

Testimony of

Hal S. Scott

**Director of the Committee on Capital Markets Regulation;
Nomura Professor and Director of the Program on International Financial Systems
at Harvard Law School**

Before the

**Subcommittee on General Farm Commodities and Risk Management
Committee on Agriculture
United States House of Representatives**

April 13, 2011

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Thank you, Chairman Conaway, Ranking Member Boswell, and members of the Subcommittee for permitting me to testify before you today on the implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).² I am testifying in my own capacity and do not purport to represent the views of any organizations with which I am affiliated, although much of my testimony is based on the past reports and statements of the Committee on Capital Markets Regulation.

I will focus my remarks on the regulatory implementation of the portions of the Dodd-Frank Act relating to derivatives, with emphasis on the role of the Commodity Futures Trading Commission (CFTC). As you know, these rules will have a profound long-term impact on our financial system. It is important to get them right the first time, or else we risk making the U.S. financial system more risky and less competitive internationally.

¹ Biography with disclosures on compensated activities available at <http://www.law.harvard.edu/faculty/hscott>.

² Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (hereinafter Dodd-Frank Act).

The Dodd-Frank Act requires many of its most important rules to be finalized by late July 2011, just over three months away. The CFTC has the major role in writing the rules governing derivatives and Chairman Gensler has stated that the CFTC is almost finished issuing its proposals—albeit some important ones remain. On the other hand, the CFTC has yet to issue a major final rule about derivatives and at least some major rules will likely slip past the July finalization deadline. I do not fault the CFTC for missing deadlines. In fact, in testimony I delivered in January before the Committee on Financial Services, I said, “the most important objective should be to get the rules right, not to act quickly.”³ I still believe this is the case.

The proposed rulemaking process has unfortunately been scattershot. It was difficult for the public or markets to understand how the issuance of 44 proposed rules over 5 months would fit together. Before finalizing these rules the CFTC (as well as the SEC) should repropose all of these rules and describe how they fit together to achieve their objectives, along with an analysis of their costs and benefits. It should then permit another round of comment on the rules as a whole. It should also make sure that the Federal Reserve concurs with its proposals and that they are coordinated with those of the SEC and other major countries. The CFTC should then, with the collaboration of the other agencies, sequence the implementation of these rules in a way to minimize transition costs.

I. The CFTC Implementation Process

Of the 31 major rulemaking areas the CFTC identified, it has proposed rules in 28 areas. Appendix A shows the CFTC’s rulemaking progress to date. Before it begins to finalize and

³ *Promoting Economy Recovery and Job Creation: The Road Forward: Hearing Before the H. Comm. On Finc. Servs.*, 112th Cong. 14–15 (Jan. 26, 2011) (testimony of Hal S. Scott) (hereinafter January Testimony).

implement these rules, however, it is important to consider whether any lessons can be drawn from the process the CFTC used to propose the rules over the last several months.

Unlike the SEC, the CFTC has not published a clear timetable outlining which rules would be proposed when, and it is not obvious that much thought was given to which proposed rules should come first. I call this the scattershot approach. This has left the public in the dark about what was coming down the pipeline. The public and markets could not understand how the rules fit together before filing comments. Some of the CFTC's earliest proposed rules turned on important terms that had yet to be defined, such as "major swap participant." It also issued optional proposals, not required by Dodd-Frank, such as those on segregation of collateral, before it proposed some of the major mandatory rules.⁴ It was also concerned with the governance of clearinghouses before addressing the relatively more important issue of risk management.

Another general problem with the proposal process has been the lack of sufficient understanding of the industry in formulating the proposals. Showcase "roundtable" discussions and meetings with firms are not enough. Regulators need to gather information from the markets as to how they operate and then discuss their understanding of this information with industry and outside experts. The rush to propose rules generally did not allow this to happen. When the rules were proposed comment periods were far too short, usually only 30 days for the earliest proposals until the agencies yielded to pressure to extend the comment periods. This process can be compared to the deliberate and multi-year deliberation process the SEC went through before deciding in 2007 that foreign companies could issue shares in the United States under international

⁴ See, e.g., Protection of Cleared Swaps Customers Before and After Commodity Broker Bankruptcies, 75 Fed. Reg. 75,162 (Dec. 2, 2010); see also Sixth Series of Proposed Rulemakings Under the Dodd-Frank Act: Opening Statement of Comm'r Jill E. Sommers Before the U.S. Commodity Futures Trading Comm. (Dec. 1, 2010), <http://www.cftc.gov/pressroom/speechestestimony/sommersstatement120110.html> ("a number of the regulations that we have already considered, and a number of regulations that we are considering today, are not required by Dodd-Frank. Commission staff has spent months and months drafting proposed regulations that are purely voluntary").

financial reporting standards without reconciling their statements to U.S. GAAP,⁵ a decision of relatively less importance than the entire transformation of the regulation of OTC derivatives.

