I've called for and others have and I've worked with Commissioner O'Malia on this, those guys I

think also need to be registered, but maybe they're not a swaps dealer. Maybe they don't have sort of the same -- they don't look the same, so I'll have some questions when we get to the rule about that, Mr. Chairman. But I think we've devised a detailed and thorough blueprint to set up this architectural regulatory structure. I thank staff, I thank all of my Commissioners particularly the Chairman who worked over the weekend with us, with all of the Commissioners, trying to do everything he can, and I thank Chairman Shapiro and colleagues at the SEC. And I also thank the public and the market participants who have been coming in to us for months and months and months telling us their views about this. Thank you very much, Mr. Chairman.

CHAIRMAN GENSLER: Thank you. It was as lovely weekend. It worked. I think it was good. With that, we've spoken so much about entities, that was just the warm-up act for commodity options. Don, your service to this Commission and to the American public is remarkable, but since this is an interim final, you might actually serve

us a little longer if that's all right when we get those comments. Don Heitman, Dave Aron who will be here again on the entities rule, Ryne Miller, Rick Shilts from the Division of Market Oversight and Steve Kane who is from our Office of Chief Economist and has been ever present on this and other rules on cost-benefit considerations. Don?

MR. HEITMAN: I feel a little bit like the under card before the heavyweight championship match. I'd like to thank the other members of the swaps and options team particularly Steven Kane our economist and David Aron who is our OGC guy who is also doing double duty for the entities team, and Ryne Miller who does most of the real heavy lifting for the team. This is the sixth time we've come before the Commission. The previous five documents, one advance notice of proposed rulemaking, two proposed rules and two final rules were all approved unanimously and we're hoping to maintain our perfect record. I've done my part by wearing the same lucky tie as at all five previous meetings and the rest is up to Ryne Miller who will be briefing the Commission.

MR. MILLER: As Don mentioned, we had a strong team working on this rule and I also want to thank each of them for their contributions. I'll mention Christa Lachenmayr, Martin Murray and John DeBord who are also on the team, and then Mark Higgins who contributed to our cost-benefit considerations.

Today we present for your consideration a final rule and an interim final rule for commodity options. As you know, the Dodd-Frank Act's swap definition includes an option of any kind for one or more commodities. Consistent with that provision, in February 2011 the Commission proposed rules that would replace the Commission's pre-Dodd-Frank options rules with a rule generally permitting commodity options to trade pursuant to the same rules applicable to every other swap.

The rulemaking proposal also requested comment on the appropriate treatment of trade options which are generally commodity options used by commercial entities to deliver or receive physical commodities in connection with their business. We received multiple comments on the

proposal and after reviewing the comments received, the team presents for the Commission's consideration this final rule and interim final rule.

Our final rule largely adopts the February 2011 proposal which would align the Commission's general commodity options rules with the Dodd-Frank Act. It does so by authorizing commodity options to transact subject to the same rules applicable to every other swap. The final rule also streamlines and simplifies the options rules by deleting several obsolete provisions including the outdated dealer option provisions and the no longer relied upon agricultural trade option provisions.

Moving to the interim final rule, the interim final rule responded to comments and implements a trade option exemption that exempts trade options from most but not all of the rules otherwise applicable to swaps. There are three requirements in the interim final rule for a transaction to be considered a trade option. One, the offeror or seller of the trade option must be either an eligible contract participant or a

commercial. Two, the offeree or the buyer of a trade option must be a commercial entity just as was required under the pre-Dodd-Frank trade option exemption. And three, the trade option if exercised must result in the sale of an exempt or agricultural, that is a nonfinancial commodity, for immediate or deferred shipment or delivery so that the trade option if exercised must result in a spot or a forward transaction.

The trade option exemption as mentioned will be subject to a few conditions including appropriate recordkeeping and reporting requirements, or in the alternative for unreported trade options, an annual notice filing requirement for anyone who is a counterparty to an unreported trade option. Two, the interim final rule retains the Commission's position limits and large trader reporting swaps rules. Three, the interim final rule retains certain swap risk-management and reporting and recordkeeping duties for swap dealers and major swap participants that are engaging in trade options. And finally, for all trade options as with any commodity option generally, the interim

final rule retains the Commission's antifraud, antimanipulation and enforcement authorities. The interim final rule includes a list of questions and requests for public comment. Comments will be due 60 days after the publication of the interim final rule in the Federal Register. The effective date for both the final rule and the interim final rule will be 60 days after their publication in the Federal Register. However, the compliance date will not be until 60 days after the term swap has been further defined by the CFTC and the SEC and then published in the Federal Register. We'll be happy to answer any questions that you may have on this rule.

CHAIRMAN GENSLER: I think I'd like to consider a motion on the staff recommendation on the final rule and interim final rule on commodity options.

COMMISSIONER SOMMERS: So moved.

COMMISSIONER CHILTON: Second.

CHAIRMAN GENSLER: As I said earlier, I support this final rule and interim final rule and I'm going to let you off the hook. I don't have any questions, Ryne.

MR. MILLER: Thank you.

CHAIRMAN GENSLER: Commissioner Sommers?

COMMISSIONER SOMMERS: Thank you, Mr. Chairman. Just as a quick comment as I said in my opening remarks, I think we could have provided more clarity with regard to this rule if we would have paired it with the product definitions instead of with the entity definitions, but I wanted to get your comments with regard to that. We've heard from a lot of different market participants who use transactions that have not historically been considered options but nonetheless have some element of optionality. Those market participants have asked us for clarification on whether or not those transactions will be deemed options. So if you could give us comments about what kind of clarity we hope to give those market participants.

MR. MILLER: As Commissioner Wetjen noted in his opening remarks, this rule is for commodity options that are not excluded from the swap definition. If you go to footnote 6 of our rule, I'll read the last sentence of it which is

the guidance we're sending out. It says, "If a commodity option or a transaction with optionality is excluded from the scope of the swap definition as to be further defined by the two agencies, this final rule and the interim final rule do not apply to that transaction." That's the guidance we're sending out. I might ask Dave Aron if he has any further comments because we did coordinate with the product definitions team on this rule.

MR. ARON: I'm also on the products rule, Commissioners, and Julian and I have been working over the last few weeks to do just what you're saying, to give more guidance on transactions with optionality in the past. There were a number of exemptions that people could rely on so they didn't really have to think about it, but now because options are swaps it's more important. We talk about a number of transactions in the products rule and we thought it was more appropriate to do it there because that's a definitional rule here, we're not defining it, so there should be quite a bit of guidance in there and of course we'll be available afterwards if

it's still not clear in a particular transaction.

COMMISSIONER SOMMERS: Thank you.

MR. HEITMAN: I'd also like to point out that through the process our team has coordinated with the products definition team. We've had joint meetings. We've had joint meetings with outside people. We've shared relevant comments across the teams. So we are closely in synch on this.

COMMISSIONER SOMMERS: That's encouraging. For the record, I'm very supportive in the product rule of being as clear as we can be about the definitions of these products that contain optionality. Thank you.

CHAIRMAN GENSLER: Commissioner Sommers, I would say because I've been in a lot of meetings that it's often the electricity companies but it's not always with electricity companies about volumetric options and I think we'll get it right in the product rule, but if you and your staff, and I say this to all the Commissioners, have thoughts now, if you can get them in to Julian Hammer, Lee Ann Duffy and Dave Aron, because it's two commissions, if we can get

this in now into this draft working arrangement with the SEC -- it was a lovely weekend, by the way. But I think it would be helpful because I think the volumetric option, I hope there's a meeting of the minds around this Commission, but sometimes the devil is in the details and the earlier we get to it the better. I do want to say for market participants that if there is a real intent to deliver something, that's historically been a forward is not a future and Congress was very clear that a forward would not be a swap. I think that's what we've put out in the proposal and the challenge here is when it has come optionality in what is effectively a forward for electricity, sometimes it's natural gas, sometimes it's other products as well. Sorry that I went off script. Bart, you're next. Commissioner O'Malia?

