BLACKROCK

August 29, 2011

VIA ELECTRONIC SUBMISSION TO: COMMENTS@SEC.GOV

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

With a copy to:

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

Re: Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants; File Number S7-25-11; RIN 3235-AL10

Dear Ms. Murphy:

BlackRock, Inc. ("BlackRock")[1] is pleased to offer its comments on the Securities and Exchange Commission's ("SEC") proposed rules (the "Proposed Rule")[2] under the Securities Exchange Act of 1934, as amended ("Exchange Act") that are intended to implement provisions of Title VII ("Title VII") of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act") relating to external business conduct standards for security-based swap dealers ("SBS Dealers") and major security-based swap participants ("Major SBS Participants").

BlackRock supports the Dodd-Frank Act's objectives of creating a comprehensive regulatory framework for swaps that will reduce systemic risk, increase price transparency, and promote market integrity while maintaining liquidity. As the voice of and a fiduciary for our clients, BlackRock has a vested interest in the development of sustainable and fair business conduct standards that protect investor interests and promote the Dodd-Frank Act's objectives.

The Proposed Rule would implement the Dodd-Frank Act's requirements related to business conduct standards for SBS Dealers and Major SBS Participants. These statutory provisions are substantially identical to those addressed by the Commodity Futures Trading Commission ("CFTC") in its December 2010 proposed rule for external business conduct standards (the

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[1] BlackRock is one of the world's leading asset management firms, and one of the largest managers of assets of employee benefit plans subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). We manage over $3.65 trillion on behalf of institutional and individual clients worldwide through a variety of equity, fixed income, cash management, alternative investment, real estate and advisory products as of June 30, 2011. Our client base includes corporate, public, multi-employer pension plans, insurance companies, third-party mutual funds, endowments, foundations, charities, corporations, official institutions, banks, and individuals around the world.

[2] 76 Fed. Reg. 137 (July 18, 2011). Capitalized terms used, but not otherwise defined, shall have the meanings in the Proposed Rule.

"CFTC External Business Conduct Release"),[3] which generated vigorous debate among industry participants including BlackRock.[4] We appreciate the time the SEC has spent consulting with the CFTC in developing the Proposed Rule. The SEC's Proposed Rule demonstrates an understanding of, and addresses, many of the issues raised by the CFTC External Business Conduct Release. Overall, we believe the Proposed Rule represents a thoughtful and helpful effort to provide workable solutions to some of the industry's concerns over the adverse consequences of the CFTC External Business Conduct Release. In particular, BlackRock notes the following positive changes as compared with the CFTC's External Business Conduct Release:

- Providing a "safe harbor" that enables an SBS Dealer to avoid classification as an "advisor" to a special entity, if (i) the special entity makes certain representations, (ii) the SBS Dealer has a reasonable basis to believe that the special entity is advised by a qualified independent representative as defined in the Proposed Rule and; (iii) the SBS Dealer discloses to the special entity that it is not undertaking to act in the best interests of the special entity;

- Proposing that the SBS Dealer can rely on representations from the special entity or the independent representative without the need, absent special circumstances, to conduct independent diligence; and

- Providing that the institutional suitability requirement generally would not apply to special entities.

We urge the SEC and CFTC to continue to work together to harmonize their rules and recommend that the CFTC incorporate the many constructive differences in approach that the SEC has proposed. If the SEC and the CFTC adopt different approaches, the complexity of complying with the rules will dramatically increase and result in the need to develop different compliance processes for swaps and security-based swaps. This will force market participants to engage in protracted contractual negotiations if they wish to continue using these products. We believe such roadblocks are unnecessary, particularly since the statutory business conduct standards that provide the basis for the CFTC and SEC proposals are nearly identical and swaps and security-based swaps are similar products. In fact, under the CFTC's and SEC's proposed product definitions, it is possible for swaps and security-based swaps to migrate back and forth between the regulators. Different regulatory requirements can only lead to confusion and interpretive difficulties in the future. Additionally, costs to clients would increase substantially and execution of transactions would be delayed without any corresponding benefit or increased protection to the client.

