620 8th Avenue
35th Floor
New York
NY 10018
United States

tel +1 212 931 4900
fax +1 212 221 9860
www.markit.com

July 22, 2011

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

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

Re: Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping – File No. S7-16-11

Dear Mr. Stawick and Ms. Murphy:

Markit[1] is pleased to submit the following comments to the Commodity Futures Trading Commission ("***CFTC***" or the "***CFTC***") and the Securities and Exchange Commission (the "***SEC***" and, together with the CFTC, the "***Commissions***") on the proposed rulemaking to implement certain requirements included in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "***DFA***")[2] regarding product definitions (the "***Proposed Rule***").[3]

Introduction

Markit is a service provider to the global derivatives markets, offering independent data, valuations, risk analytics, and related services for swaps and security-based swaps ("***SB swaps***") across many regions and asset classes in order to reduce risk, increase transparency, and improve operational efficiency in these markets. Markit provides a number of indices to the fixed income markets, including several indices upon which credit default swaps indices ("***Index CDSs***") are based.[4] Index CDSs and related tranches that reference Markit's indices are among the most actively traded credit derivatives in the world.[5]

Markit supports the objectives of the DFA, and the Commission's objectives of increasing transparency and efficiency in the OTC derivatives markets and of reducing both systemic and counterparty risk.

Executive Summary

Markit believes that some of the definitions in the Proposed Rule may not provide sufficient certainty to market participants as to whether a certain product will be classified as a narrow- or broad-based index. Because several practical implications will arise given this determination, we provide our comments below to contribute to greater regulatory certainty in the Proposed Rule.

[1] Markit is a financial information services company with over 2,300 employees in North America, Europe and Asia Pacific. The company provides independent data and valuations for financial products across all asset classes in order to reduce risk and improve operational efficiency. Please see www.markit.com for additional information.

[2] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).

[3] Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 76 Fed. Reg. 29818 (published May 23, 2011).

[4] *See* Appendix A for a complete list of Markit's fixed income indices.

[5] Based on information available from the Trade Information Warehouse that is maintained by the Depository Trust and Clearing Corporation (DTCC), Index CDS based on Markit indices total USD $7 trillion notional and related tranches based on the same total almost USD $3 trillion.

The Commodity Exchange Act (the "***CEA***") and Exchange Act of 1934 (the "***Exchange Act***") both provide a detailed definition of the term "narrow-based security index," and the Commissions supplemented that definition by adding the Public Information Availability Test (the "***PIA Test***"). We believe that the PIA Test will create significant uncertainty regarding whether an index is narrow- or broad-based, and urge the Commissions to ensure that the classification process under the final rule is clear. Specifically, we believe that: (1) the Commissions should ensure that indices do not migrate from being narrow-based to broad-based, or vice versa so that an index's classification is certain at any point in time; (2) in order to do so, the Commissions should use a volume-based test instead of the PIA Test; (3) if the Commissions do not utilize a volume-based test, the Commissions should make the PIA Test more certain by: (a) making a joint interpretation for all indices, not just for "novel" products, which should be issued quickly; (b) reducing the PIA Test's debt threshold to $100 million, including debt guaranteed by the reference entity in the debt calculation, and including loans in the debt calculation; (c) including all affiliated entities in the PIA Test's equity threshold; (d) defining the term "control" as ownership or power over 50% of voting stock instead of 20% to be in line with existing market practices; (e) giving Index CDS tranches the same narrow- or broad-based classification as the underlying index; and (f) clarifying that not all tranches of an Index CDS based on an asset-backed security must be registered under the Securities Act of 1933 (the "***Securities Act***")[6] in order to satisfy the PIA Test and that information available through the internet would satisfy the requirement that a security have publicly available distribution reports.

<u>Background</u>

a. <u>Index CDS</u>

An Index CDS is a derivative instrument that references a group or an index of entities or obligations of entities. Index CDSs provide market participants with the ability to trade baskets of the more liquid names within the CDS market, and are thereby used as a tool to manage risk in asset classes that are otherwise difficult to hedge. Index CDSs are standardized, transparent, and highly liquid.