Although the CFTC did not appropriately prioritize its rulemakings during the proposal stage, it now has the opportunity to prioritize the two most important parts of the rulemaking process, final rules and implementation. Chairman Gensler calls the CFTC's rules a "whole mosaic."⁶ Once all of the rules have been proposed, the CFTC should pause and develop a public, published plan for how that mosaic fits together and in what order the final rules should be issued. It should then permit another round of comment on the rules as a whole. This is essential given the shortcomings of the piecemeal proposal process.

The CFTC should then give careful consideration to the sequence of implementation. Chairman Gensler has already outlined a helpful broad tentative order.⁷ He has suggested that the final rules be grouped into three broad categories, beginning in the spring and ending in the early fall. While this timetable is too aggressive, some of the ordering is quite sensible: the rules involving definitions, registration, and mandatory clearing should come first. In other cases, however, the schedule is less justified. For example, Chairman Gensler mentions capital and margin as part of the last group, even though those rules are among the most important for risk management.

The Federal Reserve should play a key part in the rulemaking process. The Fed should review and approve the substance and implementation of the Commission's plans. Under the Dodd-Frank Act, the Fed has a major role to play in monitoring and managing the systemic risk of

⁵ See Acceptance From Foreign Private Issuers of Financial Statements Prepared in Accordance With International Financial Reporting Standards Without Reconciliation to U.S. GAAP, 73 Fed. Reg. 986 (Jan. 4, 2008).

⁶ Implementing the Dodd-Frank Act: Remarks of Chairman Gensler Before FIA's Annual International Futures Industry Conference (Mar. 16, 2011), <http://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-73.html>.

⁷ See *id.*

clearinghouses, so it is important to have the Fed sign off on the rules before they are finalized. First and foremost, the Fed supervises the large dealer banks that do most of the derivatives trading, as well as other systemically important nonbank financial institutions that may be designated by the Financial Stability Oversight Council (FSOC). The Fed also plays a central role in the regulation of risk in systemically important clearinghouses. Furthermore, the Fed can extend discount window privileges to a clearinghouse in “unusual or exigent circumstances”⁸ subject to any conditions it prescribes, which could include conditions relating to risk management systems. The Fed may also object to the SEC and CFTC’s rules concerning systemically important clearinghouses, in which case FSOC has the authority to resolve the conflict.⁹ Considering the major role of the Fed, the SEC and CFTC should make sure the Fed agrees with their final rules before they are implemented.

With respect to implementation sequencing, a primary objective should be, as recommended by the Committee on Capital Markets Regulation, avoiding disrupting the markets.¹⁰ For example, rules concerning the threshold for publicly reporting details of block trades should be phased in so the Commissions can be certain that the rules will not dry up liquidity. The Commissions can start with broad, principles-based rules while they monitor the markets and collect the data necessary to determine whether implementation of more specific and limiting rules are necessary. This sequencing schedule should be disclosed to the public, and, ideally should itself be subject to comment. Although the proposed rules came out in an order that

⁸ Dodd-Frank Act § 806(b).

⁹ Dodd-Frank Act § 804(a); *see also* Letter from Hal S. Scott to Chariman Gensler Regarding The Federal Reserve’s Authority Over Clearinghouses 1 (Aug. 25, 2010), http://www.capmksreg.org/pdfs/2010.09.15_Genser_Letter_Release.pdf.

¹⁰ See Comm. on Capital Mkts. Regulation, comment to Commodity Futures Trading Comm’n Notice of Proposed Rulemaking, *Real-Time Public Reporting of Swap Transaction Data*, 75 Fed. Reg. 76,140 (filed Jan. 18, 2011); Comm. on Capital Mkts. Regulation, comment to Securities Exchange Comm’n, *Regulation SBSR - Reporting and Dissemination of Security Based Swap Information*, 75 Fed. Reg. 75,208 (filed Jan. 18, 2011).

was more haphazard than necessary, the CFTC can avoid repeating that mistake in the coming months.