We further believe that the Proposed Rule (as well as the CFTC External Business Conduct Release) should only apply when parties enter into swaps whose principal terms are negotiated on a bi-lateral basis. The Dodd-Frank Act empowers the CFTC and the SEC to require clearing of certain swaps and security-based swaps and, subject to few exceptions, imposes an exchange-trading mandate for swaps and security-based swaps subject to the clearing requirement. This use of mandatory trading on execution facilities, such as swap execution facilities, designated contract markets or registered national securities exchanges (collectively referred to as "Exchanges"), and mandatory clearing of eligible swaps, will provide regulatory oversight to the swaps and security-based swaps markets.

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[3] *See* CFTC External Business Conduct Release, 75 Fed. Reg. 245 (December 22, 2010).
[4] *See* BlackRock Comment Letter in response to the CFTC External Business Conduct Release, dated February 22, 2011 Re: Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties (the "CFTC Comment Letter").

However, the Proposed Rule (and the CFTC External Business Conduct Release) is written in the context of the current environment for swaps and security-based swaps where parties enter into bi-lateral, negotiated agreements. In fact, the concerns addressed by the Proposed Rule simply will not be an issue for most swaps entered into through Exchanges and then cleared through registered clearing organizations and their clearing members. In the exchange traded environment, when transacting in a central limit order book there is no bi-lateral negotiation with the market participant (dealer) over the terms of the swap and the Exchange electronically facilitates the matching of trades. In addition, because clearing of swaps and security-based swaps results in the central clearing house as the ultimate counterparty to all market participants, market participants when seeking the best price for a transaction, will not be dependent on the underlying credit of other market participants.

Given the salient differences between the current, bi-lateral swap and security-based swap environment and the exchange-traded environment contemplated by the Dodd-Frank Act, BlackRock believes the following rule would be appropriate: when a swap or security-based swap is cleared and exchange-traded, the counterparty to the trade should be viewed as fungible, rendering compliance with the specific requirements of the Proposed Rule (as well as the CFTC External Business Conduct Release) unnecessary. As a practical matter, it is anticipated that parties to exchange-traded swaps and security-based swaps may know the identity of their counterparty before the transaction is executed, because the Exchange may, in addition to a central limit order book, provide a request for quote system (where the participants can seek quotes from specific counterparties to limit information leakage due to the sensitivity of the trade (*e.g.*, size of trade or liquidity of underlying asset)). If mere knowledge of a counterparty's identity triggers compliance with the Proposed Rule, the outcome will be time delay, additional complexity, individual negotiation and potentially higher costs (wider bid/ask spreads) for clients – precisely the result that the trading and clearing requirements of the Dodd-Frank Act seek to avoid. We do not believe Congress intended that the mere identification of an SBS Dealer or Major SBS Participant as a liquidity provider to a trade conducted through a highly-regulated venue would trigger the provisions of the business conduct standards.

Separately, as we commented to the CFTC, we believe that, at this time, the SEC should not adopt business conduct standards beyond those that Congress specifically mandated. Once other core components of the Dodd-Frank Act have been implemented, including the trading of security-based swaps on Exchanges, and the SEC has gained familiarity with the post-Dodd-Frank Act security-based swaps marketplace, it then may be appropriate for the SEC to adopt rules that go beyond the statutory standards.

Moreover, as the SEC is aware, there are several other regulatory projects underway which involve financial services firms and their role in providing services or advice. In particular, the Department of Labor ("DOL") has proposed a new rule setting forth the circumstances under which a person is considered to be a "fiduciary" for purposes of ERISA, by reason of providing investment advice to an employee benefit plan subject to ERISA ("Plan") or a Plan's participants and beneficiaries ("Proposed Fiduciary Definition").[5] We remain concerned that compliance with the Proposed Rule, in particular the requirement to act in the best interests of a special entity, could render an SBS Dealer a fiduciary for purposes of ERISA.[6] We appreciate that the SEC noted in the preamble to the Proposed Rule that it has been

[5] 75 Fed. Reg. 204 (Oct. 22, 2010).
[6] During the House-Senate conference, Congress struck a provision from the Senate version of H.R. 4173 that would have imposed a fiduciary duty on a dealer entering into a swap as a counterparty to a defined category of entities, including employee benefit plans. Thus, it is clear that Congress did not intend to impose fiduciary status on a counterparty.

consulting with the staff of the DOL and will continue to do so. This coordination is critical to ensure that Plans will not be precluded or restricted from entering into security-based swaps to hedge their risk or generate targeted investment returns.

