

UNITED STATES OF AMERICA
COMMODITY FUTURES TRADING COMMISSION

OPEN MEETING ON FIVE FINAL RULE PROPOSALS
UNDER THE DODD-FRANK ACT

Washington, D.C.
Thursday, July 7, 2011

1 PARTICIPANTS:

2 Commission Members:

3 GARY GENSLER, Chairman

4 BART CHILTON, Commissioner

5 MICHAEL V. DUNN, Commissioner

6 JILL SOMMERS, Commissioner

7 SCOTT D. O'MALIA, Commissioner

8 Presentation No. 1: Consideration of Final Rule
9 on Prohibition on the Employment, or Attempted
10 Employment, of Manipulative and Deceptive Devices
11 on Price Manipulation

12 MARK HIGGINS, Office of General Counsel

13 DAVID MEISTER, Enforcement Division

14 DAN BERKOVITZ, Office of General Counsel

15 Presentation No. 2: Consideration of Final Rule
16 on Agricultural Commodity Definition

17 DON HEITMAN, Division of Market Oversight

18 RYNE MILLER, Division of Market Oversight

19 RICK SHILTS, Division of Market Oversight

20 Presentation No. 3: Consideration of Final Rules
21 on Business Affiliate Marketing and Disposal Rules
22 under FCRA

CARL KENNEDY, Office of General Counsel

GAIL SCOTT, Office of General Counsel

1 Presentation No. 4: Consideration of Final Rule
2 on Conforming Amendments to Part 160, Privacy of
3 Consumer Financial Information under GLBA

4 CARL KENNEDY, Office of General Counsel

5 GAIL SCOTT, Office of General Counsel

6 Presentation No. 5: Consideration of Final Rule
7 on Position Reports for Physical Commodities.

8 BRUCE FEKRAT, Division of Market Oversight

9 ALI HOSSEINI, Division of Market Oversight

10 RICK SHILTS, Division of Market Oversight

11 DAN BERKOVITZ, Office of General Counsel

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1 P R O C E E D I N G S

2 (9:36 a.m.)

3 CHAIRMAN GENSLER: Good morning. This
4 meeting will come to order. It's a Public Meeting
5 of the Commodity Futures Trading Commission to
6 consider issuance of Final Rulemakings under the
7 Dodd-Frank Act. I'd like to welcome members of
8 the public, market participants and members of the
9 media to today's meeting, as well as welcome those
10 listening to the meeting by phone and watching
11 live on webcast.

12 During today's meeting the Commission
13 will embark on the final rulemaking phase is
14 implementing the Dodd- Frank Act. Specifically,
15 we'll consider final rules related to enhancing
16 the Commission's ability to protect against fraud
17 and manipulation, large trader reporting for swaps
18 on physical commodities and the definition of
19 agricultural commodities. And then two related
20 rules related to privacy and preventing certain
21 business affiliate marketing and establishing
22 other consumer information protection under the

1 Fair Credit Reporting Act, and expanding the scope
2 of privacy protections under financial law called
3 the Gramm-Leach-Bliley Act.

4 Before we hear from staff, I'd like to
5 thank the dedicated staff themselves for their
6 tireless efforts to implement the Dodd-Frank Act
7 while also enforcing the agency's existing
8 statutory authority. Staff has taken on the many
9 challenges of bringing oversight to the swaps
10 market that is more than seven times the size and
11 far more complex than the futures market we've
12 historically regulated, and they're doing that
13 with limited funding and limited staff resources.
14 I think they should be commended for their
15 contributions to the agency, to the financial
16 markets, to the economy and the American public.
17 And I'd also like to thank my fellow Commissioners
18 for doing the same, Commissioners Dunn, Sommers,
19 Chilton and O'Malia, for their significant
20 contributions in fulfilling the mission of our
21 agency in the rule-writing process as well.

22 It's important to remember why we're

1 doing all of this and why we're moving forward to
2 finalize these rules. The financial crisis of
3 2008 was very real. Millions of Americans are out
4 of work today because of the financial crisis.
5 Millions of homeowners now have homes worth less
6 than their mortgages. Millions of people have had
7 to dig into their savings, and millions more have
8 seen their investments not regain the value they
9 once had. There remains significant uncertainty
10 in the economy as we all know too well. And
11 though the crisis had many causes, it's clear that
12 the financial system and our regulatory system
13 failed and that the swaps marketplace played a
14 central role in that. They added leverage to the
15 financial system where there was more risk than
16 otherwise there would be.

17 They also contributed particularly
18 through credit default swaps to the bubble in the
19 housing markets and helped accelerate the
20 financial crisis itself and contributed to a
21 system where large financial institutions which
22 had been once thought to be too big to fail also

1 ended up being too interconnected to fail. So
2 swaps which initially were developed to help
3 manage and lower risk and still for most American
4 companies help manage and lower risk actually
5 concentrated and heightened risk in the economy
6 and to the public in the crisis.

7 Today's public Commission meeting is the
8 first of many to fulfill implementing the
9 Dodd-Frank Act. This spring we substantially
10 completed the proposal phase of the rule writing,
11 we further benefited with a 30-day period for
12 public comment that ended in early June, and the
13 staff and Commissioners are now turning toward
14 final rules and today we're taking up five very
15 important rules. I envision over the coming
16 months that we'll continue to take other final
17 rules. We'll have additional public meetings. We
18 have another one later in July that's been
19 scheduled, one in August and a couple in
20 September. As examples of what we might be taking
21 up in July and August, the whistleblower rule, a
22 rule with regard to the process to review swaps

1 for mandatory clearing and the registration
2 requirements for swap data repositories. There is
3 much on our agenda past today as move into the
4 fall and try to move through public comments and
5 finalize rules. Each of these rules is an
6 essential component of fulfilling the requirements
7 of Dodd- Frank to bring essential protections to
8 the swaps markets and to the broader economy.

9 Before we hear from staff on the
10 rulemaking that we'll consider today, I'll
11 recognize my fellow Commissioners for their
12 opening statements. I believe that Commissioner
13 Dunn is with us from Chicago. I'm hoping that the
14 technology is working from our Chicago office.

15 COMMISSIONER DUNN: It's working on this
16 side, Mr. Chairman. I want to thank all of you
17 for joining us today in our first meeting to
18 consider final rules promulgated pursuant to the
19 Dodd-Frank Act.

20 I have spent much of the last 30 years
21 either writing regulations or trying to adhere to
22 them, and I'm amazed at the work that this

1 Commission has been able to accomplish in less
2 than a year. I'm also acutely aware of the work
3 that lies before us as we move to finalizing all
4 of our proposed rules and then implementing them.
5 As I have stated before, this has been the most
6 transparent rulemaking process I have ever been
7 engaged in and I credit Chairman Gensler for
8 seeking public comment at almost every opportunity
9 and in a variety of venues to ensure that
10 commenters have had ample opportunity to provide
11 feedback on the proposed rules.

12 While the public side of the rulemaking
13 process has been extremely transparent, I have
14 been fairly quiet regarding my thoughts and
15 deliberations during the proposed rule phase of
16 this undertaking. I have acted this way
17 consciously, mindful of the important role that
18 the public should play in this process. I was
19 purposely liberal in voting on proposed rules
20 because I felt it was more important to get public
21 comment than to nitpick the rules at their
22 formative stages.

1 As we begin to finalize Dodd-Frank rules
2 and after having reviewed the volumes of comments
3 we have received from the public and read the
4 transcripts from our public roundtables, the one
5 and tenor of the questions I have for rulemaking
6 teams will be different. Before even considering
7 any final rules, I've asked each rule-writing team
8 to answer a set of questions that ask three
9 things. Number one, whether or not the proposed
10 rule adheres to the agency's principle regulatory
11 approach and if not, why. Number two, whether
12 staff has the resources both human and fiscal to
13 implement the proposed final rule as drafted. And
14 three, if there are insufficient resources, how
15 would staff prioritize the work they're currently
16 doing with the work that the Dodd-Frank rules
17 require.

18 I've asked these questions because I
19 truly believe that the innovation and growth that
20 I have witnessed in the commodities industry
21 during my tenure on the Commission was due in no
22 small part to the nimbleness of the Commission as

1 a principle-based regulator. If we are going to
2 stray from this rule, I want to hear good reasons
3 why. While my preference is for rules that adhere
4 to our principle-based model to the CFTC's
5 well-documented lack of proper funding, I may be
6 forced to accept rules that are more prescriptive
7 than I would generally favor. If we do not have
8 the necessary resources to be a principle-based
9 regulatory, we must still enforce the law even if
10 we do so in a prescriptive or even restrictive
11 fashion that have consequences of the growth of
12 the futures industry.

13 I am also interested in how staff will
14 prioritize the work in the post-Dodd world. While
15 it is important to meet all new mandates in the
16 Dodd-Frank Act, I think it is equally important
17 that the commodities markets continue to function
18 as effectively and efficiently as they always
19 have.

20 Regarding the rules we will consider
21 today, I would again like to thank Chairman
22 Gensler for working collaboratively with my office

1 to get rules to a point where I feel comfortable
2 supporting them. It is very hard for every rule
3 to satisfy every Commissioner when it is initially
4 drafted. I had concerns and questions with
5 today's final rules that I brought to the
6 Chairman's attention. To his credit, the
7 Chairman, when I raised these concerns and
8 questions, instructed staff to work with me to
9 address my issues. This has truly been a
10 collaborative process and I thank the Chairman for
11 that. I would also like to express my thanks to
12 the staff of the CFTC for their hard work on these
13 very important proposed final rules and I look
14 forward to their presentations.

15 CHAIRMAN GENSLER: Thank you,
16 Commissioner Dunn. Thank you for those personal
17 words. I really appreciate all of your input on
18 these rules and I think they're better for it.
19 Commissioner Sommers?

20 COMMISSIONER SOMMERS: Thank you, Mr.
21 Chairman. Good morning. I want to thank the five
22 teams who have final rules before us today. We

1 are all well aware that over the past year you
2 have been under an incredible amount of pressure
3 to meet certain deadlines for drafts, that you
4 have worked late nights and weekends and we are
5 all very grateful to you for everything that you
6 have done, your dedication to your work and to
7 this agency because obviously we could never do
8 all of this without you. So, thank you.

9 We're starting the process of finalizing
10 rules today with a group of rules that do not
11 relate to the structural or broader issues of
12 trading and clearing swap transactions.
13 Nonetheless, we are beginning without a plan.
14 There have been no Commission decisions regarding
15 the internal process or the implementation
16 schedule for this very important and complicated
17 task we have in front of us to finalize the rules
18 and regulations required by the Dodd-Frank Act.

19 We've been discussing the appropriate
20 sequencing of final rules as well as an
21 implementation plan for many months, and at this
22 point I am still hopeful that the Commission will

1 move forward to adopt a reasonable, phased- in
2 approach supported by market participants. A
3 tentative calendar for consideration of final
4 rules has been provided to Commissioners. That
5 schedule would require the Commission to vote on
6 no less than 17 rules during July and August, 20
7 rules in September and October and nine rules in
8 November and December. And while a few of these
9 rules will be relatively straightforward and
10 noncontroversial, the vast majority are based on
11 extremely complex proposals for which staff has
12 yet to even complete a comment summary.

13 If we stick to such a schedule, I
14 foresee a process that haphazardly requires votes
15 to be taken when the Commission has not had time
16 to sufficiently consider all of the implications
17 of final rules. This schedule would also make it
18 very difficult to coordinate with regulators
19 domestically and internationally. As I've said on
20 a number of occasions, while we were proposing
21 last fall, there was room for error. When we
22 finalize rules this fall, we do not have that

1 luxury. I reiterate yet again that we should
2 adopt a plan that starts with finalizing the
3 entity and product definitions and build from
4 there driven by a logical progression rather than
5 arbitrary deadlines.

6 I believe another issue that we as the
7 Commission need to address is the consideration of
8 material changes to our proposed rules. I am
9 comfortable admitting that we probably did get
10 everything right in our proposals. That is why
11 the notice and comment period required by the
12 Administrative Procedures Act is so critical to
13 the rulemaking process. Through that process we
14 have received many excellent and very helpful
15 comment letters that go a long way toward helping
16 us get it right. It is apparent to us that market
17 participants, trade associations and law firms
18 have spent many long hours developing detailed
19 comments and alternative solutions to our
20 proposals. In my view, if we truly consider and
21 take into account the merits of these excellent
22 comment letters, we will have no choice but to

1 re-propose a number of the rules from last fall
2 and I believe it's important for us to do just
3 that. We need to plan for this inevitability and
4 start discussing internally which rules need to be
5 re-proposed. Our goal should be to promulgate the
6 best final rules possible without regard to
7 whether that requires us to re-propose. Our
8 objective should never be to reject valid comments
9 in order to avoid re-proposing a rule.

10 With regard to the rules we have before
11 us today, I am supportive of all of them but have
12 lingering questions and concerns about the
13 anti-manipulation rules. Prior to the enactment
14 of Dodd-Frank, the Commission had broad anti-
15 fraud, false-reporting and anti-manipulation
16 authority. Section 753 expands that authority by
17 amending CEA Section 6(c) to among other things
18 include the concept of fraud- based manipulation.
19 This fraud-based manipulation has a lower standard
20 than manipulation under 9(a)(2) and does not
21 require an artificial price or an effect on prices
22 to be proven. This aspect of 753's amendment to

1 6(c) is clear. Where the amendments to 6(c) are
2 not clear and where the final rules shed no
3 additional light is when we will prosecute false
4 reporting under 9(a)(2) as opposed to the new
5 manipulation by false reporting prohibition under
6 Section 6(c)(1)(A) and Regulation 108.1(a)(4), or
7 what set of circumstances will give rise to a
8 charge under the existing manipulation prohibition
9 under 9(a)(2) as opposed to the new manipulation
10 prohibition under Section 6(c)(3) and Regulation
11 108.2.

