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August 28, 2012

The Honorable Debbie Stabenow
Chairwoman
The Honorable Pat Roberts
Ranking Member
Committee on Agriculture, Nutrition, and Forestry
United States Senate

The Honorable Tim Johnson
Chairman
The Honorable Richard C. Shelby
Ranking Member
Committee on Banking, Housing, and Urban Affairs
United States Senate

The Honorable Frank D. Lucas
Chairman
The Honorable Collin C. Peterson
Ranking Member
Committee on Agriculture
House of Representatives

The Honorable Spencer Bachus
Chairman
The Honorable Barney Frank
Ranking Member
Committee on Financial Services
House of Representatives

Subject: *Commodity Futures Trading Commission and Securities and Exchange Commission: Further Definition of "Swap," "Security-Based Swap" and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Commodity Futures Trading Commission (CFTC) and Securities and Exchange Commission (SEC) (collectively, Commissions), entitled "Further Definition of "Swap," "Security-Based Swap" and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping" (RINs:

3038-AD46; 3235-AK65). We received the rule from SEC on July 19, 2012 and CFTC on August 13, 2012. It was published in the *Federal Register* as a "joint final rule; interpretations; request for comment on an interpretation" on August 13, 2012. 77 Fed. Reg. 48,208.

The joint final rule adopts new rules and interpretations under the Commodity Exchange Act ("CEA") and the Securities Exchange Act of 1934 ("Exchange Act'") to further define the terms "swap," "security-based swap," and "security-based swap agreement" (collectively, "Product Definitions"); regarding "mixed swaps;" and governing books and records with respect to "security-based swap agreements" in accordance with section 712(a)(8), section 712(d)(1), sections 712(d)(2)(B) and (C), sections 721(b) and (c), and section 761(b) of the Dodd- Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). The Commissions, in consultation with the Board of Governors of the Federal Reserve System ("Board"), are jointly adopting the final rule. The CFTC requests comment on its interpretation concerning forwards with embedded volumetric optionality.

The joint final rule has an effective date of October 12, 2012. The compliance date for the final rules and interpretations also will be October 12, 2012; with the following exceptions: the compliance date for the interpretation regarding guarantees of swaps will be the effective date of the rules proposed in the separate CFTC release when such rules are adopted by the CFTC. Solely for the purposes of the Order Granting Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with the Pending Revision of the Definition of ''Security'' to Encompass Security-Based Swaps and the Exemptions for Security-Based Swaps, the compliance date for the final rules further defining the term ''security-based swap'' will be February 11, 2013. Comments on the interpretation regarding forwards with embedded volumetric optionality must be received on or before October 12, 2012.

Enclosed is our assessment of the Commissions' compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review of the procedural steps taken indicates that the Commissions complied with the applicable requirements.

If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shirley A. Jones, Assistant General Counsel, at (202) 512-8156.

signed

Robert J. Cramer
Managing Associate General Counsel

Enclosure

cc: Elizabeth M. Murphy
Secretary
Securities and Exchange Commission

David A. Stawick
Secretary of the Commission
Commodity Futures Trading Commission

ENCLOSURE

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
COMMODITY FUTURES TRADING COMMISSION AND
SECURITIES AND EXCHANGE COMMISSION
ENTITLED
"FURTHER DEFINITION OF "SWAP," "SECURITY-BASED SWAP" AND
"SECURITY-BASED SWAP AGREEMENT"; MIXED SWAPS;
SECURITY-BASED SWAP AGREEMENT RECORDKEEPING"
(RINS: 3038-AD46; 3235-AK65)

(i) Cost-benefit analysis

The Commissions stated in the rule that they are sensitive to the costs and benefits of their rules. In considering the adoption of the Product Definitions, the Commissions have been mindful of the costs and benefits associated with these rules, which provide fundamental building blocks for the Title VII regulatory regime. There are costs, as well as benefits, arising from subjecting certain agreements, contracts, or transactions to the regulatory regime of Title VII, known as programmatic costs and benefits. Additionally, there are assessment costs that parties will incur to assess whether certain agreements, contracts, or transactions are indeed subject to the Title VII regulatory regime, and, if so, the costs to assess whether such Title VII instrument is subject to the regulatory regime of the SEC or the CFTC.

Title VII created a jurisdictional division between the CFTC and SEC. The Commissions explain that costs and benefits flowing from an agreement, contract, or transaction being subject to the regulatory regime of the CFTC or the SEC may be impacted by similarities and differences in the Commissions' regulatory programs for swaps and security-based swaps. Title VII calls on the SEC and the CFTC to consult and coordinate for the purposes of assuring regulatory consistency and comparability to the extent possible. Title VII also calls on the agencies to treat functionally or economically similar products or entities in a similar manner, but does not require identical rules. Although the Commissions may differ on certain rulemakings, as the relevant products, entities and markets are different, the Commissions believe that, as the CFTC and SEC regulatory regimes share a statutory basis in Title VII, the costs and benefits of their respective regimes should be broadly similar and complementary. In acknowledging the economic consequences of the final rules, the Commissions recognize that the Product Definitions do not themselves establish the scope or nature of those substantive requirements or their related costs and benefits. In determining the appropriate scope of these rules, the Commissions consider the types of agreement, contract, or transaction that should be regulated as a swap, security-based swap, or mixed

swap under Title VII in light of the purposes of the Dodd-Frank Act. The Commissions have sought to further define the terms "swap," "security-based swap," and "mixed swap" to include agreements, contracts, and transactions only to the extent that capturing these agreements, contracts, and transactions is necessary and appropriate given the purposes of Title VII, and to exclude agreements, contracts, and transactions to the extent that the regulation of such agreements, contracts, and transactions does not serve the statutory purposes of Title VII, so as not to impose unnecessary burdens for agreements, contracts, and transactions whose regulation may not be necessary or appropriate to further the purposes of Title VII.