COMMISSIONER O'MALIA: Thank you. I want to thank the team for your cooperation in helping get some alternative reporting requirements that lower the burden on commercial end users that provides an alternative to Part 45. I appreciate your help on that. Thanks.

CHAIRMAN GENSLER: Commissioner Wetjen?

COMMISSIONER WETJEN: I have one question. It's mostly for the benefit of the public, but this rule requires some transactional reporting that has not been required in the past with respect to trade options so I would ask staff if you could go over some of the reasons or rationale why we're requiring the reporting here in this rule.

MR. MILLER: There are two tiers of reporting in the trade option exemption. The rationale behind the reporting is that we went for the most minimally burdensome approach we could which was if an entity is already reporting their swaps to the extent they're going to engage in trade options, they also have to report their trade options. SDR connectivity which is where swaps are reported is sometimes the cost cited as the major barrier or the high cost so that if that is already involved with an entity in its other transactions, they can report their trade options as well. If a trade option involves two entities neither of which are reporting swaps otherwise,

as Commissioner O'Malia mentioned, the interim final rule only requires an annual notice filing. What that does is it provides the Commission with a kind of database or a who to call list in the event that market circumstances warrant looking into a particular commodity class or commodity category and what type of trade options activity is occurring. As it stands with the pre-Dodd-Frank trade option exemption, there is no annual notice filing, no visibility whatsoever so we wanted to take this opportunity to address that.

COMMISSIONER WETJEN: I'll add that under this, while I'd like to give Commissioner O'Malia a lot of the credit for getting this change made to the final that provides for this tiered reporting regime, Commissioner O'Malia was able to find consensus pretty quickly on that among the Commissioners and I think it's a great improvement to the rule.

CHAIRMAN GENSLER: I too think it as a great improvement. I think that what we were challenged with here is that Congress included commodity options, expressly included commodity

options, in the definition of swaps, so keeping with Commissioner Wetjen's principles of following congressional intent in the statute it was winding their way through and also doing what all five of us thought was appropriate for physically settled options on physical commodities. Did I get the physicals right?

MR. MILLER: That's right.

CHAIRMAN GENSLER: Mr. Stawick?

MR. STAWICK: Commissioner Wetjen?

COMMISSIONER WETJEN: Aye.

MR. STAWICK: Commissioner Wetjen aye. Commissioner O'Malia?

COMMISSIONER O'MALIA: Aye.

MR. STAWICK: Commissioner O'Malia aye. Commissioner Chilton?

COMMISSIONER CHILTON: Aye.

MR. STAWICK: Commissioner Chilton aye. Commissioner Sommers?

COMMISSIONER SOMMERS: Aye.

MR. STAWICK: Commissioner Sommers aye. Mr. Chairman?

CHAIRMAN GENSLER: Aye.

MR. STAWICK: Mr. Chairman aye. On this

question the yeas are five and the nays are zero.

CHAIRMAN GENSLER: Thank you, Mr. Stawick. The ayes having it unanimously, we'll be sending the staff recommendation to the Federal Register. I guess I'm supposed to also now do a unanimous consent to allow staff to make technical changes. Absent objection, we'll do that. So ordered. Thank you all. Don, you're not off the hook when that IFR comes, and stick around for products and help us on that too.

Now we will have the team come up on the much talked about further definition of entities' joint rule. Dan Berkovitz our General Counsel, I don't see him here. Jeff Burns, Mark Fajfar and Dave Aron. I don't know if they have their buttons on, but Dave Aron is Mr. ECP, Mark Fajfar is Mr. Swap dealer and Jeff Burns is Mr. major swap participant. Do you have your button, Mr. ECP? He does. All from the Office of General Counsel as well as Steve Kane from the Office of Chief Economist and I know that there are probably dozens of other people in the agency who have worked on this collaboratively with their counterparts at the SEC. To whom do I have the

pleasure to turn it over? Jeff.

MR. BURNS: Good morning, Mr. Chairman and Commissioners. Before I begin I would like to thank my co- lead Mark Fajfar as well as David Aron, Cam Nunnery, Steven Kane and the other fellow team members as well as our counterparts at the SEC for their efforts in finalizing the joint entities definitions rulemaking that we are about to present.

Today staff is recommending that the Commission approve final rules further defining the terms swap dealer, major swap participant and eligible contract participant, as well as an interim final rule excluding certain swaps from the swap dealer determination if entered into for hedging physical positions.

As the Commission is aware, an entity that meets the definition of a swap dealer and major swap participant will be required to register with the Commission and be subject to various substantive regulatory requirements that are the subject of separate rulemakings. In connection with the term eligible contract participant, the Dodd-Frank Act makes it unlawful

for persons who are not eligible contract participants to enter into a swap other than on or subject to the rules of a designated contract market. As a result, a person cannot engage in swap transactions with persons who are not ECPs on swap execution facilities or on a bilateral off- exchange basis. The ECP definition also provides guidance regarding who is subject to the retail Forex regime.

Staff in connection with the final rule also consulted and coordinated with staffs from the Fed, the OCC, the FDIC and the Department of the Treasury. We have incorporated the input received by all parties to the extent possible within our statutory framework. During the comment period of the rulemaking, the Commission received over 968 comment letters and staff participated in over 145 meetings with interested parties. In addition, the Commission jointly with the SEC held a public roundtable in June 2011. Commenters provided staff with invaluable input. As a result of the comments and additional staff review, we have recommended a number of changes to the proposal that are detailed in the final

rules and will be discussed in turn.

The effective date for the entity definitions will be 60 days after publication in the Federal Register. However, mandatory compliance with the registration and other substantive requirements is contingent on the effective date of the definition of the term swap. Generally, compliance with the ECP retail Forex regime will be December 31, 2012. Mark Fajfar will now discuss the definition of swap dealer.

MR. FAJFAR: Good morning. The Dodd-Frank Act defines the term swap dealer in terms of whether a person engages in certain activities, holding oneself out 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 final rule follows the statutory definition.

To determine whether a person is covered by the definition of swap dealer, one would start with the statutory definition and then apply the rules and the interpretative guidance in the release. We expect that this

would proceed as follows. First, the person would review the rules which implement the four statutory tests and the exclusion for swap activities that are not part of a regular business. The person would apply the interpretative guidance in the release which provides for consideration of all the relevant facts and circumstances. As part of this consideration, the person could apply the SEC's dealer-trader distinction. This review would determine if the person is engaged in swap dealing activity.

The rule allows the person to exclude certain swaps from this determination. The person may exclude swaps entered into by an insured depository institution, with a customer in connection with originating a loan with that customer, swaps between majority owned affiliates, swaps between an agricultural cooperative or financial cooperative and its members, swaps with floor traders that was mentioned this morning and swaps entered into to hedge price risks related to physical commodities. It is important to note that while the list of swaps that are specifically excluded is limited

and narrowly drawn. This does not necessarily mean that every other swap is indicative of swap dealer. Rather, those other swaps are part of an overall multifactored determination of whether the person has engaged in the activities that the statute defines as swap dealing. If this review shows that the person has engaged in swap dealing, the next step is to determine if the person has engaged in more than a di minimis quantity of swap dealing. The final rule provides that the threshold for this is to enter into swaps resulting from dealing activity with a notional amount of $3 billion or more over a 12-month period subject to the phase-in amount of $8 billion. The phase-in amount permits an orderly implementation of the swap dealer requirements. Termination of the phase-in period relates to a study that Commission's staff will prepare examining among other things the di minimis thresholds. The study will be due 2-1/2 years after data starts to be reported to swap data repositories so that the study can consider this data. Nine months after the study, the Commission may end the phase-in period or propose new rules

to change the di minimis threshold either up or down. If the Commission does not take action to end the phase-in period, it will terminate automatically 5 years after data starts to be reported to swap data repositories.