12 In the end, we are left with Section 753
13 as it is written. The final rules are true to the
14 language of Section 753 and for that reason I
15 support them. However, as the Commission begins
16 to exercise this new authority, I want to make
17 sure that they are applied in a reasonable manner
18 that seeks to address activity that affects or
19 threatens the integrity of our markets and does
20 not result in unfair surprise to market
21 participants. Using this new authority in areas
22 with little to no connection to our markets would

1 not be a good use of our resources.

2 Again, I want to give thanks to all of
3 the five teams that are before us today and look
4 forward to the discussion.

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

7 COMMISSIONER CHILTON: Good morning.
8 Thanks, Mr. Chairman.

9 Briefly I agree with Commissioner
10 Sommers and I certainly want to make sure that
11 we're not jammed with stuff at the end, I think
12 the Chairman has made a commitment in that regard,
13 but you have my commitment, Commissioner Sommers,
14 that if it comes in too late and we don't have the
15 ability to look at it thoughtfully we shouldn't be
16 considering it, but I think we all probably agree.
17 If we were in school we'd probably get an
18 incomplete on what we've done, and I was asked by
19 somebody who's fault is it? I said it's our
20 fault, but it's sort of like a bunch of professors
21 who all give you extra homework and say it's all
22 due in this certain time period at the same time.

1 So we really just couldn't do everything under the
2 time constraints that were out there, and as I
3 think we've all said, it's more important to get
4 it right than to just do it fast, but the waiting
5 has been pretty tough. For me, and I won't spend
6 a lot of time because I know my colleagues are
7 tired of hearing me talk about position limits,
8 but that's one issue that we should have done I
9 think, that we could still do. Tom Petty sings
10 that song, "The Waiting" because the waiting is
11 the hardest part. This has been a pretty hard
12 part for me, but we'll have that until later at
13 another time, hopefully soon.

14 The good news is that we're moving
15 forward on these five rules and regulations now so
16 that the waiting is over for them hopefully if we
17 get them passed. And to pick up on what
18 Commissioner Sommers was saying with regard to
19 anti-fraud and anti-manipulation, to me that's one
20 of the key things that we're doing and when people
21 talk on the Hill about delaying Dodd-Frank for 18
22 months or something, this is a key thing, a key

1 authority that we received in the law and why we
2 need to move forward and not wait.

3 All the authority that we have has been
4 too high a hurdle. One successful prosecution for
5 manipulation in 35 years is just nuts. Right? So
6 this new authority that we've received, and
7 Chairman Gensler has thanked Senator Cantwell in
8 the past and I've joined in thanking her for this
9 provision on anti-fraud and anti-manipulation, I
10 think it's going to help us and I agree with
11 Commissioner Sommers that we need to make sure
12 we're judicious about it, but there are things in
13 here, the types of things that we can go after
14 that are more like insider trading. It's not
15 exactly insider trading. It's not exactly that
16 like it is in the securities law. But folks that
17 pocket profits from the misuse of privileged
18 information can be prosecuted under what we're
19 doing today. There's a good example. We want the
20 free flow of information but not when you take
21 privileged information and use it to trade for
22 your own personal gain. That can be prosecuted.

1 And we've also moved forward, we're not
2 exactly the securities law reckless standard, but
3 we've moved in that direction as the court has
4 defined recklessness for securities. And
5 specifically, when I say reckless I don't mean
6 haphazard, I mean intentionally trying to
7 manipulate a market like driving too fast
8 reckless. That's the type of recklessness we're
9 talking about. Specifically with regard to false
10 reporting, false reporting specifically uses the
11 word reckless in it and so if somebody for example
12 said today and they disseminated a rumor that more
13 oil was going to be released by the Strategic
14 Petroleum Reserve and they acted on that and tried
15 to move the market and act on that, that's also
16 something that could be prosecuted here. So this
17 is really important stuff that shouldn't be
18 delayed. The waiting has been the hardest part,
19 but I'll take a cue from Petty, "Don't let it kill
20 you, baby. Don't let it get to you," and we'll
21 move forward. Thank you.

22 CHAIRMAN GENSLER: Thank you,

1 Commissioner Chilton. Commission O'Malia, you
2 always get the honor of going after Commissioner
3 Chilton. Do you have some more of Mr. Petty to
4 quote?

5 COMMISSIONER O'MALIA: I never liked Tom
6 Petty, but I do appreciate following, Bart.
7 Commissioner Chilton always raises the bar.

8 Today we are voting on a major tranche
9 of regulations to be finalized under the
10 Dodd-Frank Act. Before we start I'd like to thank
11 each of the teams for their hard work. Moving
12 from the proposed rules to the final rules has not
13 been an easy task. It has been very involved and
14 the teams have been very willing and able to work
15 with us, include our comments and concerns and
16 walk us through all the comments we've received.

17 With the Commission's approval, the
18 regulations before us today will become not only
19 the law of the land, but the Commission's official
20 statement as to the interpretation of the Act it
21 is charged with administering so it is appropriate
22 that we consider our duties to market participants

1 and the public generally before issuing final
2 regulations. Our duties can be characterized in
3 two words, transparency and clarity.

4 With regard to transparency, first we
5 should provide greater insight into our process
6 before finalizing these regulations. Last week I
7 requested from the Chairman and each of the
8 Commissioners to consider posting the drafts of
9 the final regulations on the Commission website 7
10 days before the public hearing in order to provide
11 the greatest possible transparency into these
12 final rulemakings. I have not received an answer
13 as to whether the Commission will adopt this
14 proposal. Such transparency is valuable because
15 it is likely to lead to informed Commission
16 decisions as the public receives one last chance
17 to identify unintended consequences. Considering
18 the speed at which the Commission will make policy
19 decisions through the rest of the year and the
20 impact that these decisions will have on the
21 markets, this last and final check will improve
22 the quality of our final regulations. I'm not

1 asking for an extension of time, just an
2 additional layer of transparency.

3 With regard to clarity, market
4 participants deserve clear and straightforward
5 regulations to readily identify first their legal
6 obligations and when they need to begin complying
7 with such legal obligations. Failure to provide
8 clear guidance will not only general market
9 uncertainty, but it may prevent us from
10 effectively enforcing our own regulations. Two of
11 the final regulations before us today, the large
12 trader report and the anti-manipulation proposal,
13 demonstrate the strides has made toward issuing
14 clear and enforceable regulations in what we have
15 yet to do.

16 Last October, I expressed concerns as to
17 how the Commission would interpret its
18 anti-manipulation authority. I was concerned that
19 the Commission would fail to provide clarity as to
20 how the new genre of manipulation would be defined
21 in relation to the prohibition to price
22 manipulation under 9(a)(2) of the Commodity

1 Exchange Act which was specifically preserved in
2 the Dodd-Frank Act and relation to the new
3 anti-disruptive practices. In spite of receiving
4 comments from 27 parties, the Commission has
5 determined that the proposed regulatory text was
6 neither vague nor susceptible to due process
7 challenge and has only changed a single word from
8 the proposal.

9 I have concerns that the
10 anti-manipulation rule has not provided adequate
11 clarity, and such vagueness as to the course of
12 action taken by the Commission in enforcing this
13 rule will add to confusion in the markets. The
14 wholesale incorporation of standards and case law
15 developed under 10(b)(5) of the Securities
16 Exchange Act of 1934 run the risk of disregarding
17 the unique qualities of the futures and
18 derivatives markets in an attempt to apply
19 concepts developed in the securities markets for
20 insider trading based on misappropriation. It is,
21 therefore, essential for the Commission to be
22 clear as to how judicial precedents under 10(b)(5)

1 guide our judgment and decision making as we
2 exercise authority under our rule.

3 More generally, the preamble could be
4 clear as to how the Commission will use new
5 authorities in 6(c) in conjunction with new
6 authorities such as those over anti- disruptive
7 trading practices and insider trading. I believe
8 the Commission could have been more responsive to
9 requests for guidance through the provision of
10 examples of violative conduct. This is especially
11 so with regard to relatively new concepts of
12 liability in our markets such as insider trading
13 and fraud in the market.

14 By implementation of the rule, the duty
15 will fall primarily on Enforcement staff to pursue
16 those cases that ultimately define and distinguish
17 reckless and intent-based behavior as manipulative
18 or fraudulent and sort of the confusing new
19 penalty authority which this rule seems to
20 purposefully avoid. It will be up to the
21 Commission to guide the Enforcement staff as they
22 begin to pursue these new areas of authority and

1 I'm confident that my colleagues will take this
2 particular role very seriously. Make no mistake.
3 The rule will give the Commission clear authority
4 to pursue cases of intentional conduct designed to
5 deceive or defraud market participants without the
6 heavy burden of proving such conduct ultimately
7 resulted in an artificial price. Such authority
8 not only furthers the goals and purposes of the
9 Commodity Exchange Act, but brings greater
10 consistency to legal standards of manipulation
11 across all financial markets.

12 I support the Large Trader Reporting
13 Rule because obtaining data is fundamental to our
14 oversight responsibilities. The large trader rule
15 has made a number of changes to address public
16 comments. Certain of these changes allow the
17 Commission to fulfill its market surveillance
18 goals without proposing extraneous costs on end
19 users.

20 For example, the Large Trader Reporting
21 Rule clarifies that end users may keep information
22 regarding their cash market transactions in a

1 format that they have developed in the normal
2 course of business rather than to conform to
3 Commission standards. However, not even the Large
4 Trader Reporting Rule can adequately resolve the
5 fundamental issues with our final regulations.
6 Briefly stated, the problem is how can the
7 Commission move forward on final regulations
8 implicating swap dealers when the Commission has
9 not determined if the term captures end users? I
10 recognize that the Commission will obtain the
11 lion's share of data from financial swap dealers.
12 My concern is with those end users that may be
13 characterized as nonfinancial swap dealers. Even
14 though the Commission is voting on large trader
15 reporting today, the Commission cannot determine
16 the full benefits and costs of this regulation
17 until we define both the dealer and swap
18 definitions.

19 I have previously stated that end users
20 did not cause the Financial Crisis of 2008, and we
21 must be mindful that every dollar that the
22 Commission imposes on end users may translate into

1 increases in energy or food costs or squeeze
2 farmers and industrial producers unable to pass on
3 these increase costs. I am also pleased that
4 large trader reporting has attempted to provide
5 some assurances to end users by mandating
6 compliance only after the swap dealer definition
7 becomes effective. However, at that point, end
8 users will only know whether their day-to-day
9 transactions constitute dealing, but not whether
10 those transactions implicate swaps.

11 For example, many end users rely on
12 trade options in their normal course of business
13 and will not know whether the Commission will
14 regulate those options as swaps. I know the Large
15 Trader Reporting Rule attempts to address this
16 dilemma by indicating that the Commission only
17 require such end users to comply with the rules
18 for an additional 6 months. Also the rule
19 indicates that end users who are not certain
20 whether they're swap dealers may petition the
21 Commission for further relief. Obviously these
22 solutions are not perfect but do provide some path

1 forward. The uncertainty surrounding swap dealer
2 trade options and swaps may cause end users to
3 divert resources from their normal energy and
4 agricultural businesses toward reporting
5 technology while waiting for the Commission to
6 finalize relevant definitions.

7 I wish we could offer more clarity, but
8 that is not on the table today. Given the
9 interdependencies of our various definitions and
10 the definition of both dealer and swaps, I would
11 encourage the Commission to provide an
12 implementation plan to give those end users caught
13 in the regulatory crosshairs some idea as to when
14 we should expect the Commission to ultimately
15 resolve whether they are swap dealers or not.

16 Mr. Chairman, before I close I must
17 renew my request that the Commission publish for
18 comment its schedule for consideration of final
19 rules and a proposed plan for implementing over 50
20 such regulations. As I noted in our last hearing
21 and at previous Commission meetings, the final
22 regulation schedule would permit the public to

1 hold the Commission accountable for its progress
2 under Dodd-Frank.

3 Additionally, in virtually every meeting
4 I'm in, market participants request that the
5 Commission propose such an implementation plan. I
6 believe these firms are sincerely interested in
7 fully complying with the final regulations if only
8 the Commission would inform them when they should
9 be prepared to do so. They have no idea if they
10 should be ready in 8 months or 18 months. By
11 providing markets a plan, it will improve
12 compliance with our regulations and I am certain
13 it will speed their compliance.

14 Last month in testimony before the House
15 Financial Services Committee, Chairman Shapiro
16 indicated that the SEC is working on an
17 implementation plan that include opportunity for
18 public comment. She stated, "After proposing all
19 of the key rules under Title VII, we intend to
20 consider seeking public comment on a detailed
21 implementation plan that will permit a rollout of
22 the new securities-based swap requirements in an

1 efficient manner while minimizing unnecessary
2 disruption and cost to the market. Let me assure
3 you that the implementation plan is not a
4 mechanism for delay. Instead, it should help
5 facilitate the important and necessary form of the
6 OTC derivative markets."

7 I completely agree with Chairman Shapiro
8 and it's time we end the rulemaking mystery and
9 pull back the curtains so that the market has the
10 opportunity to review the implementation plan and
11 provide comment on its feasibility. It's
12 imperative that we develop a transparent process
13 by previewing our final rules and to provide
14 market participants with a rulemaking schedule and
15 implementation plan so that they can prepare for
16 their necessary investments, reorganize their
17 businesses and hire staff in order to comply with
18 the rules.

19 Let me close where I began by thanking
20 staff for their hard work, their patience and
21 their utmost cooperation with the Commission.
22 Thank you very much.

