

July 22, 2011

Mr. David A. Stawick  
Secretary of the Commission  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21st Street, NW  
Washington, DC 20581

Ms. Elizabeth M. Murphy  
Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

Re: Product Definitions Contained in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (RIN 3038-AD46, RIN 3235-AK65)

Dear Mr. Stawick and Ms. Murphy:

The Commodity Futures Trading Commission (the “CFTC”) and the Securities and Exchange Commission (the “SEC,” and together with the CFTC, the “Commissions”) issued a joint proposed Definitions making, published at 76 Federal Register 29818 (the “Proposed Definitions”), regarding the further definition of the terms “swap,” “security-based swap,” and “security-based swap agreement,” and regarding “mixed swaps” and books and records with respect to “security-based swap agreements.”

One issue that was not specifically addressed in the Proposed Definitions, and that would benefit from clarification or guidance, is whether a Title VII instrument that has as its underlying reference an exchange-traded fund based on a broad-based security index would be treated as a swap, a security-based swap, or a mixed swap. Examples of widely-held exchange-traded funds based on broad-based security indexes include exchange-traded funds that track the S&P 500, Russell 2000 and Dow Jones Industrial Average indexes. There are a great variety of broad-based security index exchange-traded funds, ranging from total market index funds to regional or country specific index funds to specific market sector index funds.

An exchange-traded fund is itself an individual security traded on a securities exchange. The share price of a broad-based security index exchange-traded fund corresponds generally to the net asset value of the underlying portfolio of securities the exchange-traded fund is invested in, but such shares may at times trade at a discount or premium to their net asset value due to market forces. On first consideration, it appears that a Title VII instrument based on a broad-based security index exchange-traded fund, such as an S&P 500 index fund, should be characterized as a security-based swap because its underlying reference is “a single security or loan” (the exchange-traded fund being a single security and therefore satisfying the second prong of definition of security-based swap in Section 3(a)(68) of the Securities Exchange Act).

However, a broad-based security index exchange-traded fund, such as an S&P 500 index fund, has as its underlying investment a portfolio consisting of a large number of different securities based on a broad-based market index. This may create some uncertainty about whether a Title VII instrument having as its underlying reference a broad-based security index exchange-traded fund would (in addition to or perhaps as an alternative to being characterized as a security-based swap) be treated under the Commissions' guidance as an instrument deriving its value on a broad-based portfolio of securities (for which there is an underlying security index with predetermined criteria or a predetermined self-executing formula), and thus be characterized as a swap or a mixed swap. See discussion in Section III.G.4 of Proposed Definitions regarding characterization of Title VII instruments having as their underlying references portfolios of securities based on broad-based and narrow-based security indexes.

I respectfully request that the Commissions clarify in the definitional provisions or provide guidance on the characterization of a Title VII instrument based on a broad-based security index exchange-traded fund as a swap, a security-based swap, or a mixed swap.

Thank you for the opportunity to express my views and comment on this issue regarding the Proposed Definitions.