The Commissions requested comment on how indices are created by third party index providers.[7] As mentioned above, Markit provides several indices that are referenced by Index CDSs. Markit selects the components of such indices either based directly on the actual volume of the underlying CDS contracts[8] or by a vote from the market makers, and issues a new series of indices every six months. We publish provisional lists of constituents before the launch of any index to assist in providing transparency about its composition before trading begins.

b. <u>The Proposed Public Information Availability Test</u>

The CEA and Exchange Act both define a "narrow-based security index."[9] These definitions both include what the Commissions refer to as numerical and concentration percentage criteria.[10] The Proposed Rule goes

[6] 15 U.S.C. 77a *et seq*.

[7] *See* Proposed Rule, 76 Fed. Reg. at 29853 ("How are indexes created by such TPIP [third party index provider] and what type of compensation do they receive? What role do parties to a swap play in determining the constituent or index criteria? What type of information does a TPIP require to ensure availability of public information about issuers and the accuracy of information? How could TPIP ensure that only entities are included where public info is available?").

[8] For example, for Markit CDX IG, the initial list of names is separated into investment grade (IG) and high yield (HY) names. The final composition of the index is determined by using rules that ensure the most liquid names are retained or added to the index, while the less liquid names are removed from the basket. In the case of the Markit CDX HY index, the economic sector and the specific credit rating of the reference entity are also a consideration.

[9] *See* CEA § 1a(35)(A-B) ("(25) (A) The term "narrow-based security index" means an index—
(i) that has 9 or fewer component securities;
(ii) in which a component security comprises more than 30 percent of the index's weighting;

further and adds the PIA Test to that definition. As currently drafted, under the Proposed Rule, an index would be a narrow-based securities index if it satisfies any of the following criteria:

- *(A) Numerical and Concentration Criteria*: (i) the index is comprised of 9 or fewer securities or securities issued by 9 or fewer issuers (subject to certain exceptions); (ii) the notional amount allocated to a single issuer or reference entity comprises more than 30% of the index's weighting; or (iii) the notional amount of 5 unaffiliated issuers or reference entities comprises more than 60% of the index's weighting; or
- *(B) PIA Test*: even if an index exceeds the numerical and concentration thresholds, it will still be classified as narrow-based if no issuer or reference entity in the index satisfies any enumerated factors[11], each of which is intended to indicate a likelihood that "information about a predominant percentage of the reference entities or securities included in the index is publicly available."[12]

(iii) in which the five highest weighted component securities in the aggregate comprise more than 60 percent of the index's weighting; or
(iv) in which the lowest weighted component securities comprising, in the aggregate, 25 percent of the index's weighting have an aggregate dollar value of average daily trading volume of less than $50,000,000 (or in the case of an index with 15 or more component securities, $30,000,000), except that if there are two or more securities with equal weighting that could be included in the calculation of the lowest weighted component securities comprising, in the aggregate, 25 percent of the index's weighting, such securities shall be ranked from lowest to highest dollar value of average daily trading volume and shall be included in the calculation based on their ranking starting with the lowest ranked security.
(B) Notwithstanding subparagraph (A), an index is not a narrow-based security index if—
(i) (I) it has at least 9 component securities;
(II) no component security comprises more than 30 percent of the index's weighting; and
(III) each component security is—
(aa) registered pursuant to section 12 of the Securities Exchange Act of 1934 [15 U.S.C. 78l];
(bb) one of 750 securities with the largest market capitalization; and
(cc) one of 675 securities with the largest dollar value of average daily trading volume;
(ii) a board of trade was designated as a contract market by the Commodity Futures Trading Commission with respect to a contract of sale for future delivery on the index, before December 21, 2000;
(iii) (I) a contract of sale for future delivery on the index traded on a designated contract market or registered derivatives transaction execution facility for at least 30 days as a contract of sale for future delivery on an index that was not a narrow-based security index; and
(II) it has been a narrow-based security index for no more than 45 business days over 3 consecutive calendar months;
(iv) a contract of sale for future delivery on the index is traded on or subject to the rules of a foreign board of trade and meets such requirements as are jointly established by rule or regulation by the Commission and the Securities and Exchange Commission;
(v) no more than 18 months have passed since December 21, 2000, and—
(I) it is traded on or subject to the rules of a foreign board of trade;
(II) the offer and sale in the United States of a contract of sale for future delivery on the index was authorized before December 21, 2000; and
(III) the conditions of such authorization continue to be met; or
(vi) a contract of sale for future delivery on the index is traded on or subject to the rules of a board of trade and meets such requirements as are jointly established by rule, regulation, or order by the Commission and the Securities and Exchange Commission. …").