1 CHAIRMAN GENSLER: Thank you,
2 Commissioner O'Malia. Thank you to all of the
3 Commissioners.

4 The staff will make presentations
5 concerning their recommendations on the
6 implementation of the Dodd- Frank Act. After
7 presentations the floor will be open for
8 statements, questions or comments from each of the
9 Commissioners, and then following those
10 discussions the Commissioners will take a vote on
11 the recommendations. To that end I ask for
12 unanimous consent that all final votes for
13 publishing final rules to implement the Dodd-Frank
14 Act conducted in this public meeting of the
15 Commission be recorded votes and that the results
16 of those votes be included in the record for
17 Federal Register releases. Without objection so
18 ordered.

19 I turn it over at this time to David
20 Meister, the director of the Division of
21 Enforcement; Mark Higgins of the Office of General
22 Counsel; and I see Dan Berkovitz, the general

1 counsel himself, is here to discuss the anti-
2 manipulation rule. Mr. Meister?

3 MR. MEISTER: Good morning, Mr. Chairman
4 and Commissioners. In the Dodd-Frank law,
5 Congress gave the Commission important new
6 anti-manipulation and anti-fraud authority by
7 amending the Commodity Exchange Act to include a
8 new Section numbered 6(c)(1). Section 6(c)(1)
9 makes it unlawful to employ manipulative or
10 deceptive devices or contrivances in connection
11 with swaps, commodity contracts and futures in
12 violation of Commission rules. In my opinion,
13 Section 6(c)(1) is one of the most important
14 provisions of Dodd-Frank. It enhances our ability
15 to promote market integrity and protect market
16 participants from all manner of fraud and
17 manipulation.

18 Our markets serve important functions.
19 They allow participants to hedge risk and they
20 play a critical role in price discovery. Market
21 participants must be confident that the markets
22 are based on legitimate forces of supply and

1 demand and are free of fraud and manipulation. A
2 Commission vote today to promulgate new Final Rule
3 180.1 will implement this new authority. Your
4 vote will provide the Division of Enforcement with
5 a new and powerful tool that will substantially
6 assist us in discharging our core
7 responsibilities. The rule will greatly advance
8 the Commission's ability to bring successful
9 enforcement actions and deter serious misconduct.

10 The staff's recommendation to adopt Rule
11 180.1 reflects our careful review of the comments
12 we received and our study of the statutory and
13 regulatory models upon which the new law is based.
14 These models include Section 10(b) of the
15 Securities and Exchange Act of 1934 and SEC Rule
16 10(b)(5), as well as more recent congressional
17 grants and exercises of similar authority by the
18 Federal Energy Regulatory Commission and the
19 Federal Trade Commission. We have been guided by
20 these models and we have adapted them where
21 appropriate to fit our legal construct.

22 Let me briefly summarize Final Rule

1 180.1. The rule makes is unlawful for any person
2 directly or indirectly in connection with any
3 swap, contract of sale of a commodity in
4 interstate commerce or futures contract on a
5 registered entity, to intentionally or recklessly
6 engage in any of the following four categories of
7 conduct. First, to use or employ or attempt to
8 use or employ any manipulative device, scheme or
9 artifice to defraud. Second, to make or attempt
10 to make material false statements or omissions.
11 Third, to engage or attempt to engage in any act,
12 practice or course of business which operates or
13 would operate as a fraud or deceit upon any
14 person. Or fourth, to deliver or attempt to
15 deliver any false report that affects or tends to
16 affect the price of any commodity in interstate
17 commerce except if mistakenly submitted in good
18 faith to a price- reporting service.

19 For example, under Section 6(c)(1) and
20 Rule 180.1, the Commission will have the authority
21 to bring enforcement actions against and sanction
22 defendants who recklessly employ manipulative

1 schemes. In such cases, the Commission will not
2 bear the added burden of proving that the
3 defendant in fact caused an artificial price. The
4 rule recognizes that the manipulative scheme in
5 and of itself is harmful to the proper functioning
6 of markets. Prosecuting such activity will better
7 markets and market participants and send a strong
8 message of deterrence.

9 Under Section 6(c)(1) and Rule 180.1,
10 the Commission will also have the authority to
11 bring enforcement actions against and sanction
12 defendants who recklessly engage in acts of fraud
13 and deception in connection with swaps, commodity
14 and futures transactions. In this regard, we will
15 have advantage of looking through the lens of a
16 substantial body of well-settled precedent,
17 applying comparable laws and rules in the
18 securities context. We fully recognize that the
19 securities markets differ in important respects
20 from the futures and derivatives markets and so
21 should the interpretation and application of our
22 new authority.

1 For example, the SEC and the federal
2 courts have long interpreted and applied Rule
3 10(b)(5) to prohibit trading in a company's stock
4 by a company insider who is lawfully in possession
5 of material nonpublic information. This
6 prohibition in the securities markets rests on the
7 corporate insider's duty to disclose the
8 information before he is permitted to trade the
9 stock. The futures and derivatives markets, on
10 the other hand, do not impose the same legal duty
11 and the final rule before you expressly states
12 that it does not impose a duty of disclosure.

13 But let me be clear. Section 6(c)(1)
14 and Rule 180.1 do prohibit fraud in connection
15 with trading in futures and derivatives markets.

16 For example, a person who engages in fraudulent or
17 deceptive conduct by trading on the basis of
18 material nonpublic information that he has
19 misappropriated in breach of a preexisting duty
20 will now be subject to a Commission enforcement
21 action.

22 The second new provision created by

1 Dodd-Frank that is relevant to today's proposed
2 order is Commodity Exchange Act Section 6(c)(3)
3 entitled "Other Manipulation." The second rule
4 presently before the Commission, Rule 180.2,
5 mirrors the text of Section 6(c)(3). The purpose
6 of this rulemaking is to affirm and clarify
7 certain legal principles of the Commodity Exchange
8 Act's longstanding prohibition against price
9 manipulation.

10 Before concluding my remarks, I would
11 like to extend a special thanks to Mark Higgins
12 who sits on my left for his work on this
13 rulemaking. I would also like to thank General
14 Counsel Dan Berkovitz, as well as members of his
15 team including Steve Seitz, Mary Connolly, Ralph
16 Avery and Jonathan Marcus; and also Kirsten
17 Sonnensen and Michael Penet from the Office of the
18 Chief Economist for their very hard work on the
19 rule's cost- benefit analyses. I also would like
20 to acknowledge you, Commissioners, and your legal
21 assistants for all of your very thoughtful
22 comments on these rules. I am now prepared to

1 respond to any questions that you may have.

2 CHAIRMAN GENSLER: Thank you, Mr.
3 Meister. The Chair will now entertain a motion to
4 accept the staff recommendation in consideration
5 of this final rule.

6 COMMISSIONER SOMMERS: So moved.

7 COMMISSIONER CHILTON: Second.

8 CHAIRMAN GENSLER: I support the final
9 rulemaking to enhance the Commission's ability to
10 protect against manipulation. I think effective
11 regulation requires an effective enforcement
12 program and the Dodd-Frank Act enhances the
13 Commission's enforcement authorities in the
14 futures market and expands it in the swaps
15 marketplace. This rule implements Dodd-Frank
16 authorities to police against fraud and
17 fraud-based manipulative schemes based upon
18 similar authorities that the Securities and
19 Exchange Commission has long had and the Federal
20 Energy Regulatory Commission and the Federal Trade
21 Commission have had in more recent years for
22 securities and certain energy commodities. In the

1 past the CFTC has had the ability to prosecute
2 manipulation, but to prevail it had to prove the
3 specific intent of the accused to create an
4 artificial price. Under the new law in one of the
5 rules before us today, the Commission's
6 anti-manipulation reach is extended to prohibit
7 the reckless use of fraud-based manipulative
8 schemes. This closes a significant gap as it will
9 broaden the types of cases we can pursue and
10 improve the chances of prevailing over wrongdoers.
11 For the listening public, that's the key. There's
12 a gap right now and this helps close that gap. I
13 think that's what Congress intended here.

14 The rule also implements the Dodd-Frank
15 Act's price-based manipulation authority to police
16 against corners and squeezes. These new
17 authorities expand the CFTC's arsenal of
18 enforcement tools and strengthens the Commission's
19 ability to effectively deal with threats to market
20 integrity, and we will use the tools to be a more
21 effective cop on the beat to promote market
22 integrity and protect market participants.

1 I want to thank Senator Maria Cantwell
2 for her work to secure this important authority
3 for the CFTC. As the Senator explained in
4 proposing this authority when she did back I guess
5 it would have been last year about this time and
6 including it in the Commodity Exchange Act, "It is
7 a strong and clear legal standard that allows
8 regulators to successfully to after reckless and
9 manipulative behavior."

10 With that I don't have any questions. I
11 do plan to support this very important rule.
12 Commissioner Dunn?

13 COMMISSIONER DUNN: Thank you, Mr.
14 Chairman, and thank you to the folks that worked
15 so hard on this particular rule.

16 We got a lot of comments about examples:
17 Tell us what's going to be prohibited. I can
18 understand folks wanting to know how much can we
19 do before we step over the line of the law? But I
20 have also problems with putting our examples
21 because if you miss something, they'll say we can
22 do everything else.

1 David, and maybe Mark might have to help
2 you on this, could you go through the process that
3 we've had in the past of when Enforcement makes a
4 decision to prosecute a case, what goes into that
5 and what are the decision levels? And most
6 importantly for the public, describe when it is
7 presented to the Commission and what the
8 Commission's responsibilities are.

9 MR. MEISTER: Sure, Commissioner Dunn.
10 As a general matter, the Division of Enforcement
11 during the course of an investigation will review
12 all available evidence and obtain evidence in
13 order to determine whether in the division's view
14 the evidence rises to the level that will meet the
15 elements of the particular offense that we're
16 considering. We look at available information

17 like documents and witness statements and then
18 reach our own conclusion based on our experience
19 with the laws, based on our experience as trial
20 attorneys and we make a conclusion internally as
21 to whether or not we want to recommend to the
22 Commission to bring an enforcement action based on

1 the facts and the law. We then go to the
2 Commission with that recommendation and explain
3 all of the facts and law that is relevant to make
4 sure that the Commission is fully informed and
5 make the recommendation that we make.

6 COMMISSIONER DUNN: The point being is
7 it's the Commission that ultimately makes the
8 decision. In the past as a Commissioner I've been
9 concerned that when cases were presented to us on
10 whether or not to make a decision and we ask staff
11 why didn't we go after this particular incident or
12 this particular case, and were told that that
13 doesn't meet our high level that we have
14 established over the years in case law. These
15 particular rules, both 180.1 and 180.2, will give
16 us a greater leeway in taking action when clearly
17 there has been a disruption to the marketplace,
18 but it hasn't reached the high standards of what
19 we had been considering in the past. Is that
20 correct?

21 MR. MEISTER: Commissioner, particularly
22 Rule 180.1 will. When you're referring to a high

1 standard, I think what you're referring to is the
2 prior obligation in all manipulation cases to
3 prove that the defendant acted with specific
4 intent to create an artificial price, and under
5 Rule 180.1. we will now be obligated to prove that
6 the defendant acted with reckless intent or with
7 reckless scienter I should say in such a
8 manipulation case. I think that's what you're
9 getting at and I think that that's accurate.

10 COMMISSIONER DUNN: I believe that in
11 the future as future Commissions get
12 recommendations from staff on prosecuting
13 enforcement matters that regardless of what the
14 examples are that we're putting in here, case law
15 will develop that will be a clear signal to the
16 industry of what will be tolerated and what will
17 not be tolerated. And I also hasten to add that
18 the makeup of Commissions change over a period of
19 time. Some Commissions may say we want to enforce
20 this more than other actions and there will be a
21 continuum and a build up of case law that will
22 begin sending a very clear signal to the industry

1 of what will be accepted by the Commission.

2 David, the second real question that
3 I've had with you and was part of the nine
4 questions that I had sent to you concerns me a
5 great deal in the fact that are we going to have
6 the resources both human and fiscal to implement
7 this? And if we're not going to be able to
8 implement this, how does this hamper the
9 Enforcement Division on some of its current
10 duties?

11 MR. MEISTER: Yes, Commissioner. In my
12 view the agency is in need of additional resources
13 agency-wide as reflected in our budget and of
14 course in the President's budget. In addition,
15 the Division of Enforcement needs additional
16 resources. I would say that this rule in and of
17 itself will be a priority for the Division of
18 Enforcement for sure and we will look to
19 investigate and bring cases under this new
20 authority and I would expect that that would
21 remain the case for Divisions of Enforcement to
22 come.

1 In the event that we get the funding
2 that we seek, I think that we will be fine. In
3 the event we do not, Commissioner Dunn, I think
4 that we will have to look at our priorities and we
5 may have to reallocate some of the resources that
6 we currently have. As you and I have discussed,
7 Commissioner, if we're talking about reallocating
8 priorities within the Division of Enforcement, we
9 will of course consult with the Commissioners to
10 make sure that we are aligned with your views and
11 interests.

12 COMMISSIONER DUNN: Thank you very much.
13 Mr. Chairman, I intend to support this proposal.

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

16 COMMISSIONER SOMMERS: Thank you. I
17 have a couple of different questions, first with
18 regard to insider trading. In the history of us
19 implementing the Commodity Exchange Act, insiders
20 have been defined as CFTC Commissions and
21 employees and exchange staff and personnel. But
22 Dodd-Frank changed that or expanded that

1 definition of insider to include all federal
2 employees. As you were giving your presentation,
3 we do discuss in the preamble of the final rule
4 trading on the basis of this material nonpublic
5 information by insiders and that it's a breach of
6 a preexisting duty. My questions are all
7 surrounding this duty.

8 I'm assuming that there is not a general
9 duty to not trade on material nonpublic
10 information, but that there are more specific
11 duties that you're referring to with regard to
12 this rule and thought maybe you could give us some
13 examples of what specific duties we are referring
14 to.