In reviewing the hundreds of comments we received on the proposed swap dealer definition and considering the alternatives they suggested, we focused especially on how the final rule would affect persons on the margin of the definition. That is, while a very large majority of swap users will not be covered by the definition and a few swap users will be clearly within it, the rule will have its greatest effect on the firms at the boundary between those two groups. We thought carefully about the potential for increased costs if the final rules are overbroad and the potential that if the final rules are too narrow, the benefits of Title VII would be dampened. We also considered whether specific provisions of the rule and the ways that swap users would respond to them would have distortive effects. With all this in mind, we expect that the final rules will help swap users

to apply the statutory definition of swap dealer efficiently and uniformly.

For example, the final release provides further interpretive guidance on concepts from the proposing release. This guidance says that market making is appropriately described as routinely standing ready to enter into swaps at the request or demand of a counterparty. On whether a person's swap activity constitutes a regular business, the guidance focuses on activities that are usual and normal in the person's course of business and identifiable as a swap dealing business. An example of that is to enter into swaps to satisfy the business or risk-management needs of the counterparty. Also the release explains that even though the CFTC is not formally adopting the SEC's dealer-trader precedents, those precedents may be usefully applied as appropriate as we've noted.

Many commenters addressed whether swaps used for hedging could be indicative of dealing. Although the statutory definition does not have any provisions specifically about hedging, we agree that in certain circumstances

of persons entering into swaps for the purpose of hedging price risk related to physical positions is not swap dealing. The rule text specifies when this is the case. The release then explains that other swaps used for hedging may or may not be indicative of swap dealing depending on the particular facts and circumstances. As I said, this is an interim final rule and we're looking forward to comments.

The rule provides specificity on when a swap is considered to be in connection with the origination of a loan. We balanced the need for flexibility in matching such swaps to the particular circumstances of the borrower and the lender against the limited scope of the statutory exclusion. The final rule provides that the swap must be entered into within 90 days before or 180 after the loan agreement or any draw of principal under the loan. Also the swap must relate to the financial terms of the loan or it must be a condition of the loan agreement that the borrower enter into the swap to hedge its commodity price risks.

Last, the rule provides that if a person

is required to register as a swap dealer, it may apply to limit its designation as a swap dealer to specified categories of swaps or specified activities based on the considerations that are relevant in the person's particular situation. Thank you, and I welcome your questions.

CHAIRMAN GENSLER: I will entertain a motion to adopt the staff recommendation on entity definitions.

COMMISSIONER SOMMERS: So moved.

COMMISSIONER CHILTON: Second.

CHAIRMAN GENSLER: I guess my first question is one I as trying to figure out back here so I'll ask where in the document because I worked so closely with Jackie Mesa on the international side and with my fellow Commissioners, particularly Commissioner Sommers, on the international reach of this to central banks and sovereign banks. What page and which section did we tuck that into?

MR. BURNS: It's in one of the MSP sections.

CHAIRMAN GENSLER: Could you turn me to the page? I'm now being whispered to that it's

in the 360s.

MR. ARON: There is also a discussion in the ECP section briefly about one aspect of cross-border.

CHAIRMAN GENSLER: Thank you because I now see it and I remember working on the language just to confirm the approach and if Dan Berkovitz you want to talk about international comity maybe you could give a little shout out to thank Jackie Mesa. If I would have remembered I would have put this in my opening statement. This is mostly for market participants and those central bankers around the globe listening. Dan?

MR. BERKOVITZ: The release provides that the CFTC does not believe that foreign governments, foreign central banks and international financial institutions should be required to register as swap dealers or major swap participants. This is based on our reading of congressional intent that Congress in enacting this did not intend to apply the Act in a way that would be inconsistent with principles of international comity so that we interpreted not to require dealer registration for those

categories.

CHAIRMAN GENSLER: I'm not entirely sure how we would have told a central bank how to have capital and margin and so forth in any event. Could you walk through a little bit more because I think this is absolutely the right thing about the concepts of international comity?

MR. BERKOVITZ: Section 2(i) of the Commodity Exchange Act which was added by Section 722(d) of the Dodd- Frank Act provides that the provisions of the Commodity Exchange Act, the swaps provisions of the CEA, shall not apply to activities outside the United States unless such activities have a direct and significant connection with activities in or affect commerce of the United States. In interpreting the scope of Section 2(i), the CFTC is guided by the Supreme Court in case law and principles of statutory construction which generally provide that agencies and courts are to interpret statutes with extraterritorial application as the Commodity Exchange Act is through Section 2(i) in a manner consistent with principles of international comity, and principles of

international comity take into account the concerns of foreign regulators, foreign jurisdictions and construing the statute in a way that does not unduly interfere or present conflicts with foreign jurisdictions. Clearly one government trying to regulate the activities of other foreign governments such as -- asserting jurisdiction over activities that other foreign governments have a clear jurisdictional interest in presents these types of issues and that's why we considered the effect of applying Dodd-Frank in requiring dealer registration where major swap participant registration to activities of foreign governments. Along with requirements, the CFTC having certain enforcement authorities, so taking into account that this will be applied to foreign governments as a matter of international comity we believe the better interpretation of the statute is that Congress did not intend to apply those activities.

CHAIRMAN GENSLER: You end up wanting to read footnote 1184 for the list of multinational development banks and international financial institutions. It ties

into the list that comes straight out of statute and straight out of Basel. I have another question in another area, hedging, and this will be my last question. As I said in my opening statement, I think that we've addressed the distinctions between dealing and trading, between hedging and dealing, market making and not market making. So I think end users unless they're genuinely market making ad not going to be caught up in this swap dealer definition. But some people have raised the question why are we putting into rule text a specific setoff words around the physical markets and does that in some way limit other hedging? If a company enters into a loan, borrows money and in connection with that also enters into a swap, is that swap dealing?

MR. FAJFAR: No, that wouldn't be swap dealing because as we say in the release, swap dealing requires you to engage in the activities that are set out in the statute with swap dealing being a point of connection to the market.

CHAIRMAN GENSLER: By hedging your loans, hedging your currency risk, hedging other risks, are also not dealing.

MR. FAJFAR: That's correct because you're not accommodating others' demand for swaps.

CHAIRMAN GENSLER: But we happen to have taken the added step that Congress didn't ask to take to give even further clarity when it related to hedging physical commodities in this interim final rule. Is that correct?

MR. FAJFAR: That's correct.

CHAIRMAN GENSLER: Thanks. Commissioner Sommers?

COMMISSIONER SOMMERS: I'm going to stick with that same theme and ask with regard to the hedging definition in the swap dealer provisions and ask why it's different from the hedging definition in MSP.

MR. FAJFAR: We address that topic on pages 71 to 21 and there are two primary reasons. First, the common-sense reason that this exclusion that we're putting in rule text as compared to the multifactor analysis that applies also is it's in the nature of a safe harbor and so we have to be careful when we draw that distinction and apply rules that we have

experience applying and I think Commissioner Wetjen made a very good point about the difficulty of distinguishing the two.

The second reason is more technical but is very important, that the swap dealer definition and the major swap participant definition where we use different hedging tests serve two different purposes and they're structured in the statute to be effectively applied at two different times. The major swap participant definition applies to anybody who is not a swap dealer, so it presumes that swap dealers are identified first, they're sorted out and they're picked out and they're identified as swap dealer. Then the major swap participant test comes in for a different purpose and says all these people who are not swap dealers, which one of those are posing this very high level of risk? So since you're only trying to identify in that second step, the subsequent step, who is a very high level of risk, you want a rule that excludes swaps that don't pose a high level of risk and a lot of hedging swaps don't pose a high level of risk. But if you were to take that second rule

and put it into the first step and say I'm going to do that first, I'm going to exclude all of the hedging swaps, all the swaps hedging or mitigating commercial risk, that wouldn't be correct because what the statute requires is that first you identify swap dealers by their activity and you say which activities are swap dealing.

COMMISSIONER SOMMERS: Can you give examples of transactions that you think qualify under the MSP definition that wouldn't qualify for hedging under the swap dealer definition of hedging?