[10] *See*, e.g., Proposed Rule, 76 Fed. Reg. at 29850.

[11] *See id.* at 29894-95 (to be codified at 17 C.F.R. §§ 240.3a68-1a(iv), 240.3a68-1b(iv)) ("(A) The issuer of the security is required to file reports pursuant to section 13 or section 15(d) of the Act (15 U.S.C. 78m or 78o(d));
(B) The issuer of the security is eligible to rely on the exemption provided in § 40.12g3–2(b) of this chapter;
(C) The issuer of the security has a worldwide market value of its outstanding common equity held by non-affiliates of $700 million or more;
(D) The issuer of the security (other than an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77))) has outstanding securities that are notes, bonds, debentures, or evidences of indebtedness having a total remaining principal amount of at least $1 billion;
(E) The security is an exempted security as defined in section 3(a)(12) of the Act (15 U.S.C. 78c(a)(12)) (other than any municipal security as defined in section 3(a)(29) of the Act (15 U.S.C. 78c(a)(29)));
(F) The issuer of the security is a government of a foreign country or a political subdivision of a foreign country;
(G) If the security is an asset-backed security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77)), the security was issued in a transaction registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) and has publicly available distribution reports and

Therefore, generally stated, narrow-based security indices are those indices: (i) that are composed of a small number of securities or a small number of issuers; (ii) where a small number of issuers or reference entities comprise a large percentage of the index's weight; or (iii) where any of the issuers or reference entities composing the index have little publicly available information.

However, even if one or more constituents of an index fail the PIA Test (because it or they do not satisfy the criteria for having information publicly available), it seems the index would nonetheless be broad-based if those constituents collectively comprise less than 20% of the index's weighting *and* individually comprise less than 5% of the index's weighting (the "***PIA Test Exception***").[13]

The PIA Test is complex to understand and will be complex to apply. It has six factors which will apply to all indices (one of which will not apply to asset-backed securities), one additional factor which will apply to asset-backed securities, and an additional three factors which will apply to CDSs entered into when the counterparties are both eligible contract participants. Moreover, it will require in-depth knowledge of the securities that comprise each index in order to determine whether an index is narrow- or a broad-based. To further complicate matters, over a life of a given index it may move from one category to the other, thus further complicating analysis and raising inevitable practical implications.

Comments

We believe that the classification rules should provide greater clarity to market participants as to whether an index is narrow- or broad-based. In particular, we believe that the PIA Test is complex and subjective and, as a result, adds uncertainty to the classification process. Additionally, we believe that the ease with which indices will migrate from broad- to narrow-based, and vice versa, will add uncertainty and raise practical implications both for entities that compile these indices as well as market participants that use these indices. We therefore suggest the Commissions use a volume-based test for classification purposes instead of the PIA Test, which we believe will satisfy the same goal as the PIA Test, or, in the alternative, to modify the PIA Test as described below.

1. Index Classification Should Be Certain at Any Point in Time and Should Not Migrate Between Narrow- and Broad Based Classifications

We believe that the PIA Test will cause indices to switch between a narrow-based and broad-based classification, which could result in unnecessary cost, confusion, and market disruption. For example, Markit CDX HY Index Series 16 is an index composed of 100 equally-weighted constituents.[14] This index would obviously not be narrow-based based on the numerical and concentration criteria because it has more than 9

(H) For a credit default swap entered into solely between eligible contract participants as defined in section 3(a)(65) of the Act (15 U.S.C. 78c(a)(65)):
(*1*) The issuer of the security (other than an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77))) provides to the public or to such eligible contract participant information about such issuer pursuant to § 230.144A(d)(4)) of this chapter;
(*2*) Financial information about the issuer of the security (other than an asset-backed security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77))) is otherwise publicly available; or
(*3*) In the case of an asset-backed security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77)), information of the type and level included in public distribution reports for similar asset-backed securities is publicly available about both the issuing entity and such asset-backed security.").