II. Cost-Benefit Analysis

In my January testimony to the House Financial Services Committee, I emphasized the need for the independent regulatory agencies to perform sound cost-benefit analysis before proposing rules. The CFTC is required by statute to “consider the costs and benefits” of its rules, and the SEC is generally required to consider whether its rules “will promote efficiency, competition, and capital formation.”¹¹ In January, the President issued an Executive Order that reaffirmed the importance of conducting cost-benefit analysis when writing new regulations.¹² Although the Executive Order does not apply to independent agencies such as the CFTC and SEC, the heads of both agencies have suggested they will comply with its principles.¹³

The new Executive Order and the one that came before it subject agencies’ cost-benefit analysis to review by the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget.¹⁴ OIRA has published, with an interagency group, a set of “best

¹¹ 7 U.S.C. § 19(a) (CFTC); 15 U.S.C. § 78c(f) (SEC); *see also* 15 U.S.C. § 78w(a)(2) (SEC required to consider burden on competition).

¹² Exec. Order No. 13,563, § 1(b), 76 Fed. Reg. 3,821 (Jan. 21, 2011).

¹³ *See Public Hearing to Review Implementation of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act: Hearing Before the H. Comm. On Agric.*, 112th Cong. (Feb. 10, 2011) (testimony of Chairman Gary Gensler), <http://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-68.html> (CFTC Chairman Gary Gensler: “the CFTC’s practices are consistent with the executive order’s principles.”); *Testimony of Chairman Mary Schapiro Before the Subcomm. on Fin. Servs.: Hearing Before the H. Appropriations Comm.*, 112th Congress (Mar. 15, 2011), http://appropriations.house.gov/_files/031511SECFY12BudgetTestimonyFINAL.pdf (SEC Chairman Mary Schapiro: “while the Executive Order doesn’t apply to us, we’re trying to act as though it does.”).

¹⁴ *See* Exec. Order No. 12,866, §6(a)(3), 58 Fed. Reg. 51,735 (Oct. 4, 1993); Exec. Order No. 13,563, §1(b), 76 Fed. Reg. 3,821 (Jan. 21, 2011).

practices” to guide those agencies bound by the Executive Order.¹⁵ Neither the CFTC nor the SEC comes close to observing this guidance.

The CFTC typically begins its cost-benefit analysis with boilerplate text explaining that under its interpretation of its statutory mandate, it is not required to quantify costs and benefits.¹⁶ It then usually devotes only a few paragraphs to identifying some costs and benefits of the proposed rules. Yet even this qualitative analysis falls short. Yesterday the Committee on Capital Markets Regulation filed a comment letter with the SEC and CFTC regarding its proposed rules on reporting by private funds (Form PF).¹⁷ In that letter, the Committee listed the three “costs” the CFTC identified in the single paragraph devoted to the subject. It identified the “costs” as: (1) “Without the proposed reporting requirements...FSOC will not have sufficient information”; (2) “the proposed reporting requirements, once finalized will provide the CFTC with better information”; and (3) “the proposed reporting requirements will create additional compliance costs.”¹⁸ The first two points are asserted benefits, not costs. The reference to compliance costs is perfunctory and so general as to be meaningless.

Sound cost-benefit analysis measures costs and benefits against a baseline. The OIRA guide of best practices instructs agencies to set the baseline as the world without the proposed regulation.¹⁹ Yet in most proposals the CFTC evaluates the overall costs and benefits of the system required by the Dodd-Frank Act, rather than the particular implementation the agency

¹⁵ Office of Management and Budget, *Economic Analysis of Federal Regulations Under Executive Order 12866* (Jan. 11, 1996), http://www.whitehouse.gov/omb/inforeg_riaguide (hereinafter OIRA CBA Guide).

¹⁶ See, e.g., Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF, 76 Fed. Reg. 8,068, 8,087 (Feb. 11, 2011).

¹⁷ Comm. on Capital Mkts. Regulation, comment to Commodity Futures Trading Comm’n and Securities Exchange Comm’n Joint Proposed Rules, *Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF*, 76 Fed. Reg. 8,068 (filed Apr. 12, 2011).

¹⁸ Reporting by Investment Advisers on Form PF, *supra* note 16, 76 Fed. Reg. at 8,087.

¹⁹ OIRA CBA Guide, *supra* note 15, § III.A.1.

proposed. Likewise, OIRA instructs agencies to evaluate alternatives to the proposed regulations.²⁰ This is especially important when, as in the case of rules requiring reporting of information, many different systems could satisfy the statutory requirement, perhaps with lower costs. Yet the agencies have not identified alternatives. Nor do the agencies engage in incremental or marginal analysis, which would consider whether the benefits of each element of the proposed rule outweigh its costs. Instead, they typically take a gestalt approach to the rules as a whole.