15 MR. MEISTER: Let me address one thing
16 that you said in your question. You referred to
17 the preamble. In the preamble we say that trading
18 by any person in breach of a preexisting duty and
19 trading on the basis of material nonpublic
20 information that was misappropriated could rise to
21 the level of a fraud under the rule and under the
22 statute, so I just wanted to clarify. We didn't

1 say trading by an insider.

2 The duty that that I'm referring to is a
3 duty that could arise under the law based upon
4 relationships, based upon for example
5 confidentiality agreements, based upon some
6 preexisting duty that would exist and that is
7 recognized very clearly in the law that would
8 obligate a person not to trade or obligate a
9 person to keep information confidential, for
10 example. Those are duties that exist in the law
11 that are separate from the rule that we propose
12 and the rule we propose very clearly says that it
13 does not create such a duty.

14 COMMISSIONER SOMMERS: Thank you. My
15 other question is with regard to false reporting.
16 Over the years we've brought a number of
17 false-reporting cases and false reporting under
18 9(a)(2) has always been a separate offense apart
19 from manipulation or attempted manipulation, and
20 now Section 753 and Rule 180.1(a)(4) make
21 reporting in and of itself manipulation. If you
22 could walk us through your recommendations for

1 when false reporting is a separate offense and
2 when false reporting is manipulation.

3 MR. MEISTER: Generally speaking, in
4 various statutory schemes there are types of
5 conduct that might violate two statutes. That's
6 not uncommon. In this case, it's very difficult
7 to come up with any particular facts and
8 circumstances of course and I know that's not what
9 you're asking me to do, but I can envision a
10 circumstance where there would be a false report
11 for which we would recommend an action under
12 9(a)(2) as we have always done, and also recommend
13 an action under Section 6(c)(1) and Rule 180.1, so
14 my point is that there are times where we may well
15 recommend an action under both statutes at the
16 same time. It is new however that false reporting
17 is specifically defined as a manipulation under
18 Section 6(c)(1).

19 COMMISSIONER SOMMERS: Thank you. I
20 think that's helpful.

21 CHAIRMAN GENSLER: Commissioner Chilton?
22 Thank you, Commissioner Sommers.

1 COMMISSIONER CHILTON: I don't have any
2 questions. I just want to thank staff for all of
3 your work and say this is a serious and
4 significant new ammo in our enforcement arsenal
5 and I look forward to us using it in a judicious
6 way. Thank you.

7 CHAIRMAN GENSLER: Thank you,
8 Commissioner Chilton. Commissioner O'Malia?

9 COMMISSIONER O'MALIA: Thank you. There
10 is no doubt that it does provide more ammo and we
11 will use it. I'm certain of that. The Act uses
12 terms like manipulative device, manipulative
13 contrivance, a deceptive device and deceptive
14 contrivance. I'm unclear as to how we define
15 these terms and is there any significance to the
16 difference in the statutory language as it's
17 applied in our rule?

18 MR. MEISTER: The terms manipulative or
19 deceptive device or contrivance are terms of art
20 that the Supreme Court has considered and
21 interpreted for many years and they generally
22 capture fraud. In Section 10(b) law, there is

1 case law that says that Section 10(b) is a broad
2 catchall statute but what it must capture is
3 fraud. As I said, we look to the long line of
4 precedent and well- settled authority in the
5 securities context to assist us in making
6 recommendations to you and to make sure that you
7 are fully informed before asking you to bring any
8 enforcement action.

9 COMMISSIONER O'MALIA: In your opinion,
10 which of these schemes is considered fraud and
11 which is considered fraud-based manipulation? Is
12 there a difference or distinction that you're
13 going to use here?

14 MR. MEISTER: I guess I can't think of a
15 particular hypothetical off the top of head, but
16 again the design of the rule and I think the
17 design of the statute is to broadly capture
18 fraudulent conduct. So you used the term
19 fraud-based manipulative schemes. I think you
20 used that earlier today. Fraud and fraud-based
21 manipulative schemes would be within the same
22 sphere.

1 COMMISSIONER O'MALIA: The essence of
2 the question is to try to separate some of this
3 stuff and have a better understanding.

4 MR. MEISTER: Again the idea is to
5 capture fraudulent conduct without trying to draw
6 a line between any particular -- or without trying
7 to bring up an example of this would be fraudulent
8 conduct and this would be fraud-based
9 manipulation. Frankly, I do think it is clear as
10 to the type of conduct that we are talking about.
11 Again, the securities laws and securities
12 prosecutors and enforcement lawyers and people in
13 the Department of Justice as well have been
14 applying these statutes in the securities context
15 in exactly these same words for years and years
16 and the Supreme Court has concluded that these
17 words are sufficiently clear to give notice to
18 people who are accused of violating them.

19 COMMISSIONER O'MALIA: Let me go on to
20 my next question. We talk about filing with the
21 SEC regarding 10(b) authority, but we seem to be
22 selectively following different precedent. One of

1 the concerns I bring to your attention and it's
2 referenced in a footnote here is the Supreme Court
3 Hochfelder case. The Supreme Court said that,
4 "The use of manipulative is especially significant
5 and it was virtually a term of art when used in
6 connection with the securities market. It
7 connotes intentional or willful conduct designed
8 to deceive or defraud investors by controlling or
9 artificially affecting the price of securities."

10 That seems to indicate that the
11 securities markets meant that the conduct is
12 designed to defraud investors by impacting the
13 price of a security. However, I think our rule
14 says in spite of that, 6(c)(1) does not require
15 that the conduct was designed to impact a price in
16 any of our jurisdictional markets or otherwise
17 impact the market itself. Is that accurate? Do I
18 have it wrong the way our rule is being
19 interpreted that it does not have to have an
20 impact on price in our markets or it does have to
21 an impact on price?

22 MR. MEISTER: It does not have to have

1 an impact on price. The reference I think, and I
2 don't have the case in front of me, the Supreme
3 Court was talking about just the word manipulative
4 in your quote there and of course the statute that
5 we're talking about talks about manipulative or
6 deceptive devices or contrivances. But just going
7 to your question, Commissioner O'Malia, we do not
8 have to prove a price impact for Rule 180.1.

9 COMMISSIONER O'MALIA: The Brattle Group
10 submitted a lengthy comment letter and proposal to
11 define manipulation as a form of fraud where
12 anomalous behavior "noneconomic, standalone
13 transactions for the actor to inject false or
14 misleading information into a market and
15 consequently impairs its integrity." We are not
16 using this definition in our rule. Why not?

17 MR. MEISTER: I think my own view is
18 that definition is narrower than the authority
19 that Congress gave to the Commission.

20 COMMISSIONER O'MALIA: Can you tell me
21 how fraud under 6(c)(1) in the File Rule 180.1
22 differ from the fraud under 4(b) and 4)(O)?

1 MR. MEISTER: Talking about 4(b), one
2 example is, and I think you're referring to
3 Section 4(b) of the Commodity Exchange Act.

4 COMMISSIONER O'MALIA: Correct.

5 MR. MEISTER: Under Section 4(b), it
6 requires proof of a fraud I believe on the
7 defendant's customer or counterparty and Section
8 6(c)(1) has no such limitation. And Section 4(o)
9 of the Commodity Exchange Act relates to commodity
10 pool operators only. Mr. Higgins points out quite
11 correctly that that conduct would still be covered
12 by Section 6(c)(1) and Rule 180.1. It's just that
13 those provisions that you are referring to are
14 narrower than Section 6(c)(1) and Rule 180.1.

15 COMMISSIONER O'MALIA: In promulgating
16 the final rules under its anti-manipulation
17 authority to prohibit the use or employment of any
18 device, scheme or artifice to defraud, the FERC
19 defined fraud generally "to include any action,
20 transaction or conspiracy for the purposes of
21 feeding a well-functioning market." How does your
22 definition of fraud compare to the FERC

1 definition?

2 MR. MEISTER: I think it's tough to make
3 a word- to-word comparison. What I would go back
4 to is that under Section 6(c)(1), we would look to
5 apply that to all manner of fraud. It has to be
6 fraud and we have to prove recklessness, but the
7 idea is to not apply this statute restrictively
8 but to apply it flexively, and that's what we
9 would recommend doing.

10 COMMISSIONER O'MALIA: Would the
11 Commission involve itself in private contracts
12 between employers and employees in regard to a
13 misappropriation of information? I raise this in
14 connection with the FERC because I believe the
15 FERC declined to use its anti-fraud authority in
16 this area.

17 MR. MEISTER: I guess it would depend
18 upon the facts and circumstances and I think that
19 your question goes to my comments about the
20 misappropriation of material nonpublic information
21 in breach of a preexisting duty. Sometimes that
22 duty could be created by a person's contract with

1 another party and by breaching that contract may
2 rise to the level of a break of a duty which would
3 then trigger liability under the Act. As far as
4 getting involved in a particular contract, I don't
5 think we would get more involved than what I just
6 said.

7 COMMISSIONER O'MALIA: Would it have to
8 have an impact on the market before we got
9 involved or pursued these cases?

10 MR. MEISTER: We don't have to prove a
11 price impact in such a case.

12 COMMISSIONER O'MALIA: Not a price
13 impact.

14 MR. MEISTER: We don't have to prove a
15 market impact in the case. We would not be
16 recommending that that would be an element for
17 example of an offense.

18 COMMISSIONER O'MALIA: One last
19 question. Several of the commenters raised the
20 concern that Rule 180.1 would apply the
21 Commission's fraud authority to "apply to
22 virtually every commercial transaction in the

1 economy" rather than those transactions that
2 impact our jurisdictional markets. The preamble
3 seems to dismiss this concern as "misplaced." The
4 preamble offers that the Commission expects to
5 exercise its authority under 6(c)(1) to cover
6 transactions related to the futures or swaps
7 markets or prices of commodities in interstate
8 commerce or where the fraud or manipulation has a
9 potential to affect cash commodity, futures or
10 swaps markets or participants in these markets.
11 Can you explain what's meant by that language?

12 MR. MEISTER: What is meant by that
13 language is that we would recommend actions where
14 appropriate and where the evidence calls for it
15 very mindful of the Commission's mission as
16 spelled out in the Act. What we were trying to
17 capture in the sentence or sentences that you were
18 referring to is just that, that we will be mindful
19 of the Commission's mission when we recommend
20 actions and I'm sure you're going to be mindful of
21 the Commission's mission if you choose to adopt
22 them.

1 COMMISSIONER O'MALIA: What is the
2 jurisdictional significance of the phrase "on or
3 subject to the rules of any registered entity?"
4 Is this a phrase useful in defining the
5 Commission's case market authority or does the
6 phrase only apply to futures contracts?

7 MR. MEISTER: I think you're referring
8 to a phrase in Section 6(c)(1).

9 COMMISSIONER O'MALIA: Correct.

10 MR. MEISTER: That's the last part of a
11 sentence in Section 6(c)(1) and if I am thinking
12 of the right phrase --

13 COMMISSIONER O'MALIA: Let me read the
14 whole thing.

15 MR. MEISTER: Okay.

16 COMMISSIONER O'MALIA: It says, "In
17 connection with any swap or contract or sale of
18 any commodity in interstate commerce or for the
19 future delivery on or subject to the rules of any
20 registered entity."

21 MR. MEISTER: I believe, my own personal
22 opinion, is that applies to modify just futures,

1 so futures contracts traded on a registered
2 entity.

3 COMMISSIONER O'MALIA: Are there
4 contracts of sale for any commodity in interstate
5 commerce on or subject to the rules of a
6 registered entity?

7 MR. MEISTER: I don't think that
8 sentence or phrase appears in the statute.

9 COMMISSIONER O'MALIA: Thank you very
10 much.

11 MR. MEISTER: Thank you.

12 CHAIRMAN GENSLER: Thank you,
13 Commissioner O'Malia. I guess at this point, if
14 the Commissioners are prepared to vote, I would
15 turn to Mr. Stawick if you will call the roll.

16 MR. STAWICK: Commissioner O'Malia?

17 COMMISSIONER O'MALIA: Aye.

18 MR. STAWICK: Commissioner O'Malia, aye.
19 Commissioner Chilton?

20 COMMISSIONER CHILTON: Aye.

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

1 COMMISSIONER SOMMERS: Aye.

2 MR. STAWICK: Commissioner Sommers, aye.
3 Commissioner Dunn?

4 COMMISSIONER DUNN: Aye.

5 MR. STAWICK: Commissioner Dunn, aye.
6 Mr. Chairman?

7 CHAIRMAN GENSLER: Aye.

8 MR. STAWICK: Mr. Chairman, aye. Mr.
9 Chairman, on this matter the yeas are five, the
10 nays are zero.

11 CHAIRMAN GENSLER: Thank you, Mr.
12 Stawick. Thank you to the Commissioners for that
13 vote in support of this rule and thank you, Mr.
14 Meister, Mr. Higgins and Mr. Berkovitz and all of
15 the hardworking folks who worked on this. With
16 the unanimous vote we'll be sending it to the
17 Federal Register.

18 I'm going to take a 5-minute recess
19 because that went a little longer than we thought
20 and so that Bruce Fekrat and others can come up to
21 the table, but we'll start very quickly here.

22 (Recess)

1 CHAIRMAN GENSLER: The Commission will
2 come back to order. We have Rich Shilts, Don
3 Heitman and Ryne Miller, who are going to fill us
4 in on the staff recommendation on the Staff
5 Recommendation on the Final Rule on the Definition
6 of Agricultural Commodity, and I turn it over to
7 Mr. Heitman.