MR. FAJFAR: I think in trying to think about it on the spot, the definition of the exclusion in the major swap participant definition would exclude the swap that the Chairman mentioned where I'm borrowing money and I'm hedging my risk for borrowing that money and it's a pure and simple interest rate swap. That would be excluded under the major swap participant test, but you were to limit yourself and look at just the rule text in the swap dealer definition, you would see there that it's talking about physical commodity price risk. One of the

reasons is under the multifactor test you know as we just discussed that swap hedging and interest rate risk is not dealing activity so you don't need the additional bright-line rule to assure yourself of that.

COMMISSIONER SOMMERS: What kind of comments are you looking for in the interim final rule that would persuade you that we didn't get this right with the definition for swap dealer?

MR. FAJFAR: We talk in the release about certain questions and two in particular are, first, whether the two definitions should be consistent. Is it consistent or do we say because these are two different situations that consistency requires treating different situations differently? Or is it the case that they should be consistent? The other, so address Commissioner Wetjen's point again, how do you identify hedging swaps as opposed to dealing swaps? The commenters were unanimous that hedging swaps are not dealing swaps. They weren't so unanimous on how you identify a hedging swap versus a dealing swap.

COMMISSIONER SOMMERS: I now have a

couple of questions about the ECPs, so I'll switch to the man with the ECP button on and I must say that it's nice to see that you were all able to keep your sense of humor throughout this very --

MR. BURNS: David was going to present a short presentation on ECPs but we could do questions and answers if you'd like.

COMMISSIONER SOMMERS: So you want me to wait?

MR. BURNS: It's up to the Commission.

MR. ARON: I'm happy not to do it so that you can just answer questions.

CHAIRMAN GENSLER: Why don't you just let Commissioner Sommers just ask her questions? Do you want to do one?

MR. ARON: It's nothing special. It was funny before, but I cut the funny part so it's just dry.

CHAIRMAN GENSLER: By unanimous consent does everybody want him to do it with his funny part? You're on.

MR. ARON: All right.

COMMISSIONER O'MALIA: Without objection.

MR. ARON: Do you want me to do the presentation? I don't have the funny part anymore, but there might still be one remnant. I guess I can wing that one. Basically, 2(c)(ii) which a lot of the ECP rules are based on is hell. If you have any sway with Congress the next time they reauthorize, maybe they can start from scratch with 2(c)(ii). It's very complicated which is why the ECP section is very dense. I liken it to "The Shining." It's kind of like a maze, the big topiary out in front of the hotel, and if you spend too much time thinking about 2(c)(ii) you might end up like Jack Nicholson did at the end of "The Shining." That was the funny part.

COMMISSIONER O'MALIA: That's not reserved to this part of the rule though.

MR. ARON: Fair enough. There are two main reasons that commenters were interested in regarding the impact of the ECP regs. Dodd-Frank added to the CEA new Section 2(e) which provides that a non-ECP can enter into a swap except on or subject to the rules of a designated contract market. Dodd- Frank also amended the ECP definition by providing that for purposes of

certain foreign exchange transactions listed in 2(c)(ii)(B) and (C) which we all retail Forex transactions, I should say that maybe that wasn't the perfect choice of terms, it's a little confusing because depending on the outcome of the analysis, if you fall within one of the relief parts of the regs, it might be within a retail Forex regime, but for simplicity we used that term. A commodity pool is not an ECP if any pool participant is not an ECP in its own right and this is what's known affectionately as the look-through provision.

I'll now quickly describe the final ECP regulations. There are eight parts. It's in 1.3(m) and one through eight. Some of them say you are an ECP, some of them say they're not and they give some further detail. The first four state that SDs, MSPs and securities analogues are ECPs based solely on their status as such. Then there is the retail Forex commodity pool look through. Prong five of the regulation states that a pool that's a party to a retail Forex transaction which we call a transaction level pool and that has one or more non-ECP participants

is not itself an ECP for purposes of the CFTC's retail Forex regime under either prong four of the statutory definition which is the pool prong or prong five which is the general entity prong. With certain exemptions discussed in the shining section of the preamble, non-ECP pools and their counterparties are subject to the CFTC's retail Forex regime. Regulation 1.3(m)(ii) mitigates the impact of the look through, however, by limiting it to looking through only the transaction level pool unless any level of the pool structure has been structured to evade the retail Forex regime and we give some guidance on when that's not the case in the preamble, in other words, not structured to evade.

The impact of the look through is further mitigated by delaying the effective date until the end of this year consistent with the compliance date for CPOs affected by the recent withdrawal of 413(a)(iv) and deeming pools with no U.S. Participants operated by CPOs located outside the U.S. to be ECPs. There's also an alternative to the retail Forex look through, notwithstanding the look-through language in the

statute and the regulation that tracks the statute for the most part. A commodity pool that enters into a retail Forex transaction is an ECP regardless of whether each participant in the pool is an ECP if it satisfies three conditions, it's not formed to evade the retail Forex regime, it's got total assets exceeding $10 million and it's formed and operated by a registered CPO or by a CPO exempt from registration pursuant to our regulation 413(a)(iii). Because many pools will have been formed by CPOs exempt from registration -- formed by registered 413(a)(iii) exempt CPO element of prong eight will not be a requirement for pools formed before the end of this year. Related to prong eight of the further definition, I think I mentioned this, the offshore, the Commission will consider a pool whose participants are limited solely to non- U.S. persons as defined in current CFTC regulation 47 with one modification, the new CPO is offshore to be an ECP for purposes of the look through. 1.3(m)(vi) provides that a pool not satisfying, this is a pool specific prong of the CEA's ECP definition, that it's total assets are $5 million

or less or because it's not formed and operated by a person subject to CEA regulation or foreign equivalent, cannot be an ECP pursuant to the general entity prong of the CEA's ECP definition. Unlike 1.3(m)(v), (m)(vi) does not have a look through but does apply to swaps. As I said before, the impact of that is mitigated by delaying the effective date until the end of the year. Then we've got the line of business ECP prong. I'm winding up here. Is this too long? This is a lot longer than the other guys. Should I keep going?

MR. FAJFAR: It's ECP. It's going to be long.

MR. ARON: I'm longwinded by nature.

CHAIRMAN GENSLER: But you did say you're winding up.

MR. ARON: Yes. There are only two more. There's line of business and the incorrect cross-reference.

The seventh prong preserves our line of business concept from our 1989 swap policy statement subject to certain conditions. An entity that does not qualify as an ECP on its own can now qualify as an ECP with respect to a swap

used to hedge or mitigate its commercial risk if all of its owners are ECPs based any prong of the ECP definition and any owner has a net worth of more than $1 million. Mark advises that I can stop here and we can return to questions.

COMMISSIONER SOMMERS: Unfortunately I still have questions after all of that. My questions begin with the bank common funds and collective investment vehicles, the issue that the OCC brought up in their comment letter. Would these be considered ECPs under this rule?

MR. ARON: I think the answer is it depends. We had a call with them and the SEC during the process and it wasn't clear, but there did seem to be a couple of ways to interpret it that way. But as you know, there's a footnote in the preamble that says the Commission may in future consider a number of the comments received and we list a few. I don't think this is one we listed, but certainly you can consider that if the Commission takes that up in another round of guidance.

COMMISSIONER SOMMERS: Should they be considered on part with mutual funds?

MR. ARON: It depends. We haven't thought about it in depth but we did start talking about it at the staff level and we didn't get enough information about the regulatory scheme that applies and we're not certain that it is as protective as the mutual fund regulatory regime, so there may be a reason that Congress didn't add those funds specifically to the ECP list so we think it needs further consideration and we'd be happy to --

COMMISSIONER SOMMERS: Will there be a follow-up ECP proposal?

MR. ARON: I sure hope so because I drafted about 40 extra pages and I'd love to keep doing it, but it depends.

COMMISSIONER SOMMERS: We would not want that to be for nothing. Right?

MR. ARON: Right.