[12] *See id.* at 29894-95 (to be codified at 17 C.F.R. §§ 240.3a68-1a, 240.3a68-1b).

[13] *See id.* at 29894-95 (to be codified at 17 C.F.R. §§ 240.3a68-1a(b), 240.3a68-1b(b)).

[14] The reference entities are high yield rated North American corporate entities, and the underlying reference obligations are corporate unsecured debt. Two sub-indices of this index are also available with 34 constituents and 39 constituents, respectively.

constituents, none of which individually comprise more than 30% weighting, and because no 5 constituents comprise more than 60% of the index's weighting. However, 10 constituents in this index would not satisfy any of the criteria in the PIA Test, so it would be narrow-based but for the PIA Test Exception.

While CDX HY would fit into the PIA Test Exception because only 10 constituents fail the PIA Test and each is only weighted 1% (thus, the index would be broad-based), we doubt that this would always be the case. For example, some of the older CDX HY series experienced a significant number of credit events, which would have given the constituents that fail the PIA Test a greater weight. If half of the names were removed from the index due to credit events, the constituents that fail the PIA Test would constitute 20% of the index's weighting, thereby exceeding the PIA Test Exception. This effect would be magnified in smaller indices or indices without equal weighting. As a result, an index could be classified as broad-based but become narrow-based at any given time.

We note that, under the DFA, the Commissions must regulate Index CDSs similarly when they are functionally and economically equivalent.[15] We believe that Index CDSs based on the same index series are functionally and economically equivalent to each other no matter when such transactions are entered into. However, if an index is narrow-based one day and broad-based another day, it will change from being a SB swap to a swap as a result, and be regulated differently as a result. Therefore, we believe that the Commissions should ensure that index classifications are certain at any point in time and do not switch between narrow-based and broad-based classifications.

2. The PIA Test Should Be Replaced with a Volume-Based Test

The Proposed Rule indicates that the purpose of the PIA Test is to "reduce the likelihood that non-narrow-based indexes . . . would be readily susceptible to manipulation, as well as to help prevent the misuse of material non-public information through the use of CDS based on such indexes."[16] We believe that the PIA Test will create significant confusion as to whether indices are narrow- or broad-based and that a volume-based test would provide more clarity while also ensuring that broad-based indices are not readily susceptible to manipulation.

We believe that a volume-based classification process would be preferable to the PIA Test for several reasons:

- First, the statutory definition of "narrow-based security index" includes a volume-based factor,[17] but does not include any reference to available public information or, for that matter, susceptibility to manipulation. We believe that the Commissions' regulations should be consistent with the statutory definition.
- Second, a volume-based factor could be applied easily and transparently. The outstanding notional volume of CDSs referencing each index constituent is captured by the Trade Information Warehouse,[18] so market participants and index providers would be able to easily determine whether an index is above or below a volume threshold.

---

[15] *See* DFA § 712(a)(7) ("In adopting rules and orders under this subsection, the [CFTC] and [SEC] shall treat functionally or economically similar products or entities . . . in a similar manner.").

[16] *See* Proposed Rule, 76 Fed. Reg. at 29848.

[17] *See* CEA § 1a(35)(A)(iii) (". . . the lowest weighted component securities comprising, in the aggregate, 25 percent of the index's weighting have an aggregate dollar value of average daily trading volume of less than $50,000,000. . . .").

[18] The Trade Information Warehouse (the "***Warehouse***") is the market's first and only centralized global repository for trade reporting and post-trade processing of OTC credit derivatives contracts. The Warehouse comprises a Trade Reporting Repository that operates and maintains the centralized global electronic database for virtually all CDS contracts outstanding in the marketplace. DTCC provides weekly reports on its website regarding current and historical data on the notional amounts of contracts outstanding and the contract turnover on legally binding records.

- Third, we believe that an index classification based on outstanding notional amount as opposed to the PIA Test would result in less indices migrating from broad- to narrow-based classifications, and vice versa. This, in turn, would create more transparency and clarity in the classification process.