For the last 30 years, a period spanning nearly five presidents, a series of executive orders has required non-independent agencies to comply with additional requirements to the rulemaking process, yet the independent agencies have not been covered by these requirements.²¹ Cass Sunstein, presently the Administrator of OIRA, has long called for subjecting the independent agencies to OIRA review.²² In my January testimony, I proposed a moderate system of OIRA review that would avoid any separation of powers issues involved with independent financial agencies.²³ This approach would have OIRA file comments with the agency for important rulemakings. OIRA's comments would evaluate the agency's cost-benefit analysis.²⁴ Although OIRA's comments would not be binding on the agencies, any final rules would still be subject to review in court. I also called for extending and strengthening the statutory provisions requiring the independent agencies to perform cost-benefit analysis so that each of the financial regulators is

²⁰ OIRA CBA Guide, *supra* note 15 § III.A.2.

²¹ See Exec. Order No. 12,866, § 6(a), 58 Fed. Reg. 51,735 (Oct. 4, 1993); Exec. Order No. 13,563, § 1(b), 76 Fed. Reg. 3,821 (Jan. 21, 2011); 44 U.S.C. § 3502(5).

²² See Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489, 1531–37 (2002); see also Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 4 (1995).

²³ For a discussion of these issues see Hahn & Sunstein, *id.*, 150 U. PA. L. REV. at 1531–37; Pildes & Sunstein, *id.*, 62 U. CHI. L. REV. at 24–33; see also Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2319–31 (2001).

²⁴ January Testimony, *supra* note 3, 10.

required to determine whether the costs of its rules exceed the benefits.²⁵ The rules proposed in the last two months have only strengthened my opinion that the independent financial regulators, particularly the CFTC and SEC, need stronger external requirements to conduct sound cost-benefit analysis.

III. Coordination

In order to write the best rules possible and to avoid unnecessary friction in the system, the federal agencies should coordinate with each other and with their foreign counterparts.

A. Domestic Coordination

The Dodd-Frank Act anticipates that the SEC and CFTC in particular should work together to regulate the derivatives markets. So far they have not coordinated as much as they should. In many of the proposed rules, the CFTC and the SEC have taken different approaches to swaps and security-based swaps, respectively. For example, the Commissions took different approaches to rules concerning public reporting of swap and security-based swap transactions,²⁶ conflicts of interest in ownership and governance of various swaps and security-based swap clearinghouses,²⁷ and risk management in clearinghouses.²⁸ The approaches of the CFTC and the SEC should diverge only when required by real differences between the types of derivatives they are

²⁵ January Testimony, *supra* note 3, 11.

²⁶ See Real-Time Public Reporting of Swap Transaction Data, 75 Fed. Reg. 76,140 (proposed Dec. 7, 2010) (CFTC); Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, 75 Fed. Reg. 75,208 (proposed Dec. 2, 2010) (SEC). The Commissions use different fields for the reporting systems.

²⁷ See Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest, 75 Fed. Reg. 63,732 (proposed Oct. 18, 2010) (CFTC); Ownership Limitations and Governance Requirements for Security-Based Swap Clearing Agencies, Security-Based Swap Execution Facilities, and National Securities Exchanges with Respect to Security-Based Swaps Under Regulation MC, 75 Fed. Reg. 65,882 (proposed Oct. 26, 2010) (SEC). The SEC Proposed Rules mandate that a higher percentage of board directors be independent but provides for fewer mandatory committees.

²⁸ See Risk Management Requirements for Derivatives Clearing Organizations, 76 Fed. Reg. 3,698 (proposed Jan. 20, 2011) (CFTC); Clearing Agency Standards for Operation and Governance, 76 Fed. Reg. 14,472 (proposed Mar. 16, 2011) (SEC). The CFTC takes a much more detailed approach to margin requirements.

regulating. If the Commissions do not take a unified approach, then they will unnecessarily raise compliance costs as market participants who are subject to two different regimes will have to comply with different rules governing similar conduct. Furthermore, it will not always be clear whether a swap falls with the jurisdiction of the CFTC or SEC—different rules will encourage transactors to design derivatives to fit into the rules they like best.