8 MR. HEITMAN: Thank you, Mr. Chairman.
9 I'd like to at the outset thank the member of my
10 team, particularly Ryne who is really doing most
11 of the heavy lifting for the team. I'm hopeful
12 that this is one of those simple and
13 straightforward rules that Commissioner Sommers
14 mentioned. One of the commenters actually
15 referred to it as straightforward and common
16 sense.

17 The Dodd-Frank Act includes provisions
18 applicable to a swap in an agricultural commodity
19 as defined by the CFTC. Up to this point, neither
20 Congress nor the Commission has ever promulgated a
21 definition of agricultural commodity for purposes
22 of the Commodity Exchange Act or CFTC regulations

1 and the final rules before the Commission today
2 will establish for the first time such a
3 regulatory definition. The definition is needed
4 primarily in the context of Section 723(c)(3) of
5 Dodd-Frank which provides that swaps in an
6 agricultural commodity are prohibited unless
7 permitted under the Commission's 4(c) general
8 exemptive authority. In fact, the next time the
9 ag swaps team comes before the Commission it will
10 be to present a proposed final rule pursuant to
11 Section 4(c) regarding the treatment of
12 agricultural swaps.

13 The proposed definition was published
14 for comment on October 26, 2010, and the vast
15 majority of the commenters supported the
16 definition as proposed. The final definition
17 before you today is identical to the proposed
18 rules with the exception of minor changes in
19 Category 4 which I will discuss in a moment. The
20 definition is broken down into four categories.
21 First, the enumerated commodities listed in
22 Section 1(a)(4) of the Act such as wheat, cotton,

1 corn, the soybean complex and livestock. Then
2 second, a general operational definition that
3 covers "all other commodities that are or once
4 were or are derived from living organisms
5 including plant, animal and aquatic life which are
6 generally fungible within their respective classes
7 and are used primarily for human food, shelter,
8 animal feed or natural fiber." The third category
9 is a catchall for commodities that would generally
10 be recognized as agricultural in nature but which
11 don't fit within the general operational
12 definition: Tobacco products or horticulture and
13 such other commodities used or consumed by animals
14 or humans as the Commission may by rule,
15 regulation or order designate after notice and
16 opportunity for hearing. And the fourth element
17 of the definition a provision applicable to
18 commodity-based, index-based wholly or principally
19 on underlying agricultural commodities.

20 Looking more closely at the four
21 categories, Category 1, the enumerated
22 commodities, is self-explanatory. Congress has

1 already said that these are ag commodities.

2 Category 2, the operational definition,
3 seeks to draw a line between products derived from
4 living organisms that are used for human food,
5 shelter, animal feed or natural fiber which would
6 fall within the definition, and products that are
7 produced through processing plant- or animal-based
8 inputs to create products largely used as
9 industrial inputs which would be outside the
10 definition. To give a simple example, polylactic
11 acid, a corn derivative, is used in biodegradable
12 packing and that falls outside the definition. So
13 if you buy a bag of corn chips in a biodegradable
14 bag, the chips are an agricultural commodity, but
15 the package is not. Also, as requested by several
16 commenters, the preamble to the final rule makes
17 clear that Category 2 is self-executing, i.e., it
18 doesn't require any additional Commission action
19 to apply the definition. Something is either in
20 the definition or out regardless of whether it's
21 traded for future delivery or not.

22 Category 3, as I noted, includes

1 commodities that don't readily fit within the
2 first two categories but would generally be
3 recognized as agricultural in nature, and the
4 examples in the definition are tobacco and
5 products or horticulture, for example, ornamental
6 plants. Anything else used or consumed by humans
7 or animals that doesn't fit within Categories 1 or
8 2 the Commission could deal with under this
9 category on a case-by-case basis as questions
10 arise in the context of specific markets or
11 products.

12 Category 4 is the only category that has
13 been amended. First, we replaced the references
14 to contracts with references to indexes to make it
15 clear that this category applies to
16 commodity-based indexes rather than
17 commodity-based contracts on an index. Secondly,
18 in response to concerns raised by commenters, we
19 revised the category to apply to indexes based
20 wholly or principally on underlying agricultural
21 commodities, commodities generally rather than
22 based wholly or principally on a single

1 agricultural commodity which is what the original
2 proposal had said.

3 For example, if you had an index that
4 was composed of 25 percent each wheat, corn,
5 soybeans and gold, that would fall under the
6 definition now. Should the Commission sometime in
7 the future impose limitations on agricultural
8 swaps, this fourth provision would prevent anyone
9 from using agricultural-based commodity indexes to
10 replicate the terms of otherwise restricted
11 agricultural swaps. In fact, however, the
12 proposed agricultural swaps rules recommended
13 treating agricultural swaps exactly like every
14 other kind of swap and virtually all of the
15 commenters supported that approach. Therefore,
16 assuming that those final rules are consistent
17 with the Commission's proposal and the commenters'
18 views, the index provision would have no
19 substantial effect or no substantive effect,
20 excuse me. There would be no incentive for
21 regulatory arbitrage between an agricultural swap
22 and some kind of economically equivalent

1 index-based swap because both transactions would
2 be subject to the same regulatory scheme, and the
3 same would hold true for agricultural swaps
4 subject to the other three categories of the
5 definition. They would be regulated no
6 differently than swaps in any other commodity.

7 Similarly, with respect to position
8 limits these rules would have no substantive
9 effect. The position limits as proposed would
10 apply to positions in specific reference
11 contracts, to the relevant question becomes
12 whether a contract on an index is economically
13 equivalent to a reference contract, not whether an
14 index is or is not an agricultural commodity. In
15 the last analysis, therefore, this definition will
16 provide legal certainty regarding whether any
17 given commodity or is not an agricultural
18 commodity, but it will not have any significant
19 practical effect because those commodities will be
20 regulated in exactly the same manner regardless
21 whether they fall inside or outside the
22 definition.

1 I'll be happy to answer any questions
2 that the Commission has.

3 CHAIRMAN GENSLER: Don, thank you very
4 much. I'll entertain on the staff recommendation
5 on the final rule on agricultural commodities.

6 COMMISSIONER SOMMERS: So moved.

7 COMMISSIONER CHILTON: Second.

8 CHAIRMAN GENSLER: Thank you. I support
9 the final rulemaking to define the term
10 agricultural commodity. The Dodd-Frank Act
11 requires that agricultural commodities be defined
12 in a separate rulemaking and the Commission will
13 then determine the requirements to apply to swaps
14 on agricultural commodities which I look forward
15 to doing and I know that we put that proposal out
16 separately and got public, but today is just doing
17 the workaday thing of defining agricultural
18 commodity and I think Don, Rick and Ryne and the
19 rest of the staff has done an excellent job, we
20 did get public comment and I will be supporting
21 this rule.

22 Commissioner Dunn, a statement or

1 questions from Chicago?

2 COMMISSIONER DUNN: Mr. Chairman, I'd
3 like to thank staff for working on this and in
4 particular their interaction with the Agricultural
5 Advisory Committee, and I intend to support this
6 proposal.

7 CHAIRMAN GENSLER: Commissioner Sommers?

8 COMMISSIONER SOMMERS: I don't have any
9 questions, but just want to thank Don and his team
10 for a good job. Thanks.

11 CHAIRMAN GENSLER: Commissioner Chilton?

12 COMMISSIONER CHILTON: I don't have any
13 questions. Thank you, Don. And I also want to
14 thank one of our former colleagues, David Johnson,
15 who's not here today and is back at Senate ag, but
16 he worked on this rule, too, and you all did a
17 good job. Thank you.

18 MR. HEITMAN: Dave was invaluable while
19 he was here and we miss him.

20 CHAIRMAN GENSLER: He's still
21 invaluable. He's serving in a different way.

22 MR. HEITMAN: He's invaluable to the

1 country now. He's not doing me any good.

2 CHAIRMAN GENSLER: Hopefully he will.
3 Commissioner O'Malia?

4 COMMISSIONER O'MALIA: No questions.
5 Thank you very much for your hard work on this
6 one. Good rule.

7 CHAIRMAN GENSLER: Mr. Stawick?

8 MR. STAWICK: Commissioner O'Malia?

9 COMMISSIONER O'MALIA: Aye.

10 MR. STAWICK: Commissioner O'Malia, aye.
11 Commissioner Chilton?

12 COMMISSIONER CHILTON: Aye.

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

15 COMMISSIONER SOMMERS: Aye.

16 MR. STAWICK: Commissioner Sommers, aye.
17 Commissioner Dunn?

18 COMMISSIONER DUNN: Aye.

19 MR. STAWICK: Commissioner Dunn?

20 COMMISSIONER DUNN: Aye. Commissioner
21 Dunn, aye. Mr. Chairman?

22 CHAIRMAN GENSLER: Aye.

1 MR. STAWICK: Mr. Chairman, aye. Mr.
2 Chairman, on this matter the yeas are five, the
3 nays are zero.

4 CHAIRMAN GENSLER: Then Mr. Stawick, I
5 thank you with the vote to send this on. We'll be
6 sending it to the Federal Register and I want to
7 thank the entire team.

8 I think Carl Kennedy, you're going to be
9 up next. I don't know where the rest of your team
10 is, but we'll give them a few minutes to get up
11 here. Carl Kennedy and Gail Scott, I guess you're
12 presenting both of these rules on privacy matters.

13 MR. KENNEDY: Yes, I am, Mr. Chairman.
14 Good morning, Commissioners, and thank you,
15 Chairman Gensler, for the opportunity to present
16 today. Before I begin I would like to thank my
17 team for their assistance in preparing two final
18 rulemakings that we present today for your
19 consideration and vote.

20 The first rulemaking that I present
21 today is required under Section 1088 of the
22 Dodd-Frank Act. Section 1088 amends certain

1 provisions of the Fair Credit Reporting Act and
2 the Fair and Accurate Credit Transactions Act of
3 1993 by requiring the CFTC to establish two new
4 requirements. Essentially these two requirements
5 are intended to provide privacy protections to
6 customers of CFTC regulated entities. One
7 requirement establishes a regime for consumer to
8 opt out of receiving affiliate marketing
9 solicitations. The other requirement mandates
10 CFTC-regulated entities to develop and implement
11 written disposal plans with respect to any
12 nonpublic consumer information in their
13 possession.

14 Prior to the enactment of the Dodd-Frank
15 Act, the Fair Credit Reporting Act and other acts
16 related to consumer privacy required other federal
17 regulators to jointly promulgate affiliate
18 marketing disposal rules. The FTC, SEC, FDIC and
19 other federal regulators all have prescribed final
20 rules to date. Staff believes that many of our
21 regulated entities already may be complying with
22 the affiliate marketing and disposal rules of

1 other federal regulators. As a result, we do not
2 believe that this rulemaking will create a
3 significant cost burden on our regulated entities.

4 Following the publication of the CFTC's
5 Notice of Proposed Rulemaking on October 27, 2010,
6 the Commission received a total of four comment
7 letters in response to the Proposed Affiliate
8 Marketing and Disposal Rules. All the comments
9 received can be characterized as minor. The final
10 rule under consideration today is substantially
11 similar to what the CFTC proposed. Based on the
12 comment that we did receive, staff has revised the
13 final rule text in a few places so that the text
14 is more consistent with the rule texts of the
15 other federal agencies' rules. In addition, staff
16 has revised the definition of consumer to ensure
17 that it does cover individuals who are not
18 intended to be protected under the Fair Credit
19 Reporting Act. Staff has made changes to its
20 cost-benefit consideration sections as well as its
21 Paperwork Reduction Act analysis also in response
22 to comments. Lastly, staff has staggered and

1 extended the effective date of the Affiliate
2 Marketing and Disposal Rules in a way that I'll
3 describe shortly.

4 I'll now briefly describe the scope and
5 the effective date of the new Part 162 which will
6 include both the requirements related to affiliate
7 marketing and the disposal information held by
8 CFTC regulated entities. This rulemaking will
9 apply to the following types of CFTC regulated
10 entities because of the increased likelihood that
11 these entities come in contact with nonpublic
12 consumer information, futures commission
13 merchants, retail foreign exchange dealers,
14 commodity trading advisers, commodity pool
15 operators, introducing brokers, swap dealers and
16 major swap participants.

17 Title X of the Dodd-Frank Act does not
18 create a deadline for this rulemaking. Commenters
19 to the proposal request that the new Part 162 have
20 an effective date of 9 months following the
21 publication on the Federal Register instead of
22 what we proposed which was July 21, 2011. Staff

1 disagreed with commenters in that, as I mentioned
2 previously, staff does not believe that many of
3 its existing regulated entities will need 9 months
4 to comply with the regulation since we believe
5 that many of these entities are already complying
6 with the other federal agencies' Fair Credit
7 Reporting Act rules. Staff recommends that the
8 new Part 162 become effective 120 days following
9 the date of publication in the Federal Register
10 for existing regulated entities. With respect to
11 swap dealers and major swap participants, we
12 recommend that the new Part 162 becomes effective
13 60 days from the date of publication of the final
14 entities' definition rules which will be voted on
15 later this year.

16 I will now briefly describe the
17 requirements regarding affiliate marketing.
18 CFTC's Affiliated Marketing Rule gives consumers
19 the right to block CFTC-regulated entities from
20 using certain nonpublic consumer information
21 obtained from an affiliate to make solicitations
22 to those consumers. The purpose of the Affiliated

1 Marketing Rule is to help consumers deal with
2 solicitations from businesses with which they have
3 no prior business relationship. The General
4 Notice requirement under this rule provides that
5 affiliates can only make solicitations to a
6 consumer based on that consumer's information if,
7 one, the consumer is given clear, conspicuous and
8 concise notice; two, the consumer is given a
9 reasonable opportunity to opt out of the use of
10 their information for marketing purposes; and
11 three, the consumer does not opt out.