We also believe that a volume-based test would ensure that broad-based indices are not readily susceptible to manipulation. Indices based on constituents with high volumes are likely to have significant public information available. Indeed, the Commissions previously determined, when applying a volume-based test to volatility indexes, that indexes for which there is a liquid market are not likely to be readily susceptible to manipulation.[19]

We therefore suggest that, instead of employing the PIA Test in addition to the number and concentration criteria, the Commissions apply a volume-based test to classify security indexes. Such a volume-based test might be further enhanced by adding a threshold for the minimum number of counterparties for CDS in the single name components so that index constituents with large notional volume but only a small number of counterparties would not contribute toward a broad-based classification.

3. Alternatively, the PIA Test Should Be Modified to Ensure Greater Clarity Regarding Index Classification

If the Commissions determine to codify the PIA Test in a final rule, we urge the Commissions to modify that test in several ways to ensure greater clarity regarding index classification.

a. <u>Index Classification Should Be Subject to a Joint Interpretation and Should Be Rapid for Widely Traded Index CDS</u>

Under the Proposed Rule, an index's narrow-based or broad-based classification would be fact-intensive, and would be "based on the facts and circumstances relating to the Title VII instrument at the time that the parties enter into it."[20] We believe that this classification procedure would make it difficult for parties to have certainty as to whether an index was narrow- or broad-based and, therefore, whether an Index CDS was a swap or SB swap. While the Proposed Rule permits parties to send a request to the Commissions to determine whether a particular transaction is narrow- or broad-based,[21] this process is only directed toward "novel derivatives products"[22] and the Commissions are not obligated to provide a joint interpretation for 120 days following submission of such a request.[23]

We believe that the Commissions should issue a joint interpretation for each widely-utilized index itself, which would apply to all Index CDSs based on that index, at the time of the index series' launch. This would provide Index CDS counterparties with necessary certainty regarding the regulations applicable to a given transaction. Additionally, we believe that classifying existing indices according to the same rules as new indices would ensure proper market functioning.

---

[19] *See* Joint Order Excluding Indexes Comprised of Certain Index Options From the Definition of Narrow-Based Security Index Pursuant to Section 1a(25)(B)(vi) of the Commodity Exchange Act and Section 3(a)(55)(C)(vi) of the Securities Exchange Act of 1934, 69 Fed. Reg. 16900, 16901 (March 31, 2004) (". . . the exclusion applies only if the options comprising the index have an aggregate average daily trading volume of 10,000 contracts. The Commissions believe that this condition limits the exclusion to indexes for which there is a liquid market on a national securities exchange for the options on the Underlying Broad-Based Security Index, which contributes to the Commissions' view that futures on such indexes should not be readily susceptible to manipulation.").

[20] *See* Proposed Rule, 76 Fed. Reg. at 29839-40.

[21] *See id.* at 29895-96 (to be codified at 17 C.F.R. § 240.3a68-2).

[22] *See id.* at 29864.

[23] *See id.* at 29896 (to be codified at 17 C.F.R. § 240.3a68-2(e)(1)).

We also believe that the review process should be more expedited than the proposed 120 day period. New Index CDS series are typically created twice a year. There is typically only 2 weeks between publication of the provisional list of index components and index launch, but the indices are highly standardized and have a significant amount of overlap of constituents. Therefore, we believe that the Commissions could determine whether a new index series would be narrow- or broad-based within the 2 week timeframe.

b. The PIA Test's Debt Threshold Should Be Reduced and Clarified

The PIA Test would classify an index as broad-based (so long as the index exceeds the numerical and concentration criteria) if, among other things, the reference entity or issuer of the security has outstanding securities that are notes, bonds, debentures, or evidence of indebtedness having a total remaining principal amount of at least $1 billion.[24] We agree with including a debt threshold as a factor in the PIA Test, but believe that this threshold can be improved in certain ways.