The legislative solution to this coordination problem is real structural reform. In 2009, the Committee on Capital Markets Regulation called the financial regulatory structure “an outmoded, overlapping sectoral model,” and called for its reorganization.²⁹ I regard it as dysfunctional. The Dodd-Frank Act did little to solve the problem. Although it eliminated one agency, the Office of Thrift Supervision, it created three more: FSOC, the Federal Insurance Office, and the Bureau of Consumer Financial Protection.³⁰ FSOC, the agency tasked with some oversight and coordination roles, is not a solution to the large structural problem. It has little direct supervisory authority and power over other agencies, in part because many of its actions require a two-thirds supermajority vote.³¹ On the other hand, it is the only game in town and Secretary Geithner, its Chairman, needs to be more proactive in insuring agency coordination.

B. International Coordination

International coordination is equally important. Last September, the European Union proposed regulations for its derivatives markets.³² Although the E.U. proposal and the U.S. system are similar, particularly with their joint emphasis on central clearing, there are many important

²⁹ COMM. ON CAPITAL MKTS. REG., *THE GLOBAL FINANCIAL CRISIS: A PLAN FOR REGULATORY REFORM* 1, 203 (May 2009).

³⁰ *See* Dodd-Frank Act §§ 312(b) (eliminating the Office of Thrift Supervision), 111(a) (FSOC), 502 (Federal Insurance Office), 1011(a) (Bureau of Consumer Financial Protection).

³¹ January Testimony, *supra* note 3, 18.

³² *Proposal for a Regulation of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories*, COM (2010) 484 final (Sept. 15, 2010) (hereinafter E.U. Proposal).

differences, most of which can only be changed by bringing the U.S. and E.U. legislation closer. For example, the E.U. proposal has a much more generous end-user exception and puts less emphasis on exchange trading. Furthermore, the United States and European Union differ significantly when it comes to the regulation of trade repositories. The Dodd-Frank Act provides for detailed regulation of trade repositories, including specific mechanisms for the disclosure of information to U.S. and foreign regulators.³³ The E.U. proposal, on the other hand, provides general requirements for trade repositories and does not specifically address disclosure of information to E.U. and non-E.U. regulators.³⁴

But the regulation of clearinghouses provides a risk of conflict that is not inherent in Dodd-Frank. Under the proposed E.U. regulations, in order for a U.S. or other foreign clearinghouse to be recognized by the European Union, the European Securities and Markets Authority (ESMA) must determine that there is equivalent home state regulation, authorization, and supervision provisions, as well as cooperation arrangements with the ESMA.³⁵ Similarly, under the Dodd-Frank Act, U.S. regulators may exempt a foreign clearinghouse from certain regulations only if the foreign organization is subject to comparable and comprehensive home state regulation.³⁶ These equivalence determinations may be difficult if E.U. and U.S. regulation divide on major matters like risk management and governance. Will the European Union permit E.U. firms to use U.S. clearinghouses that admit members with less capital than is required for E.U. clearinghouses?³⁷ I am not suggesting that the CFTC abandon its approach to member capital, but rather that it detail how the clearinghouses can be structured to be as safe with such lowered capital requirements for

³³ Dodd-Frank Act § 728.

³⁴ E.U. Proposal, Article 64.

³⁵ E.U. Proposal, Article 23.

³⁶ Dodd-Frank Act § 738(a).

³⁷ See Risk Management Requirements for Derivatives Clearing Organizations § 39.12, 76 Fed. Reg. 3,698, 3719 (proposed Jan. 20, 2011) (\$50 million requirement).

members. Conversely, will the CFTC permit U.S. firms to use dealer-owned clearinghouses in the European Union while insisting that there be limitations on dealer ownership in the United States?³⁸ This would be unwise. Yet, not doing so could lead the major dealers to use European rather than U.S. clearinghouses. Or will the Fed permit U.S. banks to use E.U. clearinghouses that do not have access to the ECB discount window when the Fed permits such access here, albeit under unusual and exigent circumstances? These important issues must be resolved before going live with the new rules.

IV. Micromanagement

Overall the SEC seems to embrace the principles-based approach of the Dodd-Frank Act more than the CFTC, which has tended to propose rules that would micromanage the industry. For example, the CFTC proposed a detailed rule concerning block trades, while the SEC took a simpler approach.³⁹ Similarly, the CFTC's rules about margin in clearinghouses are far more specific than the SEC's.⁴⁰ When developing its rules for Swap Execution Facilities, the CFTC described a Request for Quote system that required sending requests to at least five members, while the SEC gave more freedom.⁴¹ In general, a broad, principles-based approach is preferable to an approach of micromanagement, unless there are specific reasons to think that a detailed rule

³⁸ See Dodd-Frank Act § 726(a); Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest § 39.25, 75 Fed. Reg. 63,732, 63,750 (proposed Oct. 18, 2010) (imposing limits on ownership).