12 It is important to note that this rule
13 does not prohibit the sharing of information with
14 or among affiliates but, instead, only prohibits
15 the use of that information for marketing
16 purposes. The final Affiliated Marketing Rule
17 sets out which party has the responsibility for
18 providing notice, exceptions to the General Notice
19 requirement, the required contents of the notice,
20 what constitutes a reasonable opportunity to opt
21 out and finally what constitutes a reasonable and
22 simple method of opting out.

1 I'll now provide a brief description of
2 the requirements related to the disposal of
3 consumer information. Section 1088 of the
4 Dodd-Frank Act also directs the Commission to
5 promulgate rules dealing with the disposal of
6 consumer information. Our final rule requires
7 CFTC-related entities to reasonably dispose of
8 consumer report information in their possession
9 related to their business activities. This rule
10 is meant to prevent the unauthorized access to
11 consumer information. The final disposal rules do
12 not define what reasonable disposal measures are.
13 Instead, the final rules set forth a list of
14 examples. Staff believes that the final rule
15 provides our regulated entities with a sufficient
16 amount of flexibility to develop and implement a
17 plan that fits the size and complexity of their
18 businesses.

19 This concludes my summary of the two
20 requirements that are included in the new Part
21 162. Thank you for your time, and I'm happy to
22 answer any questions.

1 CHAIRMAN GENSLER: Thank you very much.
2 I'll entertain a motion to accept the staff
3 recommendation.

4 COMMISSIONER O'MALIA: So moved.

5 CHAIRMAN GENSLER: I'll second it.

6 COMMISSIONER CHILTON: Second.

7 CHAIRMAN GENSLER: I support the final
8 rulemaking to extend to consumers of
9 CFTC-regulated entities protections preventing
10 certain business affiliating marketing and
11 establishing other consumer information
12 protections under the Fair Credit Reporting Act.
13 The rulemaking protects consumers by providing
14 privacy protections to nonpublic consumer
15 information held by entities that are not subject
16 to the jurisdiction of the Commission, and the
17 final rulemaking provides consumers of
18 CFTC-regulated entities with the same privacy
19 protections now enjoyed by consumers of entities
20 regulated by other federal agencies. I gather we
21 weren't included many years ago under the Fair
22 Credit Reporting Act.

1 MR. KENNEDY: We were not.

2 CHAIRMAN GENSLER: So this just brings
3 us into a regime and consumers then or consumers
4 of regulated entities of the CFTC will get those
5 similar protections. The rulemaking has two
6 important features. First, it allows consumers to
7 prohibit Commission-related entities from using
8 certain consumer information obtained from
9 affiliates and to make solicitations to them
10 unless the consumer wants that to happen and they
11 can certainly get, and this will be done through
12 an opt out. Second, it requires
13 Commission-regulated entities to develop and
14 implement written programs and procedures for the
15 proper disposal of consumer information, and the
16 rulemaking will help prevent the unauthorized use
17 and disclosure of nonpublic information.

18 I'm going to support the rule. I don't
19 have any questions. I turn to Commissioner Dunn.

20 COMMISSIONER DUNN: Thank you, Mr.
21 Chairman. I, too, will be supporting this. I
22 appreciate the work of the team and the follow-up

1 information that I had asked from them and from
2 the division director.

3 COMMISSIONER SOMMERS: I don't have any
4 questions. Thank you, Carl, to you and your whole
5 team.

6 COMMISSIONER CHILTON: I don't any
7 questions, and thank you for your work. I
8 appreciate the work on the rule. Thank you.

9 MR. KENNEDY: Thank you.

10 COMMISSIONER O'MALIA: Carl, in your
11 statement you'd indicated that you ignored the
12 commenters' request for additional time because
13 you believed that they were already complying with
14 other federally regulated entities or regulatory
15 bodies, and the Chairman said we're kind of
16 bringing the CFTC into this new regulatory regime.
17 Is all of that correct?

18 MR. KENNEDY: Yes.

19 COMMISSIONER O'MALIA: So we've got all
20 these other regulators already doing this, looking
21 at these firms, et cetera, we're going to be a
22 little new to this so I see where we have some

1 additional requirements. But your team has told
2 us that the estimate is an additional six FTEs
3 will be needed for the CFTC to fulfill its
4 regulatory responsibilities in relation to the two
5 rules you talked about including four for the
6 Division of Enforcement. Six people to do
7 something? Really?

8 MR. KENNEDY: In consultation with DCIO
9 and other staff, we believe that that's what we'll
10 need.

11 COMMISSIONER O'MALIA: It will take six
12 people full-time doing these two little rules?

13 MR. KENNEDY: Correct.

14 COMMISSIONER O'MALIA: I find that hard
15 to believe. I have no further questions.

16 CHAIRMAN GENSLER: Mr. Stawick?

17 MR. STAWICK: Commissioner O'Malia?

18 COMMISSIONER O'MALIA: Aye.

19 MR. STAWICK: Commissioner O'Malia, aye.
20 Commissioner Chilton?

21 COMMISSIONER CHILTON: Aye.

22 MR. STAWICK: Commissioner Chilton, aye.

1 Commissioner Sommers?

2 COMMISSIONER SOMMERS: Aye.

3 MR. STAWICK: Commissioner Sommers, aye.

4 Commissioner Dunn?

5 COMMISSIONER DUNN: Aye.

6 MR. STAWICK: Commissioner Dunn, aye.

7 Mr. Chairman?

8 CHAIRMAN GENSLER: Aye.

9 MR. STAWICK: Mr. Chairman, aye. Mr.

10 Chairman, on this matter the yeas are five and the

11 nays are zero.

12 CHAIRMAN GENSLER: Thank you, Mr.

13 Stawick and thank you, Commissioners. Carl and

14 Gail are about to give us another presentation,

15 but we'll send this one to the Federal Register as

16 well.

17 MR. KENNEDY: Thank you, Chairman. This

18 rulemaking is promulgated under Section 1093 of

19 the Dodd- Frank Act. This section amends Title 5

20 of the Gramm-Leach- Bliley Act to affirm the

21 Commission's authority to promulgate privacy rules

22 protecting consumer information. I think it's

1 important to note that this rule primarily covers
2 non-affiliate sharing of information, whereas the
3 final rulemaking under the Fair Credit Reporting
4 Act relates to an affiliate's use of consumer
5 information for marketing purposes.

6 The Commission's rules under Title V of
7 the Gramm-Leach-Bliley Act presently are found in
8 Part 160 of our regulations. In general, Part 160
9 requires a financial institution to provide
10 initial and annual notices to consumers about its
11 privacy policies and practices. Part 160 also
12 describes the conditions under which a financial
13 institution may disclose nonpublic personal
14 information about consumers to nonaffiliated third
15 parties. And lastly, it provides a method for
16 consumers to prevent a financial institution from
17 disclosing this information to most nonaffiliated
18 third parties by opting out of that disclosure.

19 Currently the term financial institution
20 includes futures commission merchants, commodity
21 trading advisers, commodity pool operators,
22 introducing brokers and retail foreign exchange

1 dealers. This final rule under consideration
2 today simply seeks to amend Part 160 to expand the
3 scope to include swap dealers and major swap
4 participants. In Part 160 and the amendments,
5 it's important to note that staff statutory
6 definitions of these terms as they may be further
7 defined by the Commission.

8 In addition, the final rule does make a
9 number of small textual changes to Part 160. For
10 instance, Title X of the Dodd-Frank Act created
11 the Bureau of Consumer Financial Protection and
12 transferred a number of consumer protection
13 authorities away from several federal agencies to
14 the new bureau. The final rule, accordingly,
15 removes all references to the FTC in our Part 160
16 rules and changes those references to the bureau.
17 Following the publication of our proposed
18 rulemaking on October 27 of last year, we received
19 a total of six comment letters. However, only two
20 were substantive and all the comments can
21 basically characterize as being minor.

22 The commenters' main comment was that

1 they sought clarification to some of the
2 statements that were made in the Paperwork
3 Reduction Act calculations. Staff considered
4 these comments and has accordingly amended its
5 final Paperwork Reduction Act accordingly. Like
6 in the previous rule presented and voted on today,
7 commenters also requested that amendments to Part
8 160 have an effective date of 9 months from the
9 date of publication. Staff again disagrees and
10 believes that for our existing regulated entities,
11 they will not need 9 months so we have tied the
12 effective date of the amendments to Part 160 to
13 the effective date with respect to the Part 162
14 rules that you voted on today.

15 Then with respect to swap dealers and
16 major swap participants, similarly we've
17 recommended that the effective date with respect
18 to those entities become effective 60 days after
19 the date of publication of the final entities'
20 definition rules which will be voted on later this
21 year.

22 This concludes my presentation of the

1 rulemaking under Section 1093. Again, I thank you
2 for your time and I'm happy to answer to any
3 questions that you have.

4 CHAIRMAN GENSLER: I'll entertain a
5 motion for the staff recommendation on the final
6 rule on the privacy pieces of Gramm-Leach-Bliley.

7 COMMISSIONER SOMMERS: So moved.

8 COMMISSIONER CHILTON: Second.

9 CHAIRMAN GENSLER: I also will be
10 supporting the final rulemaking to expand the
11 scope of privacy protections for consumer
12 financial information under the Gramm-Leach-
13 Bliley Act. The rulemaking expands the scope of
14 the Commission's existing privacy protections
15 afforded to consumer information under the
16 Commission's current existing Part 160 rules to
17 swap dealers and major swap participants. Of
18 course it would go effective later when we've
19 finished those definitions.

20 So I'll be supporting this rule, and
21 turn to Commissioner Dunn for any questions,
22 statements or comments.

1 COMMISSIONER DUNN: I will be supporting
2 this, Mr. Chairman, but, once again, it points out
3 the need for definitions to be out.

4 CHAIRMAN GENSLER: Agreed.

5 COMMISSIONER SOMMERS: I do have one
6 quick question. Because what this rule does is
7 just extend the Gramm-Leach-Bliley provisions to
8 FCMs, IBs, CPOs, CTAs and RFEDs that already
9 comply with this, it extends it to swap dealers
10 and major swap participants, are there any
11 provisions that are in this rule that are changes
12 to what's currently in place for our current
13 registrants so that it would change anything for
14 FCMs, IBs, CPOs, CTAs or RFEDs?

15 MR. KENNEDY: There is one, again, minor
16 change to a section that talks about the way that
17 state laws interact with the provisions in Part
18 160, and says that to the extent that state law
19 conflicts with the provisions in Part 160 that
20 state law should prevail. The language was
21 changed. We changed the language. Title X
22 Dodd-Frank amended the language in

1 Gramm-Leach-Bliley, so we did amend the language
2 accordingly. But in terms of it being an actual
3 change, it's more textual than any sort of
4 substantive change.

5 COMMISSIONER SOMMERS: We conform with
6 what Dodd- Frank said, but it really is no change
7 for our registrants?

8 MR. KENNEDY: Absolutely. It's still
9 that our registrants should defer to state law.

10 COMMISSIONER SOMMERS: Thank you.

11 CHAIRMAN GENSLER: Commissioner Chilton?

12 COMMISSIONER CHILTON: No questions.
13 Thank you for your work.

14 CHAIRMAN GENSLER: Commissioner O'Malia?

15 COMMISSIONER O'MALIA: Let me just come
16 back to this budget question. What will be keep
17 our people doing in surveilling and enforcing on
18 this rule if we're relying on other regulators,
19 are you just indicated to Commissioner Sommers
20 that will rely on state laws? What are going to
21 keep our six new FTEs so busy with in surveilling
22 for this?

1 MR. KENNEDY: It's my understanding,
2 again, in consultation with DCIO staff, that the
3 persons who currently have experience with these
4 rules, someone who is on my team, some of their
5 pre-Dodd-Frank functions, they would have to start
6 working on that in order to focus on monitoring
7 NFA or any SROs' administration of these rules.
8 So it was the recommendation in consultation with
9 DCIO staff to request additional staff to manage
10 NFA and/or an SRO. And in terms of DOE staff, it
11 was also the recommendation that we increase
12 staffing there.

13 COMMISSIONER O'MALIA: I realize you're
14 not the budget guy on this one and I don't want to
15 put you on the spot too much here, but we're going
16 to watch NFA watching the registrants?

17 MR. KENNEDY: Yes.

18 COMMISSIONER O'MALIA: Exactly what are
19 we watching for watching NFA watch the
20 registrants?

21 MR. KENNEDY: In terms of managing their
22 administration of these rules to make sure that

1 when they're conducting audits to make sure that
2 they are in fact ensuring that our registrants are
3 complying with these rules. Just having staff on
4 hand to make sure that the inspections are taking
5 place and that they're in accordance with our
6 rules and regulations.

7 COMMISSIONER O'MALIA: Thank you.

8 CHAIRMAN GENSLER: Mr. Stawick. It
9 might be a long roll call because Commissioner
10 Chilton may have gotten coffee or something, but
11 why don't you try to do it and then we'll pause?

12 MR. STAWICK: Yes, sir. Commissioner
13 O'Malia?

14 COMMISSIONER O'MALIA: Aye.

15 MR. STAWICK: Commissioner O'Malia, aye.
16 Commissioner Chilton?

17 COMMISSIONER CHILTON: Aye.

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

20 COMMISSIONER SOMMERS: Aye.

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

1 COMMISSIONER DUNN: Aye.

2 MR. STAWICK: Commissioner Dunn, aye.
3 Mr. Chairman?

4 CHAIRMAN GENSLER: Aye.

5 MR. STAWICK: Mr. Chairman, aye. Mr.
6 Chairman, on this matter the yeas are five, the
7 nays are zero.

8 CHAIRMAN GENSLER: Thank you, Mr.
9 Stawick. Thank you Commissioners, Carl and Gail.
10 With that I think we'll be sending this to the
11 Federal Register.