COMMISSIONER SOMMERS: Are there other issues that that follow-up proposal will include that you haven't talked about here?

MR. ARON: I could just list the things that are in the footnote in the preamble. The meaning of amounts invested on a discretionary

basis in the individual prong of the ECP definition because it used to be total assets so we got comment asking what the new language should mean. We had a comment asking whether bond proceeds also would count toward that same language in the governmental ECP context. There were various permutations of how credit support is given by the owners of entities to the entity guarantees and joint and -- liability. A number of banks asked about that, can these permutations result in ECP status if the entity itself is not an ECP depending on the credit support providers. The proprietorship definition generally in anticipatory ECPs are the ones we list.

COMMISSIONER SOMMERS: Thank you, David. I don't have any other questions.

CHAIRMAN GENSLER: Thank you, Mr. ECP. Commissioner Chilton?

COMMISSIONER CHILTON: Thanks, Mr. Chairman. The di minimis provision here, we struck a good balance but my initial thought, and I appreciate Mr. Chairman your remarks talking about the notional size of markets and what it really meant, but my first thought was how do you

even say di minimis and then the figure $8 billion without laughing? It seems such a huge number when you consider that we started at $100 million. Really? Like everything, it's a compromise and we got there and I'm okay with it. But the reason that I'm okay with it is, one, we really don't have enough information. It's sort of the problem with what we are doing in the OTC world to begin with. We don't know what's out there and so we have to find it out. So I think we've done the best we can given what we have. But I'm okay with it because of what happens if there's not another action and I just want to make sure I'm clear about that. There is a study in 30 months as I recall and then there may or may not be a rulemaking or an order or some other action that the commissions may in their discretion decide to take. But if nothing is done, when you get to 5 years we could all get a car right now and pay off a car in 5 years, but when we get to 5 years, the di minimis goes back down to $3 billion. It's sort of a hard stop. So absent anything else by the commissions, it goes down to 3 years. Is that correct? Or goes down to $3 billion. Correct?

MR. FAJFAR: That's correct. It's automatic.

COMMISSIONER CHILTON: I think that keeps us all honest, that people who think it should be higher and they may be right as we're learning more and more about these numbers, or people who think that it should be lower, we'll have the study and we can if we do the right thing, both commissions, we can come up with a more appropriate or fine-tuned, recalibrated level. But I think we're erred way on the high side with the 8 and I'm glad that we go to the 3.

I do have one question, and maybe this is for the Chairman if you like. We're going to do this study and we're going to look at who's under $3 billion and we'll look at under $8 billion, but they're not required to provide information here to us. So how are we going to look at that and figure out what this appropriate level is?

CHAIRMAN GENSLER: I think that's an excellent question, Commissioner Chilton. I think we'll benefit because swap data reporting will have begun actually 60 days after we finish

the product rule, so sometime this year, later this summer in fact I would anticipate that you'd start to have data reporting in the markets. That study that we do in 30 months would benefit, and what we've expressly said is it would be based on the first 2 years of market information that's in those swap data repositories. We of course already also have folks registered that are over $8 billion and if we've gotten it wrong, for instance, if there was no one who was registered in a certain category, that would be illustrative. If there was nobody in the cotton or corn or wheat markets that's registered --

COMMISSIONER CHILTON: That would tell us something.

CHAIRMAN GENSLER: That would tell us something in that regard as well. On the other hand, if we had folks who had been knocking on our door saying we're over $8 billion and we're not out because of dealer-trader and we're not out because of hedging and we're not out because of market making and we looked at it together and said that doesn't feel like a dealer. So I think we're going to hear on both sides, one from the

swap data repository, two from people who if you just look at and you say this kind of looks underinclusive or in fact over this 30 months if somebody that we've collectively said feels overinclusive.

COMMISSIONER CHILTON: Thank you. I have to put on my glasses for this one. I don't know about the copy that other people have, but the one that we have has important footnotes that I want to refer to which happens to on my copy be about four-point types so I apologize. In my opening comments I discussed how there were folks who we defined who were in and folks that we defined who were out and I want to talk specifically about these prop traders and HFTs. First of all I refer to the law, we expressed how Jeff, I think it was you, Jeff, you talking about the four criteria of being a swap dealer. One of them is if you engage in any activity, the fourth one, that they would be commonly known in the trade as a dealer or market maker in swaps. That's the law. So if somebody, even a prop trader, is involved in a market maker program, they're going to be a swaps dealer. We don't have the discretion

to say whether or not --

CHAIRMAN GENSLER: That's certainly how I've read the law and I think staff has read the law, that the fourth as you say prong says if you're commonly known in the trade as a market maker in swaps, you might be out for a di minimis, so if in the future -- there's not necessary electronic trading of swaps today, but if in the future somebody is the equivalent of a floor trader, we've provided for that. Those floor traders could sign up as floor traders, the equivalent and Commissioner Sommers -- many people raised this, but I attribute Commissioner Sommers saying with locals, we don't want to capture a bunch of locals in the pit and the ring who happen to do $8 billion of activity. We can register those as floor traders, and then you get to this question. But if somebody -- I think the statue is the statute and we have to be consistent with Congress and I believe because we've also addressed an issue if you are a swap dealer who is solely doing cleared swaps and you're doing those cleared swaps guaranteed by a futures commission merchant, that our capital rules

should take -- that when we finalize the capital rules that we should take that into consideration and I think that's the important footnote that you're probably --

COMMISSIONER CHILTON: That's the footnote. Let me tease it out just a little bit more. So if they're using only their money and it's cleared and it's guaranteed by an FCM, and I know you're not prejudging the rule or what will be ultimately in our capital rule, but it's your view that there shouldn't be a capital requirement whatsoever.

CHAIRMAN GENSLER: The question that's raised actually is not whether there's a capital requirement. The question was if there had to be a minimum.

COMMISSIONER CHILTON: The question -- there has to be a capital requirement.

CHAIRMAN GENSLER: I think the question the commenters have raised is whether there needs to be a minimum capital requirement particularly because how they organize themselves might be in multiple entities and I think if I recall that's what the footnote spoke to.

COMMISSIONER CHILTON: What I was asking about was, and if you don't want to -- I was asking your personal opinion about proprietary traders. You obviously have a little more than a fifth of the input of what a final rule looks like. So I'm curious as to your --

CHAIRMAN GENSLER: Sometimes only a tenth.

COMMISSIONER CHILTON: That is true. But I'm curious as to your personal view about a proprietary trader who has cleared, is only doing cleared and doing it through an FCM that's guaranteeing it. Would there be any reason why they would --

CHAIRMAN GENSLER: Yes. I think that the risk of the system still is that somebody has come capital standing behind their trades so the capital rule has a minimum that we proposed of $20 million and it also says as our rules have in the past that you have 8 parent of your margin, that it's a relationship. Like if you have a lot of margin at the clearinghouse, you in essence have sort of an 8 percent cushion; 8 percent of the margin you have at the clearinghouse, you have an

8 percent cushion back at home so that it's all scaled to how much you have at the clearinghouse. And what I understand the commenters have come in on is why do they have to have a minimum because most of these folks don't have open positions at the end of the day. Most of these folks don't have risk at the end of the day, so it would be a pretty small amount of capital, this 8 percent, but they said why are you forcing us to have $20 million when we don't really have many open positions? That's the nature of these high-frequency traders.

COMMISSIONER CHILTON: We'll get to it when we get to the capital rule and I'll be keenly interested in it. The last thing I had was these folks, the prop traders, unless they are mandated to fit in because we don't have discretion under the law or they chose to be a market maker and then they're a swap dealer if they choose to be a market maker that we can deal with in the capital rule what additional requirements are. But if they're not a market maker, they're not either in the law or in the rule, our intent is to put out another rule that would allow them to register as a floor

trader?

CHAIRMAN GENSLER: In here there's a whole floor trader thing right in here.

COMMISSIONER CHILTON: With regard to that, what would be required in addition to in the other things that we're doing, for example, would they be required to deal -- and I could ask staff, would they be required to deal with external business conduct standards?