³⁹ See Real-Time Public Reporting of Swap Transaction Data § 43.5, 75 Fed. Reg. 76,140, 76,174–76 (proposed Dec. 7, 2010) (CFTC); Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information § 242.902, 75 Fed. Reg. 75,208, 75,285 (proposed Dec. 2, 2010) (SEC); see also Letter from the Comm. on Capital Mkts. Reg. to David Stawick, Sec'y of the Comm'n, Commodity Futures Trading Comm'n and Elizabeth Murphy, Sec'y, Sec. and Exch. Comm'n 4 (Jan. 18, 2011), http://www.capmksreg.org/pdfs/2011.01.18_Swaps_Reporting_Comment_Letter.pdf.

⁴⁰ See Clearing Agency Standards for Operation and Governance § 240.17Ad-22(b)(2), 76 Fed. Reg. 14,472, 14,538 (proposed Mar. 16, 2011) (SEC); Risk Management Requirements for Derivatives Clearing Organizations § 39.13(g), 76 Fed. Reg. 3,698, 3,720 (proposed Jan. 20, 2011) (CFTC).

⁴¹ Registration and Regulation of Security-Based Swap Execution Facilities § 242.801, 76 Fed. Reg. 10,948, 11,054 (proposed Feb. 28, 2011) (SEC); Core Principles and Other Requirements for Swap Execution Facilities, § 37.9(a)(ii)(A), 76 Fed. Reg. 1,214, 1,241 (proposed Jan. 7, 2011) (CFTC).

is necessary. A broad approach is particularly important when, as here, dozens of rules will reshape an industry in ways that cannot be predicted. As I have described, a staged implementation approach could begin with broad, principled rules and gradually phase in more specific rules when they are necessary and after the Commissions can be more confident that they will not unnecessarily disrupt the market.

Thank you and I look forward to your questions.

APPENDIX A
CFTC Proposed Rules to Date Concerning Derivatives under the Dodd-Frank Act⁴²

Proposed Date	CFTC Category	Rule
10/14/2010	VII: DCO Core Principle Rulemaking, Interpretation & Guidance X: Systemically Important DCO Rules Authorized Under Title VIII	Financial Resources Requirements for Derivatives Clearing Organizations
10/18/2010	IX: Governance & Possible Limits on Ownership & Control	Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest
10/26/2010	XIX: Agricultural Swaps	Agricultural Commodity Definition
10/27/2010	XXX: Fair Credit Reporting Act and Disclosure of Nonpublic Personal Information	Business Affiliate Marketing and Disposal of Consumer Information Rules
10/27/2010	XXX: Fair Credit Reporting Act and Disclosure of Nonpublic Personal Information	Privacy of Consumer Financial Information; Conforming Amendments Under Dodd-Frank Act
11/2/2010	XXIX: Reliance on Credit Ratings	Removing Any Reference to or Reliance on Credit Ratings in Commission Regulations; Proposing Alternatives to the Use of Credit Ratings
11/2/2010	XXVI: Position Limits, including Large Trader Reporting, Bona Fide Hedging Definition & Aggregate Limits	Position Reports for Physical Commodity Swaps
11/2/2010	VIII: Process for Review of Swaps for Mandatory Clearing	Process for Review of Swaps for Mandatory Clearing
11/2/2010	XXIV: Disruptive Trading Practices	Antidisruptive Practices Authority Contained in the Dodd-Frank Wall Street Reform and Consumer Protection Act
11/2/2010	XV: Rule Certification & Approval Procedures (applicable to DCMs, DCOs, SEFs)	Provisions Common to Registered Entities
11/3/2010	XXIX: Reliance on Credit Ratings	Investment of Customer Funds and Funds Held in an Account for Foreign Futures and Foreign Options Transactions
11/3/2010	XXIII: Anti-Manipulation	Prohibition of Market Manipulation
11/17/2010	IV: Internal Business Conduct Standards	Implementation of Conflicts of Interest Policies and Procedures by Futures Commission Merchants and Introducing Brokers
11/19/2010	IV: Internal Business Conduct Standards	Designation of a Chief Compliance Officer; Required Compliance Policies; and Annual Report of a Futures Commission Merchant, Swap Dealer, or Major Swap Participant
11/19/2010	XIV: New Registration Requirements for Foreign Boards of Trade	Registration of Foreign Boards of Trade
11/23/2010	IV: Internal Business Conduct Standards	Regulations Establishing and Governing the Duties of Swap Dealers and Major Swap Participants
11/23/2010	IV: Internal Business Conduct Standards	Implementation of Conflicts of Interest Policies and Procedures by Swap Dealers and Major Swap Participants

⁴² This table does not contain interim rules, corrections, extensions, or other variations.