12 Next is large-trader reporting. Mr.
13 Fekrat, why don't you walk us through, Ali, Rick
14 and Dan, large-trader reporting, and we'll look
15 forward to the staff recommendation here?

16 MR. FEKRAT: Good morning, Mr. Chairman
17 and Commissioners. Before beginning I would like
18 to take a moment to thank all of you and your
19 legal assistants for your direction and guidance
20 throughout the whole process. I would also take a
21 moment to thank some staff members who were a very
22 important part of this rulemaking: Carlene Kim,

1 Neil Kumar, Steve Sherrod, Ali Hosseini, Salman
2 Banai and Tom Littlefield.

3 The Commission today is considering the
4 adoption of large swaps trader reporting rules.
5 The reporting rules that are before the Commission
6 if they are adopted will be the first systematic
7 and comprehensive collection of swaps and swaption
8 data by any financial regulatory body domestically
9 or internationally. The new rules if adopted will
10 require clearing organizations, clearing members
11 and swap dealers to provide principal and
12 counterparty position reports on physical
13 commodity swaps linked to a discrete set of listed
14 futures contracts. The new rules will also apply
15 recordkeeping and production requirements to
16 reportable swaps traders. When fully implemented,
17 the rules will enable the Commission to meet its
18 regulatory responsibilities by serving as the
19 cornerstone of an effective surveillance program
20 providing value insight into the size and
21 complexity of a vital but previously opaque
22 marketplace in futures-linked physical commodity

1 swaps. The reporting rules will also support the
2 Commission's transparency initiatives such as its
3 commitments of trader reports and index and
4 investment reports and will allow for the
5 monitoring and compliance with any trading
6 requirements or limits that may be established by
7 the Commission.

8 The regulations will collect data on
9 swaps and swaptions linked to 46 physical
10 commodity futures contracts listed on designated
11 contract markets. A swaps position would be
12 deemed reportable if it is in any one futures
13 equivalent month comprised of 50 or more

14 economically equivalent swaps on a futures
15 equivalent basis based on the same commodity
16 underlying the contracts covered by the
17 regulation. In order to obviate potential burdens
18 associated with mapping systems to identify
19 reportable positions as described earlier,
20 reporting entities would have the discretion to
21 deem one economically equivalent swap to be a
22 reportable position. The final regulations

1 contemplate staggered compliance dates for
2 different categories of reporting firms. Clearing
3 organization and members and persons with books
4 and records obligations would be required to
5 comply with the regulations 60 days after their
6 publication in the Federal Register. Swap dealers
7 that are not clearing members would comply upon
8 the effective date of final regulations further
9 defining the term swap dealer.

10 In addition, the Commission may permit a
11 risk- free reporting period for up to 6 months
12 from the effective date of the rulemaking whereby
13 data elements that are reported or the frequency
14 of reporting may be different than those
15 prescribed by the regulations. The Commission is
16 contemplating also extending compliance dates by
17 additional months for certain swap dealers that
18 may not be financial entities.

19 At this time I'm happy to answer any of
20 your questions.

21 CHAIRMAN GENSLER: Thank you very much,
22 Bruce. I need to entertain a motion first to

1 accept the staff recommendation.

2 COMMISSIONER CHILTON: So moved.

3 COMMISSIONER SOMMERS: Second.

4 CHAIRMAN GENSLER: Thank you for that
5 motion and second to take the staff
6 recommendation. I guess I was supposed to say as
7 amended. I support the final rulemaking to
8 establish large-trader reporting for physical
9 commodity swaps. I think this is one of the
10 significant rulemakings that we'll have as Bruce
11 said because it gives us for the first time and
12 enables the CFTC to receive data from large
13 traders in the commodity swaps marketplace. The
14 American public has benefited for decades in that
15 we've had similar authority in the futures
16 marketplace and the Commission's ability to gather
17 that large-trader reporting in the futures
18 marketplace helps us to oversee the markets, to
19 police the markets, but also every Friday the
20 American public can see the results because we
21 aggregate that data and put it out in Commitments
22 and Trader Reports and I think markets have

1 greater transparency just because we collect that
2 data.

3 Today's large trader reporting
4 rulemaking establishes that clearinghouses and
5 swap dealers will have to report to the CFTC about
6 swap activities of large traders in the physical
7 swaps market, and we'll have the similar ability
8 to aggregate data, to look at the markets and
9 police those markets. Over time as a result of
10 the Dodd-Frank Act, the markets will benefit from
11 swap data repositories, but we don't have them
12 yet. So today's rulemaking will enable the
13 Commission to gather important swaps data until
14 these swap data repositories are robust,
15 well-regulated swap data repositories. This data
16 will be useful for the Commission to monitor and
17 police the markets, and as I say, potentially
18 aggregate data and put it out on our website so
19 the market can benefit from that. And including
20 hopefully establishing with support of the
21 Commission, enforcing position limits ultimately
22 with the use of this data.

1 So I will be supporting this rule.

2 Commissioner Dunn?

3 COMMISSIONER DUNN: Thank you, Mr.

4 Chairman. I have some concerns on getting the
5 data and how we're going to store it, but I'll
6 leave those questions for later on as they do the
7 implementation. But I do have a series of
8 questions that I want to ask. When the contract
9 becomes effective presuming we don't have swap
10 dealers definitions at the time, the only people
11 who will be required to comply are clearinghouses,
12 clearing members and persons with books and
13 records obligations. Looking at just this subset,
14 can we estimate what percentage of
15 over-the-counter markets we will be seeing?

16 MR. FEKRAT: It's very difficult to
17 answer that right now because we don't collect
18 comprehensive data. This is a question we could
19 probably answer much more intelligently once we
20 actually do collect the data for several months.
21 One thing to note, however, is that there is a
22 special call requirement that is effective 60 days

1 after the rulemaking and that applies to any
2 person with a reportable position. So if we
3 determine that we need to do something to get
4 additional information to answer a question like
5 that, we have the authority to do that.

6 MR. SHILTS: And, Commissioner, I might
7 add that I think it also might vary a little bit
8 by commodity group or even asset type because I
9 think a lot of the -- through the work of
10 ClearPort and ICE, many in the energy swaps are
11 being cleared now is our understanding, but maybe
12 in some other agricultural areas you don't have as
13 many that are cleared. But as Bruce said, that's
14 something we'll get more information on and then
15 if we need to supplement the information we get we
16 can use the special call authority.

17 COMMISSIONER DUNN: I'm a little
18 concerned because this data is what we will be
19 basing position limits on and if we don't have a
20 clear idea of what the total universe is out
21 there, won't it be difficult for us to be
22 establishing these position limits based on that

1 proposed rule?

2 MR. SHILTS: As we go to make a proposal
3 on limits, the idea is that we would be getting
4 this information and/or have this available. And
5 I think as Bruce said, as this starts coming in
6 and as we do further work working with the
7 potential swap data repositories, we should be
8 getting a much better feel for the scope of the
9 information that we're getting. And as I said, I
10 think in some areas I think we do have a pretty
11 good feel for roughly the amount of swaps that
12 potentially would be captured because, as I said,
13 for some commodity areas there is a significant
14 amount that's already being cleared through the
15 various initiatives of the clearinghouses, but
16 it's something that we'll have to continue to
17 focus on and see how as we get the information and
18 as we do further with the swap data repositories,
19 we should get a much better handle on that.

20 COMMISSIONER DUNN: The reality is we
21 probably won't begin seeing some of that
22 information then until 60 days after the adoption

1 of the definition of swap dealers.

2 MR. FEKRAT: We'll be getting data on
3 cleared swaps and the requirements also extend to
4 clearing members. Some of the clearing members
5 may also be swap dealers and they may also engage
6 in activities that involve uncleared swaps. So
7 we're not clearing on the quality of the data or
8 the quantity of the data that we would be getting
9 and that may vary from market to market. We
10 certainly have the special call authority to use
11 if we need to refine the data that we're getting
12 or we want to target a specific collection of data
13 to allow us to see the size of the market. So we
14 do have tools to work with and we're going to be
15 dedicated to getting this rulemaking system up and
16 running and we are confident that the industry is
17 going to be working with us to do this as well.

18 We anticipate that although we don't
19 have a definition for swap dealer, we do have
20 statutory definitions that are out there and
21 regardless of their effectiveness, many people do
22 know or should know where they stand, what side of

1 the line they are, and we anticipate that they
2 will be anxious to report to us regardless of
3 being designated as a swap dealer conclusively.

4 COMMISSIONER DUNN: Does the division
5 then contemplate doing a special call concurrent
6 with the implementation data of this final
7 regulation?

8 MR. FEKRAT: Yes. We can do a special
9 call on anyone with a reportable position and that
10 doesn't matter whether they're registered with us,
11 not registered with us, cleared swaps, uncleared
12 swaps, a swap dealer or not. We can collect data
13 from anyone with a reportable position.

14 COMMISSIONER DUNN: I didn't ask if we
15 could do it. I asked do we anticipate doing it?

16 MR. SHILTS: I think at this time we
17 don't have a specific plan, but as Bruce said,
18 that is a tool in our arsenal that we can use as
19 we start getting the information to kind of
20 supplement our knowledge of what individual
21 traders or clearing members have with respect to
22 their swaps positions. But that's not part of

1 what we have now, a specific timetable for issuing
2 those, but it's something we will be considering
3 as we get closer to the effective date.

4 MR. FEKRAT: And it will be up to our
5 staff in surveillance and the Commission to
6 determine whether we need to collect that data and
7 whether it will have utility in terms of providing
8 information to other rulemakings. I think at that
9 time the team members and the Commission will
10 decide whether they need to do that.

11 COMMISSIONER DUNN: Let me thank the
12 staff for the tremendous job they did on this.
13 Mr. Chairman, I have commended these folks on the
14 format they used. I found it most helpful for me
15 in understanding the comments that came in and I
16 would like to see the rest of them use this same
17 type of format. They did an excellent job on it
18 and I intend to support this proposal.

19 CHAIRMAN GENSLER: Thank you,
20 Commissioner Dunn. Message to team leads yet to
21 go in July through the end of this year,
22 Commissioner Dunn likes the large-trader format so

1 that it might be used by others. I wanted to do
2 something before I turn to Commissioner Sommers.
3 Rick, if we go final on this rule, this has some
4 delegations in this rule.

5 MR. SHILTS: Yes.

6 CHAIRMAN GENSLER: But one delegation is
7 under 20.10 about compliance dates and if this
8 rule is supported it rests on you to do some of
9 this, but I'm directing you as Chairman to consult
10 with the Commissioners' offices, all five
11 Commissioners' offices, as you consider any such
12 determinations under 20.10.

13 MR. SHILTS: Yes, I will.

14 CHAIRMAN GENSLER: Commissioner Sommers?

15 COMMISSIONER SOMMERS: Thank you, Mr.
16 Chairman. I am supportive of moving forward with
17 collecting these position reports from swap
18 dealers and anyone who has swaps on their books.
19 I do think that what makes this very complicated
20 for us and what has made it very complicated for
21 this team to put together a rule on this issue is
22 because we have not done the definitions. So

1 because we are trying to move forward to get data
2 to help us and to inform us for decisions and
3 moving forward with position limits, this is going
4 to be very helpful for us. But until we know who
5 a swap dealer is and until we know what a swap is,
6 it's very difficult for who is able to report and
7 who is captured in this rulemaking. So although I
8 am supportive of the rule, I have a lot of
9 reservations about moving forward with final
10 rulemakings because we have not done the
11 definitions first.

12 I have one question with regard to swap
13 dealers who may be classified as limited-purpose
14 swap dealers in specific commodities. How will we
15 treat those swap dealers with regard to their
16 reporting requirements?

17 MR. FEKRAT: A reporting entity in the
18 rulemaking is defined as a swap dealer. It
19 actually does say in the final draft that a
20 reporting entity is a swap dealer with respect to
21 any one of the 46 paired commodities which would
22 be swaps that are linked to any of the 46

1 physically delivered contracts. So you would have
2 to be a swap dealer in one of the 46. At that
3 point you would be a reporting entity and you
4 would be subject to reporting all of your swaps
5 positions in those 46 regardless of what made you
6 a limited designation swap dealer. The reason we
7 recommended this to the Commission was at that
8 point the entity would have a regulated status.
9 They would have had to map their systems to
10 provide reports to us at least -- the limited
11 designation, at least in one commodity, and once
12 you do that for one commodity, you have the same
13 code and the same procedures and methods in place
14 to extend that to others, and obviously we would
15 get much, much greater data. So those were the
16 policy reason behind making that recommendation.

17 COMMISSIONER SOMMERS: Thank you.

18 CHAIRMAN GENSLER: Thank you,
19 Commissioner Sommers. Commissioner Chilton?

20 COMMISSIONER CHILTON: I don't have a
21 question. I just want to make a point and not
22 specifically with regard to this rule. A lot of

1 these things, we've gotten the comments, we're
2 doing the best we can given the time constraints
3 and staff is working hard. That doesn't mean that
4 there's not going to be some outlier on one rule
5 or another that we learn something in the future.
6 You don't want to ever change final rules going
7 into them, but if we discover something in the
8 future, we not only have the plenary authority to
9 do so, we have a responsibility to do so. I'm not
10 suggesting there's anything on this one. I'm just
11 sort of trying to let market participants and
12 others know that if we see some problem with
13 something we've done in the future that we have to
14 address, I think all of us understand that we will
15 have to address it.

16 Thank you. I support this rule.

17 CHAIRMAN GENSLER: Thank you,
18 Commissioner Chilton. I agree with what you just
19 said. It's part of the funding issue too, but if
20 we're funded and we have the staff analysts and
21 accountants and economists and lawyers, it's also
22 to work with the market participants on their

1 questions.