MR. FAJFAR: For people registered as floor traders, there are certain specified external business conduct standards that they would have to comply with.

COMMISSIONER CHILTON: Would it be the external business conduct standards that we passed in our external business conduct standards rule?

CHAIRMAN GENSLER: I ought to clear it up. There is no external business conducts in there. It's just risk management.

MR. FAJFAR: Right. I stand corrected.

COMMISSIONER CHILTON: What about internal business conduct standards?

CHAIRMAN GENSLER: Do you want to go

through the list? And Frank Fisanich is here too I thought as well. You're waving. You don't want to come up to the table?

MR. FAJFAR: There are specific references to rules in Section 23 that would apply.

CHAIRMAN GENSLER: I'll help out. It's what we finalized 6 weeks ago, that within those rules there are some risk-management and recordkeeping, that they'd have to be registered with the CFTC as a floor trader, a local or floor trader as the term goes, and then be willing to comply with some risk-management and recordkeeping, not chief compliance officer or firewalls or anything, and not external business conduct, not any of the whole regime.

COMMISSIONER CHILTON: The last thing, and I appreciate the patience of staff or anybody else.

CHAIRMAN GENSLER: This is an open meeting. We're deliberating.

COMMISSIONER CHILTON: With regard to recordkeeping, one of the things that has been heretofore ungettable for us with the HFTs are

things like their change books. Mr. Berkovitz, did you want to comment?

MR. BERKOVITZ: Excuse me. I didn't want to interrupt. I wanted to clarify in terms of external business conduct standards. One of the conditions that the Chairman was referring to in terms of these floor traders is they do not directly or through an affiliated person negotiate the terms of swap agreements other than price or quantity or to participate in a request for quote process subject to the rules of a designated contract market. So they're not negotiating. They're only doing price and quantity. They're not negotiating other terms of the swap.

COMMISSIONER CHILTON: Thank you. My question was whether or not the section that calls for records would extend to their change logs. The change logs are what the HFTs do when they change their algorithms so you can track what they're doing. Commissioner O'Malia has heard a lot about this. You have the algorithms in place but then they morph as they trade and as they go on and unless we know what they're doing, and I

don't know how we'd actually analyze all of this yet without the technology, but the ability for us to get the books and records is a key reason why I thought these traders, these market participants, do need to be registered. We need to have access if there is a problem. It puts them on our radar screen. Could we get the change log? Would that include their records?

CHAIRMAN GENSLER: Frank, you are being brought up to the table. I can have it by unanimous consent if you want, but this would be a question on the rule that was passed for swap dealers as well.

MR. FISANICH: The risk-management rule includes a section that requires them to have policies and procedures for testing and review of any programmatic trading program so that there would be some written policies and procedures surrounding change logs and that kind of thing. The daily trading records rule would also require the recording of execution times and all of those things would apply as well.

CHAIRMAN GENSLER: That's daily trading records, to be clear, that may not have addressed

Commissioner Chilton's question. Do we require swap dealers to keep -- I'm not familiar with this term.

COMMISSIONER CHILTON: Change log.

CHAIRMAN GENSLER: Change log. I'm not familiar with the term.

COMMISSIONER CHILTON: It's a trading algorithm.

MR. FISANICH: Not specifically and not in recordkeeping rule, but the risk-management rule does have a requirement that they have written policies and procedures surrounding the use of trading systems, the testing of trading systems and the review of those trading systems. I would think that would cover things like change logs.

COMMISSIONER CHILTON: Thank you. That's what I was getting at. You answered perfectly. I appreciate you coming up. Thank you. I don't have anything else on that unless there's something you needed to add.

CHAIRMAN GENSLER: No.

COMMISSIONER CHILTON: There is no other additional rule we'll need to do to make

these guys traders?

CHAIRMAN GENSLER: There may be whatever it's called, technical or conforming things that the SEC and we are doing on this document.

COMMISSIONER CHILTON: To get these guys registered, these traders, these market participants, I want to make sure there's not an additional rulemaking we have to do.

CHAIRMAN GENSLER: Eric Juzenas is reminding me. We have proposed and not finalized conforming amendments. We have to finalize conforming amendments because they're very critical to the conforming amendments.

COMMISSIONER CHILTON: Is it a rulemaking? Is it something that goes out for public comment?

CHAIRMAN GENSLER: It's already out for public comment. We last June proposed conforming amendments to the terms floor trader and floor broker to include for the first time the word swap because of course prior to Dodd-Frank that was not the case. So working among all of us, we have to finalize those conforming -- the definition of

floor trader has to be finalized to include swaps for people to benefit from this.

COMMISSIONER CHILTON: Thank you for your patience. Is this something, and I know we've got another 20 or so rules to go, but is this something that as far as you know, and you may not know, that is on a faster track than other things or is it months away?

CHAIRMAN GENSLER: The conforming rules, actually to the credit of staff we're in really good shape. I haven't served them up to the ninth floor partly because of the capacity issues of the ninth floor and I think some Commissioners have had a view, I think that I generally agree with it, they're sort of a little bit better as everything else comes together. Now we'll have done 31 and maybe we'll peel some off, but they could be done quite soon. But I've held them off just to see, just like here, we have a new approach to floor trader, we want to make sure these conforming amendments incorporate, that they benefit from, so I was sort of thinking maybe if we got closer not to the full end but a little bit closer it would be a better time for everybody to

weigh in on the conforming finals. Do I have that right, Eric?

COMMISSIONER CHILTON: My only thing is that we -- essentially we figured these guys, these prop traders, are not going to be in here like we proposed and I think that's a good thing. I think we struck a reasonable balance. But I want them registered. I want to have them on our radar screen. My personal preference is this isn't something that goes on for another 6 or 7 months.

CHAIRMAN GENSLER: No, no. With your encouragement we'll try to get maybe some of the conforming stuff up during the springtime.

COMMISSIONER CHILTON: Thank you. And thanks again for your patience.

CHAIRMAN GENSLER: Commissioner Sommers? No, we're with Commissioner O'Malia now.

COMMISSIONER O'MALIA: Commissioner Sommers raised a good point, several good points, about the hedging definition and some of the uncertainty. I'm sure I have the wrong draft, but there is a line in the definition that says, "a per se exclusion," referring to the hedge

definition, "is not appropriate because it is possible that in some circumstances a person that might enter into swaps that are connected to the physical commodity business but also serve market function characteristics of the function served by swap dealers" which obviously raises questions. Some of the questioning that went back and forth is that there a more definitive hedging is not dealing. This seems to say that in some cases hedging isn't necessarily excluded. Could you explain that a little bit and how we're going to understand that and provide the certainty that everybody has claimed in this rule?

MR. FAJFAR: I think a good place to start is one of the comments made at the roundtable that swaps by their nature are hedges. A swap serves to hedge things. Every swap that you enter into hedges something else. So a person could be entering into a swap that has the consequence of hedging their exposure that they have somewhere else, but that doesn't tell you whether or not they're holding themselves out as a swap dealer.

COMMISSIONER O'MALIA: Let me say that

that is part of my rub on this rule and frustration. It isn't very clear. It is going to be facts and circumstances and there's going to be a lot of instances where people are confused. What will be the process if people are confused? How will they appeal to the Commission for certainty? Do we have a process, a standards and exemptive process that we're considering? Are you guys going to set up a hotline?

MR. BERKOVITZ: We've had a process for a number of the rules, for example, the Office of General Counsel or the other appropriate divisions depending on the particular rule. We're available to answer questions about the rules. In this particular rule we've been discussing we haven't put it into place yet a more established interdivisional process where the Office of General Counsel or Division of Swap Intermediary Oversight. What we want to is both be available to answer questions and provide guidance and at the same time make sure it's consistent and communicated and we're considering exactly how to do that.

COMMISSIONER O'MALIA: That's very

helpful. Thank you. What category would Fannie and Freddie fall into in this dealer MSP definition?