- First, we believe that the threshold should be reduced to $100 million because debt issuance in some debt markets such as the high yield markets tends to be relatively small. For example, 26 entities in the CDS HY Series 16, which are the 100 most liquid high yield CDSs in the U.S., have less than $1 billion in outstanding securities, and 16 of those entities have less than $250 million. Therefore, a $1 billion threshold may be too high of a bar to serve as an appropriate proxy for the availability of public information.
- Second, the debt that is deliverable into a CDS contract is often only guaranteed by the reference entity, not actually issued by the reference entity. For example, Berkshire Hathaway, Inc. is a constituent of CDX IG and it is a guarantor for the debt referenced to it. However, the actual issuer of the debt is Berkshire Hathaway Finance Corporation.[25] We therefore believe that the debt threshold factor should refer to "debt that is issued *or guaranteed*" by the issuer or the entity.
- Third, it is unclear whether the debt threshold factor includes loans and leveraged loans, which are important for leveraged loan indices such as LCDX or LevX.[26] If loans are not included in the debt threshold, these entities might fail this factor of the PIA Test even though they have a significant amount of information publicly available. We therefore believe that the debt threshold factor should refer to "notes, bonds, debentures, *loans*, or evidence of indebtedness."

c. The PIA Test's Equity Threshold Should Include all Affiliated Entities

The PIA Test also includes a factor for when "the reference entity [or issuer of the security] has a worldwide market value of its outstanding common equity held by non-affiliates of $700 million or more."[27] We believe that this factor would overlook several entities with adequate public information available because the reference entity is often different from the entity that issues equity. For example, Kinder Morgan Kansas Inc. (CDS) / Kinder Morgan Inc. (equity) is just one example from CDS HY where the CDS Reference Entity and the issuer of the equity are not the same.

We note that the Proposed Rule defines "reference entity" to include "a group of affiliated entities,"[28] which could ensure that affiliated entities issuing equity would be captured in this PIA Test factor, but we request that

[24] *See id.* at 29894-95 (to be codified at 17 C.F.R. §§ 240.3a68-1a(a)(1)(iv)(D), 240.3a68-1b(a)(1)(iv)(D)).

[25] Similarly, United Parcel Service, Inc. is another constituent of CDX IG which guarantees the debt that is referenced for purposes of CDS contracts. However, the actual issuer of that debt is United Parcel Service of America, Inc.

[26] No names in Markit CDX HY or Markit CDX IG can only have loans outstanding because rules for the CDX indices exclude loans when determining the $100 million debt outstanding threshold.

[27] *See* Proposed Rule, 76 Fed. Reg. at 29894-95 (to be codified at 17 C.F.R. §§ 240.3a68-1a(a)(1)(iv)(C), 240.3a68-1b(a)(1)(iv)(C)).

[28] *See id.* at 29890 (to be codified at 17 C.F.R. §1.3(zzz)(3)(iii)(C)).

the Commissions specifically clarify as much. Therefore, we suggest the Commissions to state in the final rules that the equity threshold applies to "the reference entity or the group of entities affiliated with the reference entity."

d. Affiliation Rules Should Define "Control" to Mean 50% or More of Voting Shares

The Proposed Rule defines "control" for purposes of affiliation as "ownership of 20 percent or more of an entity's equity, or the ability to direct the voting of 20 percent or more of the entity's voting equity."[29] We believe that this definition of "control" should follow existing market practice, which only considers ownership of 50% or more of voting stock to constitute control.

The industry applies this 50% threshold for control in several contexts. In the 2003 ISDA Credit Derivatives Definitions, for example, a qualifying affiliate guarantee is provided only by an entity with direct or indirect control of 50% or more of the voting shares. Also, affiliates that are majority owned by the same parent as an existing Markit CDX constituent are excluded from becoming a constituent in the index.

We therefore believe that the rule should define "control" as "ownership of 50 percent or more of an entity's equity, or the ability to direct the voting of 50 percent or more of the entity's voting equity."[30]

e. Index CDS Tranches Should Have the Same Classification as the Underlying Index

It is unclear how the Proposed Rule would apply to an Index CDS on a tranche of an index. Market participants often trade on tranches of Markit CDX HY, CDX IG, iTraxx Europe and LCDX. For example, tranche attachment and detachment points for Markit LCDX are 0-8%, 8-15%, 15-30% and 30-100%, allowing investors to buy or sell protection on layers of the index. As credit events occur, entities are removed from the first tranche until it is consumed. At that point, subsequent credit events impact the next tranche.