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603-605, 607, and 609

With respect to the proposed release, while the CFTC provided an RFA statement that the proposed rule would have a direct effect on numerous entities, specifically DCMs, SDRs, SEFs, SDs, MSPs, ECPs, FBOTs, DCOs, and certain "appropriate persons" who relied on the Energy Exemption, the Chairman, on behalf of the CFTC, certified that the rulemaking would not have a significant economic effect on a substantial number of small entities and sought comments on that certification. Accordingly, for the reasons stated in the proposal and the foregoing discussion in response to one comment received respecting CFTC's RFA certification, the CFTC continues to believe that the rulemaking will not have a significant impact on a substantial number of small entities. Therefore, the Chairman, on behalf of the CFTC, certified pursuant to 5 U.S.C. § 605(b) that the rules will not have a significant impact on a substantial number of small entities.

For purposes of SEC rulemaking in connection with the RFA, a small entity includes: (1) when used with reference to an "issuer" or a "person," other than an investment company, an "issuer" or "person" that, on the last day of its most recent fiscal year, had total assets of $5 million or less and (2) a broker dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to rule 17a–5(d) under the Exchange Act, or, if not required to file such statements, a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the last day of the preceding fiscal year (or in the time that it has been in business, if shorter); and is not affiliated with any person (other than a natural person) that is not a small entity. The SEC continues to believe that the types of entities that would participate in the swap markets—which generally would be swap market dealers and major participants—would not ''small entities'' for purposes of the RFA. The final rules and interpretive guidance do not themselves impose any compliance obligations. Instead they describe the categories of agreements, contracts, and transactions that are outside the scope of the Product Definitions and delineate the jurisdictional divide between the SEC's and the CFTC's regulatory regime. Accordingly, the SEC certifies that the final rules and

interpretive guidance would not have a significant economic impact on a substantial number of small entities for purposes of the RFA.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

As independent regulatory agencies, the Commissions are not subject to title II of the Unfunded Mandates Reform Act of 1995.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

On May 23, 2011, the Commissions published a notice of proposed rulemaking in the *Federal Register* entitled Further Definition of "Swap," "Security- Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping. 76 Fed. Reg. 29,818. The Commissions received approximately 86 written comment letters in response to the Proposing Release. The Commissions have reviewed and considered the comments received, and the staffs of the Commissions have met with many market participants and other interested parties to discuss the definitions. Moreover, the Commissions' staffs have consulted extensively with each other as required by sections 712(a)(1) and (2) of the Dodd-Frank Act and have consulted with staff of the Board as required by section 712(d) of the Dodd-Frank Act.

Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520

Certain provisions of this rule will result in new collection of information requirements within the meaning of the PRA. With the exception of the new "book-out" confirmation requirement, the CFTC believes that the burdens that will be imposed on market participants under rules 1.8 and 1.9 already have been accounted for within the SEC's calculations regarding the impact of this collection of information under the PRA and the request for a control number submitted by the SEC to the Office of Management and Budget (OMB) for rule 3a68–2 ('"Interpretation of Swaps, Security-Based Swaps, and Mixed Swaps") and rule 3a68–4 ("Regulation of Mixed Swaps: Process for Determining Regulatory Treatment for Mixed Swaps"). In response to this submission, OMB issued control number 3235–0685.

Rules 3a68–2 and 3a68–4(c) under the Exchange Act contain new "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995. The SEC has submitted them to OMB for review in accordance with the PRA.

Statutory authorization for the rule

Pursuant to the Commodity Exchange Act, 7 U.S.C. §§ 1 et seq., as amended by Title VII of the Dodd-Frank Act, and sections 712(a)(8), 712(d), 721(a), 721(b), 721(c), 722(d), and 725(g) of the Dodd-Frank Act, the CFTC is adopting rules 1.3(xxx) through 1.3(bbbb) and 1.6 through 1.9 under the Commodity Exchange Act.

Pursuant to the Securities Act, 15 U.S.C. §§ 77a et seq., and particularly, sections 19 and 28 thereof, and the Exchange Act, 15 U.S.C. §§ 78a et seq., and particularly, sections 3 and 23 thereof, and sections 712(a)(8), 712(d), 721(a), 761(a) of the Dodd-Frank Act, the SEC is adopting rule 194 under the Securities Act and rules 3a68–1a through 3a68–5 and 3a69–1 through 3a69–3 under the Exchange Act.

Executive Order No. 12,866 (Regulatory Planning and Review)

As independent regulatory agencies, the Commissions are not subject to the review requirements of the Order.

Executive Order No. 13,132 (Federalism)

As independent regulatory agencies, the Commissions are not subject to the review requirements of the Order.