MR. FAJFAR: The dealer or the MSP? Are you asking whether it would be a dealer or an MSP?

COMMISSIONER O'MALIA: Which one. Yes.

MR. FAJFAR: From what I know about Fannie Mae and Freddie, they don't hold themselves out as swap dealers. I think then we would have to have the question of whether they have -- we talk about factors like if they have a staff and resources dedicated to customer -- collateral management and so forth. As far as I know, I don't think they have that but that would be the question they would have. Then they would ask whether they're routinely standing ready to enter into swaps at the request or demand of a counterparty. Are they doing that with an intention of profiting from providing liquidity to the market? That's one of the keystones of the dealer-trader distinction. If they say we're not running a market making operation, then they wouldn't be a dealer. And then as I said, the subsequent determination is to run their swaps to

see if they pose a level of a high degree of risk that's under the MSP test.

MR. BURNS: And we always thought the analysis for those entities would be MSP and whether they met the thresholds or not under the MSP definition.

COMMISSIONER O'MALIA: So we don't know? We put in the rule 125 dealers and six MSPs.

MR. FAJFAR: I think your question is whether we know now who is a swap dealer and who is an MSP and there are a lot of different factors to consider in answering that. First of all, the basis of this rule is that we set out rules and guidance to the public and they apply those rules and guidance and they decide if they need to come in and register or not. Second of all, just to cut to the chase, there are many other factors, but we didn't write the rule to achieve a certain result. I think an interesting comparison and analogy would be to think about a city board saying if we drop the speed limit on this street from 25 to 20, how many tickets would we write? We didn't think that was the question. We thought the question was what's a prudent rule that can

be applied efficiently and uniformly and appropriately considering all of these factors? We have to estimate, and there are estimates in the document, for various purposes how many people do we think it's reasonable to think would be captured by the different definitions and those numbers appear in the back. Those are estimates for a purpose of trying to talk about the effect of the rule and some of those estimates in the back were for budgetary purposes we refer to.

COMMISSIONER O'MALIA: Fair enough, but when we do the forensics on the financial meltdown, they are the smoldering heap that people always point to and I'm wondering where they fall in this rule. I have no further questions.

CHAIRMAN GENSLER: May I ask who is the "they" at the end there in the smoldering heap?

COMMISSIONER O'MALIA: Fannie and Freddie.

CHAIRMAN GENSLER: I don't know. From the little bit I know, it's the question of whether they'd come over the major swap participant category rather than the dealer

category. Commissioner Wetjen?

COMMISSIONER WETJEN: Thanks, Ms. Chairman. Thanks again to staff for your work on this. I've enjoyed our multiple conversations over the last few months trying to sort all this out. Real briefly, I wanted to try and clarify a point that I think has already been made by staff in response to other questions. There are a lot of different factors that could go into the determination any one of which by itself wouldn't be dispositive. Isn't that generally correct?

MR. FAJFAR: That's correct. It's a multifactor test.

COMMISSIONER WETJEN: For example, if you fall on some trade association's list of members, that could be indicative but not necessarily dispositive. Correct?

MR. FAJFAR: Correct. Clearly that's true.

COMMISSIONER WETJEN: And the same holds true with accommodating demand. Correct? Just because an entity does swaps that accommodate demand, it's not necessarily the case that it's a dealing type of swap that would render

the entity a dealer.

MR. FAJFAR: Exactly. You have to consider the other factors.

COMMISSIONER WETJEN: I have another question related to compliance which I'd like to loop the Chairman in on as well. Do we say anything in this rule with respect to when a dealer would have to register as a dealer if they believe they are one?

MR. FAJFAR: We talked about the effective date, effectively the registration compliance date, being 60 days after the swap definition is completed.

COMMISSIONER WETJEN: Obviously our swap rule is going to come later, but 60 days after that would be the trigger for an entity registering. Correct?

MR. FAJFAR: That's correct.

COMMISSIONER WETJEN: Mr. Chairman, you alluded to this in your opening statement, but we have a number of entities who are not necessarily located in the U.S. who have questions about whether they could be required to register as dealers. I think you indicated in your statement

that there is additional work by the Commission to address that question and I wondered if you could share with us the latest thinking on how the Commission might take that up.

CHAIRMAN GENSLER: I do think it's a very critical point. We've worked in partnership here and with the SEC in this remarkable effort, but also with international regulators. And in Europe, let me at least publicly congratulate them because I've done it privately, but the last month they finished their key legislation on clearing and risk management and data reporting EMIR for derivatives. They still have some work to do on posttrade and pretrade transparency, on some sales practices and on position management, what we call position limits. Those four areas are still to be done in MIFID review. They've made tremendous strides. It's not identical to where we are, but it's largely consistent on the clearing regime with end users and so forth.

I anticipate that the Commission will expressly seek public input on cross-border application of Title VII. We've still been working on that and the documentation has

benefited from a lot of input from the Securities and Exchange Commission, Treasury, the Federal Reserve and they still don't give me a draft. Dan keeps saying I can't read it yet. I kind of substantively know what they're working on with Carlene Kim who's the head of that team. I also believe that it would be appropriate through an order to think about a phased-in compliance for certain requirements of this cross- border swap circumstance. Frankly speaking, if you're a swap dealer, you're located in New York and you're dealing with U.S. persons, I think it's pretty clear with the cross-border unless they worry about cross-border from New York to Kansas.

COMMISSIONER WETJEN: Those entities likely know what their dealers --

CHAIRMAN GENSLER: That's a different type of cross- border issue. As it relates to certain requirements on the real cross-border stuff, I think we can do that. Dan, we could do that if we wanted to through some order as I understand it.

MR. BERKOVITZ: That's correct. We could address that in exemptive order.

CHAIRMAN GENSLER: I envision that we've got a lot of things on our plate in the next month or two, get this product rule done, get a cross-border release out for public comment, consider an exemptive of what we'll call the Dunn set. That's we call it for Mike Dunn. Consider a couple of rules that are in the hopper. There are at least two that are pens down with the Commissioners, the designated contract market and the end user. There are now some pens down versions of non-Dodd-Frank, the ownership and control reporting rule that I know many Commissioners care deeply about as it's a really good way to get more transparency for us. But then also working through these questions of the appropriate approach for phased-in compliance and we've had some good dialogue with Adair Turner who runs the Financial Services Authority, the FSA, and I had some good dialogue. I've had good dialogue with Michel Barnier and with industry representatives.

COMMISSIONER WETJEN: I think that's reassuring and I'm sure a lot of folks listening will be reassured by that too. We'll in other

words provide legally binding certainty to these firms so they'll know -- I guess in the first instance they'll know that they don't necessarily have to register right away even within 60 days.

CHAIRMAN GENSLER: Or if they register there's a phased-in compliance.

COMMISSIONER WETJEN: Right.

CHAIRMAN GENSLER: So I have long felt that we want to get these rules done right, not against a clock and that we want to provide market participants appropriate, balanced phase-in periods. We're doing a big phase-in today on this di minimis. It's just another form of it.

COMMISSIONER WETJEN: Thank you. I have one other subject I wanted to cover with a few questions, and that is the section of our release that deals with limited designations. As I mentioned in the statement, there are a lot of these firms that do a lot of different swaps some of which might fall within the bona fide hedging definition in this rule, some of which might not, some of which clearly firms have acknowledged are dealing swaps. But I think our rule takes into account the fact that if they are dealing swaps

among a larger pod of other swaps, the Commission's regulatory interest is mostly in those dealing types of swaps which is why we've laid out this limited designation regime. I wonder if you could give me a few examples of what might be appropriate as limited designations.

MR. FAJFAR: Yes, I could. One area where this comes up especially is in the agricultural area where there can be a wide difference in how different types of swaps on different agricultural products can be traded. Some can be very liquid and others less liquid. So it's possible that somebody could be a swap dealer with respect to a very liquid commodity but not others. Another example would be the point we just talked about where an institution has a variety of different activities, they're using swaps some for hedging and then others where they're having a profit motive of providing liquidity to the market and so forth and so those two activities could be split and the flatter activity would be registered.