We believe that Index CDS tranches should have the same narrow- or broad-based classification as the underlying index itself, and ask the Commissions to clarify this in the final rule.

f. Structured Finance Indices

The PIA Test would be satisfied for asset-backed securities if the securities were issued in a transaction registered under the Securities Act of 1933 (the "***Securities Act***")[31] and have publicly available distribution reports (the "***Structured Finance Factor***").[32] We believe that this may be difficult to apply in practice for two reasons.

First, not all securities underlying a specific structured finance deal are always registered under the Securities Act. For example, in the ABX.HE and CMBX indices,[33] tranches of a particular securitization can be included in sub-indices even if they are not registered.

---

[29] *See id.* at 29890 (to be codified at 17 C.F.R. §1.3(zzz)(3)(ii)).

[30] Defining "control" in keeping with this industry standard will be important because the construction of the major Index CDSs reference ISDA affiliate definitions.

[31] 15 U.S.C. 77a *et seq*.

[32] *See* Proposed Rule, 76 Fed. Reg. at 29894-95 (to be codified at 17 C.F.R. §§ 240.3a68-1a(a)(1)(iv)(G), 240.3a68-1b(a)(1)(iv)(G)).

[33] The ABX.HE is a synthetic CDS index referencing the sub-prime mortgage-backed securities issued between 2005 and 2007. The CMBX is a synthetic CDS index referencing commercial mortgage-backed securities issued between 2005 and 2008.

Second, the PIA Test requires asset-backed securities to have public information available through "distribution reports,"[34] but much of the information regarding securities in the ABX.HE, CMBX, and TRX indices is available to investors through Monthly Service Reports, which are available through the deal Trustee and/or SEC websites. It is unclear whether these Monthly Service Reports would qualify as distribution reports that satisfy the PIA Test. Similarly, it is unclear whether information regarding Agency mortgage-backed security pools, which are available on Agency websites, would be sufficient to satisfy the PIA Test. In both instances, we believe that significant information is publicly available and should therefore satisfy the test.

We therefore believe that the Commissions should clarify that not all tranches of a transaction need be registered under the Securities Act in order to satisfy the Structured Finance Factor, and information publicly available through the internet would satisfy the requirement that the security have publicly available distribution reports.

* * * * *

We appreciate the opportunity to provide these comments on this proposed regulation.

We thank the Commission for considering our comments. In the event you may have any questions, please do not hesitate to contact the undersigned or Marcus Schüler at marcus.schueler@markit.com.