2 There is going to be a lot to interpret
3 in each of these rules. There might even be no
4 action letters that people request and
5 interpretive guidance and so forth. I hope that
6 we're working actively with market participants in
7 a smooth transition to a new regime and it's going
8 to take a lot of questions being answered,
9 interpretive guidance, no action letters, all of
10 that and I think we'll be pretty active and will
11 need to be active to help. Even on this
12 compliance date thing, we delegate some authority
13 but you consult with us because I think we have to
14 give people some time on compliance as well.

15 Commissioner O'Malia?

16 COMMISSIONER O'MALIA: Thank you, Mr.
17 Chairman. Thank you for your cooperation and
18 assistance to improve this rule here at the table,
19 and to all of my colleagues, frankly, for their
20 cooperation as well.

21 Bruce, can you talk to me a little bit?
22 We've been collecting some special call data on

1 swap markets and this new rule makes a distinction
2 between financial and nonfinancial swap dealers.
3 Do you have a sense today of how much of the trade
4 volume related to swaps is being done by financial
5 swap dealers as a percentage?

6 MR. FEKRAT: I think we would have an
7 idea about the percentages once we get some data
8 flowing. Right now that's very difficult to say.

9 COMMISSIONER O'MALIA: Maybe, Rick,
10 you'd want to reflect on this. Even in our
11 special call that we've been doing on swaps for
12 over a year or 2 years I guess, what is your
13 sense?

14 MR. SHILTS: The special call in that
15 sense has a kind of different focus. We're really
16 focused on getting information to access index
17 activity. So in addition to swap dealers, we also
18 go out to funds which wouldn't be covered by this
19 rulemaking. Given the kind of different focus,
20 again I'm not sure I could give a really good
21 guess.

22 COMMISSIONER O'MALIA: Then obviously we

1 need to do this rule.

2 MR. FEKRAT: Commissioner, I'd like to
3 add that in thinking about your question,
4 personally and my colleagues on our team, I think
5 I probably can speak for them as well, we do think
6 that a significant portion do go through the
7 financial swap dealers. At some level or another
8 they are the aggregators of risk and the risk
9 moves to them and they offset the risk. There may
10 be particular commodity categories where the
11 nonfinancial swap dealers may play a role, but in
12 the major commodities, I would say that the major
13 and financial swap dealers account for a
14 substantial portion of the transactions.

15 COMMISSIONER O'MALIA: Thank you.
16 That's very helpful. So we do make a distinction
17 in this rule. Could you make sure that everybody
18 is clear on this? Let's walk through a couple of
19 these definitions and let me know when they have
20 to report. Financial swap dealers have to report
21 when?

22 MR. FEKRAT: Upon final definition of

1 the term swap dealer.

2 COMMISSIONER O'MALIA: Upon the
3 effective date or the compliance date?

4 MR. FEKRAT: Upon the effective date.

5 COMMISSIONER O'MALIA: Which is under
6 this rule?

7 MR. FEKRAT: The compliance date for
8 swap dealers, when they would have to comply with
9 the regulations that the Commission may adopt
10 today, the reporting rules, their compliance date
11 would be upon the effectiveness of the final
12 rulemaking further defining the term swap dealer.

13 COMMISSIONER O'MALIA: How about
14 clearing organizations?

15 MR. FEKRAT: Clearing organizations
16 would have to comply 60 days after the publication
17 of this rulemaking.

18 COMMISSIONER O'MALIA: Clearing members?

19 MR. FEKRAT: Clearing members, same
20 thing, 60 days after publication of the
21 rulemaking.

22 COMMISSIONER O'MALIA: So we have to

1 define the swap dealer definition. And then once
2 it's clear who swap dealers are, we also have some
3 issue with the definition of swaps. Right? For
4 example, the issue of trade options. I understand
5 that we have received multiple comments relating
6 to whether such contracts should or should not be
7 regulated as swaps. Clarity regarding this issue
8 would be helpful not only for this rule but for
9 others, obviously. Do we have any sense of when
10 we'll get that kind of clarity as to defining a
11 swap in trade options or forwards would be dealt
12 with?

13 MR. BERKOVITZ: Commissioner, the
14 comment period on the proposed rule for defining
15 swaps will close I believe in about 2 weeks. It's
16 on I think the 22nd or 23rd of this month. So we
17 are obviously aware of that issue and looking at
18 it and we will be examining the concept of the
19 definitional issue as well as in the context of
20 this rule and how the two relate. So we'll be
21 looking at it, and as the Chairman mentioned,
22 there are opportunities to provide interpretation,

1 guidance and address it in further rulemakings and
2 this is one of those issues that we will be
3 clearly looking at and following and perhaps
4 addressing in one of those forums.

5 COMMISSIONER O'MALIA: What if we define
6 the dealer definition and it's still unclear, and
7 as to a nonfinancial dealer they're in a gray
8 area. They don't know if they qualify. What do
9 we do with them under this rule?

10 MR. FEKRAT: You mean it's unclear
11 whether they qualify based on the types of
12 transactions they engage in or whether their
13 conduct is dealing activity?

14 COMMISSIONER O'MALIA: Dealing activity,
15 yes.

16 MR. FEKRAT: Once we have a final rule
17 defining the term swap dealer, that rulemaking if
18 it occurs prior to a final definition for the term
19 swap, would be defining conduct which would render
20 an entity a swap dealer. At that point the
21 nonfinancial should know whether they are or are
22 not engaged in that type of conduct. And the

1 rulemaking, this may have been amended by what you
2 considered, did envision as submitted to you
3 without the latest amendment, but a later
4 compliance period.

5 COMMISSIONER O'MALIA: It has been
6 amended.

7 CHAIRMAN GENSLER: It has been amended.
8 I'll help you out. It contemplates that if
9 somebody needs time, that the Commission may give
10 them another 6 months.

11 MR. FEKRAT: So they would get an
12 additional 6 months from the effective date for
13 the term swap dealer. That means they would have
14 potentially a considerable amount of time to
15 determine their regulatory status.

16 COMMISSIONER O'MALIA: Thank you very
17 much, Bruce, and maybe this is a question for
18 Rick. A lot of compliance and filing of this,
19 we've discussed having a more automated filing
20 system, an electronic Form 40 and an electronic
21 Form 102. We've contemplated greater fidelity in
22 understand in the futures market who owns these

1 contracts through an OCR rule. It would obviously
2 be useful to have all of this electronic reporting
3 automatically populate our system so we could look
4 at this through a very streamlined, automated way
5 and to avoid rekeying in and retyping in any of
6 these forms. What is the process? Where do we
7 stand today in bringing these new forms, the new
8 OCR rules, that will really give us the next level
9 of data?

10 MR. SHILTS: We have a team that's been
11 working on that. We've kind of combined a group
12 that's working on automating the Form 40s and 102s
13 with the Ownership of Control Reporting and making
14 some changes there so that we would hope to
15 capture not all but a substantial portion of the
16 data that we would have gotten in the other
17 report, the ownership and control report proposal
18 again trying to respond to a lot of the comments
19 that we got about the costs involved with that to
20 try to reduce the costs but still get us the
21 information. So we're working on that and we
22 would hope to have that up and running and

1 operational before these new forms that would be
2 adopted if the Commission approves these rules and
3 that would all be electronics which has been a
4 goal of ours for quite a while. It's in progress
5 and we hope to have that before these new forms,
6 the 102-S and 40-S, would have to be submitted
7 under this rulemaking if the Commission adopts it.

8 COMMISSIONER O'MALIA: Do you have a
9 sense of time in general when you're going to be
10 proposing a new OCR and electronic forms?

11 MR. SHILTS: We were hoping this summer
12 to complete that. It's just a balancing of
13 priorities with the rulemakings, but we have a
14 team working on that and trying to as I said
15 consolidate the OCR with the Form 40- 102 project.

16 COMMISSIONER O'MALIA: How long might it
17 take to have electronic reporting of the lion's
18 share of the swaps market and the futures market
19 does in electronic fashion? How far away are we
20 from that?

21 MR. SHILTS: I'd have to get back to
22 you. I don't know off the top of my head, but I

1 can ask and report that.

2 COMMISSIONER O'MALIA: Fair enough.

3 Thank you.

4 CHAIRMAN GENSLER: Before we go to a
5 vote, maybe this is more for the public and the
6 people from the fourth estate over there at the
7 desk. The clearinghouses have a lot of this
8 information in some of these markets. Is that
9 right? That's probably mostly a question for Rick
10 who heads the Division of Market Oversight. In
11 the energy markets, in oil and natural gas and
12 heating oil and so forth, there's been on a
13 voluntary basis a high level of clearing of swaps.
14 Is that not right, Rick?

15 MR. SHILTS: Yes, that's right. I think
16 both with NYMEX and ClearPort and then ICE, we
17 understand a very large percentage of those go to
18 clearing. I can't say exactly what the percentage
19 is, but it's high.

20 CHAIRMAN GENSLER: So if we vote this
21 out moments from now, 2 months from now roughly
22 we'll be getting significant information that we

1 don't currently have from those clearinghouses at
2 least in the energy swaps marketplace. Is that
3 not right?

4 MR. SHILTS: I believe that's so.

5 CHAIRMAN GENSLER: I think that's good
6 news for this Commission. The definition of swap
7 dealer is still very important, but I was just
8 pointing out that at least in the energy space I
9 think we'll get a lot from the clearinghouses.

10 COMMISSIONER O'MALIA: I think Bruce
11 pointed out the fact that financial dealers also
12 constitute -- and they are the counterparty to
13 many of these commercial firms and I think the
14 objective is to go after the lion's share of these
15 and who they trade with, and these end users,
16 their trades will be reported. We're not putting
17 the burden on the end users. We're putting on the
18 dealer and appropriately so as they've got the
19 resources and will really give us the insight into
20 what the whole market looks like.

21 CHAIRMAN GENSLER: I think that's right.
22 We'll get the clearing piece and some of their

1 clearing members, and then later we'll get the
2 financial swap dealers once we get the dealer
3 definition and we all agree we need to get that
4 done. Then there might be a delay for some
5 nonfinancial dealers which I think is appropriate.

6 COMMISSIONER O'MALIA: I greatly
7 appreciate the Commission's willingness to look at
8 this in totality because we will have the data.
9 There's no doubt about it. We're going to have
10 the data. This rule provides the data and we're
11 going to get it as soon as the rule -- once all
12 these effective dates are in place. We don't need
13 to worry about that. We're going to have great
14 insight into the market and when the data
15 repositories come in, additional fidelity of the
16 complete market. I greatly appreciate everybody's
17 willingness to offer some patience in staging,
18 phasing in if you will, to make sure that we
19 aren't putting a burden on the end users or on
20 some of these farmers who may be caught up in some
21 of these yet-to-be-defined definitions that may
22 complicate their lives. And whether they fall

1 into one category or another, we've given them
2 some flexibility at the Commission to make prudent
3 decisions as to who has to report immediately, et
4 cetera. So I do appreciate everybody's patients
5 and cooperation on that to get that squared away.

6 CHAIRMAN GENSLER: I think it's the
7 Commission working well together. The Commission
8 is now going to turn to Dave Stawick.

9 MR. STAWICK: Commissioner O'Malia?

10 COMMISSIONER O'MALIA: Aye.

11 MR. STAWICK: Commissioner O'Malia, aye.
12 Commissioner Chilton?

13 COMMISSIONER CHILTON: Aye.

14 MR. STAWICK: Commissioner Chilton, aye.
15 Commissioner Sommers?

16 COMMISSIONER SOMMERS: Aye.

17 MR. STAWICK: Commissioner Sommers, aye.
18 Commissioner Dunn?

19 COMMISSIONER DUNN: Aye.

20 MR. STAWICK: Commissioner Dunn, aye.

21 Mr. Chairman?

22 CHAIRMAN GENSLER: Aye.

1 MR. STAWICK: Mr. Chairman, aye. Mr.
2 Chairman, on this matter the yeas are five, the
3 nays are zero.

4 CHAIRMAN GENSLER: Mr. Stawick, thank
5 you, and Bruce, Ali, Rick and Dan, thank you. So
6 that would send that one to the Federal Register
7 as well. I'm looking at my notes here to see if
8 I'm supposed to do anything else here. I guess
9 I'm supposed to at this point to ask for unanimous
10 consent to allow staff to make technical
11 corrections to the documents voted on today prior
12 to sending them to the Federal Register.
13 Sometimes technical corrections as to make it in
14 the style that the Federal Register wants it. Not
15 hearing any objection, that's moved.

16 Our next scheduled public meeting will
17 occur on July 19. The subjects of rulemaking will
18 be presented and the meeting will be published on
19 our website 7 days prior to the meeting. If there
20 is no other Commission business, I want to once
21 again thank all of the staff and I want to thank
22 my fellow Commissions. We were able to move five

1 rules forward today. I'm very thankful for the
2 staff work and the Commissioners all working
3 together. We may not always be unanimous, but
4 we're working hard to get all of the
5 Commissioners' feedback and input before we move
6 to these final rules, to consider all the public
7 comments on them.

8 And I want to thank all the public who
9 have commented on these five and who continue to
10 comment on the remaining ones. With that I'll
11 call for a motion to adjourn the meeting.

12 COMMISSIONER SOMMERS: So moved.

13 CHAIRMAN GENSLER: All in favor of
14 adjourning the meeting?

15 GROUP: Aye.

16 CHAIRMAN GENSLER: Any opposed? Thanks,
17 Mike, so much for joining us from Chicago.

18 COMMISSIONER DUNN: Thank you.

19 (Whereupon, at 12:16 p.m., the
20 PROCEEDINGS were adjourned.)

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CERTIFICATE OF NOTARY PUBLIC

DISTRICT OF COLUMBIA

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

Notary Public, in and for the District of Columbia
My Commission Expires: January 14, 2013