COMMISSIONER WETJEN: With a firm that has part of its business that is registered as a

swap dealer under a limited designation, how would the swap dealer requirements, the whole panoply of swap dealer requirements, apply to the firm as a whole or would it just apply to the limited designee?

MR. FAJFAR: The definitional rule provides that only the portion that is designated as a swap dealer, whether it's a unit or whatever the designation is, the swap dealer requirements would apply to that unit.

COMMISSIONER WETJEN: And that also would hold true with respect to our capital requirements. Correct?

MR. FAJFAR: To the extent that I'm familiar with the capital rule, I've been concentrating on this one, that is generally the way the capital rule would work.

COMMISSIONER WETJEN: That's all I have.

CHAIRMAN GENSLER: Thank you, Commissioner Wetjen. I wanted to come back to one thing that Commissioner Chilton and I were going back and forth deliberating earlier on. Among three sets of conforming rules that we proposed,

they're in pretty good shape. I didn't do it for this meeting, but I think all three sets' comment summaries and staff recommendations have been to the Commissioner, there is no pens down, but two of them are in my office. I haven't felt like flooding the system with conforming rules. What I'm encouraged about by this is I'm going to go back and ask staff what could we maybe do as an early package including what is the definition of floor trader in 1.3(x). Given where we've come to and with today maybe 30 rules finished, there are some conforming rules we should just -- because it lowers market uncertainty, it lowers uncertainty for a lot of participants rather than holding them all, so I think that was a good suggestion.

COMMISSIONER CHILTON: Thanks, Mr. Chairman.

MR. BERKOVITZ: If I could add a clarification to Commissioner Wetjen's last question on limited designation and the requirement like capital requirement which would I believe apply to the whole firm. One of the things that I think if somebody comes in, and this

is explained in the preamble, and applies for a limited designation, the way it's structured we have flexibility in terms of we're looking for the applicants to demonstrate how they would apply or comply with for example the capital requirement in the limited designation context. So if certain of their activities were only swap dealing of these activities, they would still be required to show and to demonstrate how they could satisfy the capital requirement because that would generally be applied across the firm so that we would look for them to show us how they could comply with a requirement like that.

COMMISSIONER WETJEN: I think the point you're also making, Dan, is that it's not necessarily the case that -- I'd like to make an even stronger statement than that. It's not the case that of the swaps that any company does if it happens to have part of its business as a limited designee, it's still not the case that all of those swaps will automatically determine what the capital requirements would be of the limited designee. That's my understanding.

MR. BERKOVITZ: I'm not sure of the

answer to that right now.

COMMISSIONER WETJEN: We'll have to continue discussing that and the capital rule perhaps.

CHAIRMAN GENSLER: Yes. Before you call the roll, Mr. Stawick, I thought that I would thank the Securities and Exchange Commission which I have been informed has actually voted on this joint rule and they voted unanimously some moments ago, so I do sincerely thank the five Commissioners all of whom have weighed in on this, four of whom I've personally been talking to about it, probably all five of us have been talking to probably all five of them and their staffs and their excellent work. Mr. Stawick, I guess you call the roll and we'll find out over here.

MR. STAWICK: Commissioner Wetjen?

COMMISSIONER WETJEN: Aye.

MR. STAWICK: Commissioner Wetjen aye. Commissioner O'Malia?

COMMISSIONER O'MALIA: No.

MR. STAWICK: Commissioner O'Malia no. Commissioner Chilton?

COMMISSIONER CHILTON: Aye.

MR. STAWICK: Commissioner Chilton aye. Commissioner Sommers?

COMMISSIONER SOMMERS: Aye.

MR. STAWICK: Commissioner Sommers aye. Mr. Chairman?

CHAIRMAN GENSLER: Aye.

MR. STAWICK: Mr. Chairman aye. On this question the yeas are four, the nays are one.

CHAIRMAN GENSLER: A majority having it or the ayes having it, the staff recommendation is accepted and apparently since the Securities and Exchange Commission did so also today, it will be sent to the Federal Register in the appropriate way. At this point I ask for unanimous consent to allow staffs of the CFTC and SEC to make technical corrections to the document voted on today prior to sending it to the Federal Register. Without objection, so ordered. Let me see if there is anything else.

COMMISSIONER O'MALIA: Mr. Chairman, this is usually where you lay out the schedule.

CHAIRMAN GENSLER: Here we go. This is also usually when I make Mr. Adamske nervous. I think that as we all know, there are two matters,

reporting of historical swaps in Part 46 which is greatly benefited from all five Commissioners' efforts is ready and we might end up just doing that by notational vote because it's a matter that I think everybody has weighed on and the document is in good shape. The other thing is this approach to an interpretive guidance on indemnification which I think also now everybody has weighed in for swap data repositories. We'll probably put that into notational. That will seek public comment and will benefit from public comment. The two rules that have been in pens down version for final consideration, designated contract markets and the end user exception, I'm hoping to get everybody's feedback from staff whatever changes, consensus, let's try to move on those in a thoughtful but prompt way. In terms of the next op (?), and there is a pens down version for the ownership and control which I'm certainly willing to do in a public meeting or notational, whichever way folks desire because that's a pretty important rule and we could do it either way. Is there another pens down? There may be something non-Dodd-Frank. There is. There's the

consideration of the petition on aggregation and position limits that went pens down in the last day or two. So if you can all give feedback on that, that would be excellent. That's a proposal but it's in reaction to an important petition on aggregation and position limits. That's what I think is in your offices.

What I think is next up very importantly is this product definition rule. We've made excellent progress with the SEC. It's not quite ready to give to the 10 Commissioners' offices, but any feedback particularly on the volumetric options or the borderline between forwards and swaps would be -- and you know Julian Hammers's and Lee Ann Duffy's phone numbers. Then it's these orders that we're talking about, cross-border, exemptive and some approach to phased possible implementation of compliance dates. I think the other two things that are pretty near, and I see Sarah Josephson here and Frank or Frank left because he doesn't want -- the other two that are pretty close to come onto the ninth floor are the phased implementation of the clearing mandate as well as documentation,

netting and portfolio compression. To the rest, internal business conduct and phased implementation, are pretty close to getting to the ninth floor. Dan you'll have to help me with what it's called, 4(c) relief on regional transmission organizations, RTOs.

MR. BERKOVITZ: That's correct.

CHAIRMAN GENSLER: Bob Wasserman, Laura Estrada and others are pretty close to getting to the ninth floor. I don't have a list doing this. Dan, is there something? Always make Adamske nervous.

COMMISSIONER O'MALIA: Anything on MF Global policy reforms?

CHAIRMAN GENSLER: You're talking about broad customer protection. Is Gary Burnett here? I don't see him. If somebody can have Gary follow-up.

COMMISSIONER CHILTON: I thought we were going to do a roundtable or hearing on those customer protection things.

CHAIRMAN GENSLER: Again Gary would have to give us an update. Maybe he can give us all an update.

COMMISSIONER CHILTON: To follow-up on Commissioner O'Malia's to tease it out, are we going to have a meeting on a certain date that you're contemplating?

CHAIRMAN GENSLER: No, I don't have a date to announce.

COMMISSIONER CHILTON: So not May 10 yet. Not sure about it. We'll wait to hear.

CHAIRMAN GENSLER: Is there anything else? Then I'll consider a motion to adjourn the meeting.

COMMISSIONER SOMMERS: So moved.

COMMISSIONER CHILTON: Second.

CHAIRMAN GENSLER: All in favor? Aye. Thank you all very, very much.

(Whereupon, at 11:58 a.m. the PROCEEDINGS were adjourned.)

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CERTIFICATE OF NOTARY PUBLIC

DISTRICT OF COLUMBIA

I, Irene Gray, 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.

(Signature and Seal on File)

Notary Public in and for the District of Columbia

My Commission Expires: April 30, 2016