11/23/2010	I: Registration	Registration of Swap Dealers and Major Swap Participants
12/3/2010	VI: Segregation & Bankruptcy for both Cleared and Uncleared Swaps	Protection of Collateral of Counterparties to Uncleared Swaps; Treatment of Securities in a Portfolio Margining Account in a Commodity Broker Bankruptcy
12/6/2010	XXV: Whistleblowers	Implementing the Whistleblower Provisions of Section 23 of the Commodity Exchange Act
12/7/2010	XVIII: Real Time Reporting	Real-Time Public Reporting of Swap Transaction Data
12/8/2010	XVII: Data Recordkeeping & Reporting Requirements	Swap Data Recordkeeping and Reporting Requirements
12/9/2010	XVII: Data Recordkeeping & Reporting Requirements	Reporting, Recordkeeping, and Daily Trading Records Requirements for Swap Dealers and Major Swap Participants
12/13/2010	VII: DCO Core Principle Rulemaking, Interpretation & Guidance	General Regulations and Derivatives Clearing Organizations
12/15/2010	VII: DCO Core Principle Rulemaking, Interpretation & Guidance	Information Management Requirements for Derivatives Clearing Organizations
12/17/2010	XVII: Data Recordkeeping & Reporting Requirements	Reporting Certain Post-Enactment Swap Transactions
12/21/2010	II: Definitions, such as Swap Dealer, Major Swap Participant, Security-Based Swap Dealer, and Major Security-Based Swap Participant, to be Written Jointly with SEC	Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant”
12/22/2010	III: Business Conduct Standards with Counterparties	Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties
12/22/2010	XII: DCM Core Principle Rulemaking, Interpretation & Guidance	Core Principles and Other Requirements for Designated Contract Markets
12/23/2010	XVI: Swap Data Repositories Registration Standards and Core Principle Rulemaking, Interpretation & Guidance	Swap Data Repositories
12/23/2010	XI: End-user Exception	End-User Exception to Mandatory Clearing of Swaps
12/28/2010	IV: Internal Business Conduct Standards	Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants
1/6/2011	IX: Governance & Possible Limits on Ownership & Control	Governance Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities; Additional Requirements Regarding the Mitigation of Conflicts of Interest
1/7/2011	XIII: SEF Registration Requirements and Core Principle Rulemaking, Interpretation & Guidance	Core Principles and Other Requirements for Swap Execution Facilities
1/20/2011	VII: DCO Core Principle Rulemaking, Interpretation & Guidance	Risk Management Requirements for Derivatives Clearing Organizations
1/26/2011	XXVI: Position Limits, including Large Trader Reporting, Bona Fide Hedging Definition & Aggregate Limits	Position Limits for Derivatives
2/3/2011	XIX: Agricultural Swaps	Commodity Options and Agricultural Swaps

2/8/2011	IV: Internal Business Conduct Standards	Orderly Liquidation Termination Provision in Swap Trading Relationship Documentation for Swap Dealers and Major Swap Participants
2/8/2011	IV: Internal Business Conduct Standards	Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants
2/11/2011	XXVII: Investment Adviser Reporting	Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF
2/11/2011	XXVII: Investment Adviser Reporting	Commodity Pool Operators and Commodity Trading Advisors: Amendments to Compliance Obligations
3/3/2011	XXXI: Conforming Amendments	Amendments to Commodity Pool Operator and Commodity Trading Advisor Regulations Resulting From the Dodd-Frank Act
3/9/2011	XXXI: Conforming Amendments	Registration of Intermediaries
3/10/2011	VII: DCO Core Principle Rulemaking, Interpretation & Guidance	Requirements for Processing, Clearing, and Transfer of Customer Positions



Hal S. Scott

Hal S. Scott is the Nomura Professor and Director of the Program on International Financial Systems at Harvard Law School, where he has taught since 1975. He teaches courses on Capital Markets Regulation, International Finance, and Securities Regulation.

He has a B.A. from Princeton University (Woodrow Wilson School, 1965), an M.A. from Stanford University in Political Science (1967), and a J.D. from the University of Chicago Law School (1972). In 1974-1975, before joining Harvard, he clerked for Justice Byron White.