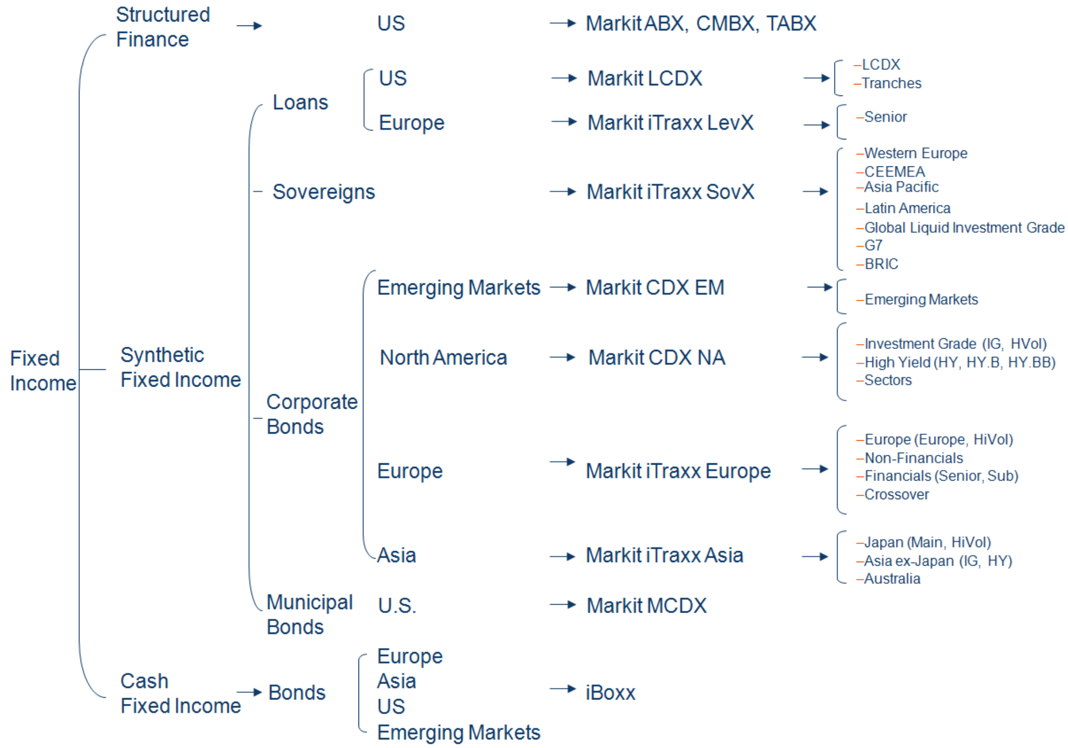
Sincerely,

Kevin Gould
President
Markit North America, Inc.

[34] *See* Proposed Rule, 76 Fed. Reg. at 29894-95 (to be codified at 17 C.F.R. §§ 240.3a68-1a(a)(1)(iv)(G), 240.3a68-1b(a)(1)(iv)(G)).

Appendix A

1. Markit Indices



2. iTraxx Indices

	Index	Entities (1)	Coupon (bps)	Recovery Rates (%)	Roll Dates	Maturity in years (2)	Underlying
iTraxx Europe	Europe	125	100	40	3/20 – 9/20	3, 5, 7, 10	Top 125 single name CDS contract by volume
	Non Financials	100	100	40	3/20 – 9/20	5, 10	
	Senior Financials	25	100	40	3/20 – 9/20	5, 10	
	Sub Financials	25	100	20	3/20 – 9/20	5, 10	
	Crossover	50	500	40	3/20 – 9/20	3, 5, 7, 10	Sub-investment grade reference entities
	High Volatility	30	100	40	3/20 – 9/20	3, 5, 7, 10	Top 30 highest spread names from iTraxx Europe
iTraxx Asia	Japan	50	100	35	3/20 – 9/20	5	
	Asia ex-Japan IG	50	100	40	3/20 – 9/20	5	
	Australia	25	100	40	3/20 – 9/20	5	
	Asia ex-Japan HY	20	500	25	3/20 – 9/20	5	
iTraxx SovX	Western Europe	15	100	40	3/20 – 9/20	5, 10	Top 15 sovereign entities by liquidity that trade on Western European documentation
	CEEMEA	15	100	25	3/20 – 9/20	5, 10	Top 15 sovereign entities by liquidity that trade on Emerging Market documentation
	Asia Pacific	10	100	40	3/20 – 9/20	5, 10	Top 10 sovereign entities by liquidity in the Asia and Oceania regions
	Global Liquid IG	11-27	100	40	3/20 – 9/20	5, 10	Most liquid high grade global sovereign entities
	G7	Upto 7	100	40	3/20 – 9/20	5, 10	Most liquid industrialized countries
	BRIC	Upto 4	100	40	3/20 – 9/20	5, 10	Most liquid BRIC countries
iTraxx LevX	LevX Senior	40	500	40	3/20 – 9/20	5	European First Lien Syndicated Loans

3. CDX Indices

	Index	# Entities (1)	Coupon (bps)	Recovery Rates (%)	Roll Dates	Maturity in years (2)	Underlying	Sub-Indices
LCDX	LCDX	100	250	70	4/3 – 10/3	3, 5	North American First Lien Senior Secured Loans	
CDX	IG	125	100	40	3/20 – 9/20	1, 2, 3, 5, 7, 10	Investment Grade	HVol – 30 names in IG with High Volatility Sectors
	HY	100	500	30	3/27 – 9/27	5	High Yield	HY.B, HY.BB
	EM	14 - can vary	500	25	3/20 – 9/20	5	Emerging Markets (Sovereign)	
MCDX	MCDX	50 credits	100	80	4/3 – 10/3	3, 5, 10	U.S. Municipal Bonds	