The Program on International Financial Systems, founded in 1986, engages in a variety of research projects. Its book, *Capital Adequacy Beyond Basel* (Oxford University Press 2004), examines capital adequacy rules for banks, insurance companies and securities firms. The Program also organizes the annual invitation-only U.S.-Japan, U.S.-Europe, and U.S.-China Symposia on Building the Financial System of the 21st Century, attended by financial system leaders in the concerned countries. In addition, the Program directs a concentration in International Finance for LLM students at Harvard Law School.

Professor Scott's books include the law school textbook *International Finance: Transactions, Policy and Regulation* (17th ed. Foundation Press 2010); and *The Global Financial Crisis* (Foundation Press 2009).

Professor Scott is the Director of the Committee on Capital Markets Regulation, which in May 2009 released a comprehensive report entitled *The Global Financial Crisis: A Plan for Regulatory Reform*. He is also Co-Chair of the Council on Global Financial Regulation that was formed in 2010. He is an independent director of Lazard, Ltd., a past President of the International Academy of Consumer and Commercial Law and a past Governor of the American Stock Exchange (2002-2005). He is also a member of the Senior Advisory Board of Oliver Wyman.

Since April 07, 2011, in order to furnish interested parties information on other compensated outside activities, Professor Scott is providing the following additional disclosures:

Current Consulting Engagements

- State Street Corporation
- International House of Japan
- Special Assistant Attorney General for the Commonwealth of Massachusetts and expert witness for the Massachusetts Department of Revenue

Compensated Speeches (since 2007)

- Faculty of Law, University of Western Ontario, London, Ontario (Torys LLP Business and Law Pre-Eminent Scholars Series), October 1, 2010
- Ironshore, November 2, 2010

Compensated Publications (since 2007, sponsor disclosed in publications)

Scott, Hal S., "How to Improve Five Important Areas of Financial Regulation," in "Rules for Growth: Promoting Innovation and Growth Through Legal Reform," Yale Law and Economics Research Paper, No. 426 (2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1757982. Sponsored by Kauffman Foundation.

Scott, Hal S. "What to Do About Foreign Discriminatory Forum Non-Conveniens Legislation," 49 *Harvard International Law Journal Online* (2009), http://www.harvardilj.org/2009/01/online_49_scott/. Sponsored by Dole Food Company, Inc.

Brief for the Financial Services Roundtable as Amicus Curiae Supporting Respondents, Andrew M. Cuomo v. The Clearinghouse Association, L.L.C. and Office of the Comptroller of the Currency, 557 U.S. ___ (2009) (No. 08-453), http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_07_08_08_453_RespondentAmCuFinancialServicesRoundtable.authcheckdam.pdf.

Scott, Hal S. "Financial Crisis Responsibility Fee: Issues for Policy Makers," U.S. Chamber of Commerce (2010), <http://www.uschamber.com/reports/financial-crisis-responsibility>.

Scott, Hal S. Letter to Congress on Single Repositories, on behalf of the Depository Trust & Clearing Corporation (April 14, 2010).

Committee on Agriculture
U.S. House of Representatives
Required Witness Disclosure Form

House Rules* require nongovernmental witnesses to disclose the amount and source of Federal grants received since October 1, 2008.

Name: Hal S. Scott

Organization you represent (if any): _____

1. Please list any federal grants or contracts (including subgrants and subcontracts) you have received since October 1, 2008, as well as the source and the amount of each grant or contract. House Rules do NOT require disclosure of federal payments to individuals, such as Social Security or Medicare benefits, farm program payments, or assistance to agricultural producers:

Source: N/A Amount: _____

Source: _____ Amount: _____

2. If you are appearing on behalf of an organization, please list any federal grants or contracts (including subgrants and subcontracts) the organization has received since October 1, 2008, as well as the source and the amount of each grant or contract:

Source: N/A Amount: _____

Source: _____ Amount: _____

Please check here if this form is NOT applicable to you: X

Signature: HS. Scott

* Rule XI, clause 2(g)(4) of the U.S. House of Representatives provides: *Each committee shall, to the greatest extent practicable, require witnesses who appear before it to submit in advance written statements of proposed testimony and to limit their initial presentations to the committee to brief summaries thereof. In the case of a witness appearing in a nongovernmental capacity, a written statement of proposed testimony shall include a curriculum vitae and a disclosure of the amount and source (by agency and program) of each Federal grant (or subgrant thereof) or contract (or subcontract thereof) received during the current fiscal year or either of the two previous fiscal years by the witness or by any entity represented by the witness.*

PLEASE ATTACH DISCLOSURE FORM TO EACH COPY OF TESTIMONY.