As currently drafted, neither the preamble to the Proposed Rule nor the operative language provides the specificity and clarity that is needed to address the industry's concerns. Citing to the letter from Phyllis Borzi to Gary Gensler, dated April 28, 2011, the SEC stated that "[t]he determination whether an SBS Dealer is acting as an advisor . . . is not intended to prejudice the determination whether the SBS Entity is otherwise subject to regulation as an ERISA fiduciary."[7] It is not clear what the SEC intended by this statement, which, read literally only amounts to an acknowledgment that there are different rules (administered by a separate agency) that determine whether a person is an ERISA fiduciary. Ms. Borzi's letter also does not resolve the issue. She expressed, in a non-binding document, that the DOL did not intend to impose ERISA fiduciary obligations on persons who are merely counterparties. The letter does not resolve whether fiduciary status may flow from complying with additional duties. We urge the SEC to draft its rules in such a way that compliance would not require the SBS Dealer to act in a manner that could render it a fiduciary. Furthermore, the SEC should state expressly that compliance with the Proposed Rule, standing alone, is not intended to impose fiduciary status on the SBS Dealer. As indicated in our CFTC Comment Letter, regulatory business conduct standards should neither alter the nature of the relationship between SBS Dealers, Major SBS Participants and their counterparties (and when the counterparty is a special entity between the SBS Dealer and the special entity) nor create confusion regarding the responsibilities of those parties.

In addition, we support the SEC's approach in not applying certain business conduct standards to Major SBS Participants where the Dodd-Frank Act does not expressly impose such standards. We believe this is consistent with the statutory language of Section 764 of the Dodd-Frank Act, as well as the statutory definitions of Major Swap Participant and Swap Dealer which make it clear that these entities fall into entirely separate categories.[8] While it may be appropriate to impose business conduct standards for a dealer's interactions with customers (as compared to other dealers), the imposition of such duties on Major SBS Participants, who, by definition, are not dealers, do not have customers, and rarely if ever trade with other buy-side counterparties, will likely result in compliance costs and burdens that far exceed any benefits.

We recommend that the SEC take a more consistent approach to distinguishing between Major SBS Participants and SBS Dealers. There is no requirement in the Dodd-Frank Act that the SEC must subject SBS Dealers and Major SBS Participants to identical or substantially identical regulation. As such, we believe the SEC should not apply to Major SBS Participants the requirements to disclose "material information" provided orally to their counterparties, to provide contemporaneous written records of such oral disclosures and to provide daily marks for uncleared swaps. Major SBS Participants are transacting with their counterparties at arms-length and should not have to develop systems to track and deliver this information, particularly since SBS Dealers will be counterparties to Major SBS Participants in nearly all instances. However, if the SEC concludes that such requirements are necessary for Major SBS Participants, the SEC should make such requirements inapplicable to transactions with an SBS Dealer and should allow all other counterparties to opt out of receiving such disclosures.

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[7] *See* 76 Fed. Reg. at 42423.

[8] *See* BlackRock Comment Letter in response to the CFTC External Business Conduct Release, dated April 12, 2011 Re: Swap Dealers and Major Swap Participants Should Not be Treated as Identical Twins.

BlackRock also has the following specific comments with respect to the Proposed Rule.

I. *The SBS Dealer Should be Permitted to Rely on Simple Representations Regarding the Qualifications of the Independent Representative*

BlackRock is proud to be a fiduciary for its clients and, in its role as an asset manager, expects that it will often fulfill the role of independent representative for its special entity clients. Section 15Fh-5 of the Proposed Rule requires an SBS Dealer to have a reasonable basis to believe that a counterparty that is a special entity has a qualified independent representative. In contrast with the CFTC External Business Conduct Release, the SEC has proposed that an SBS Dealer could rely on written representations regarding the various qualifications of the independent representative to provide the reasonable basis for its belief that the independent representative is qualified. BlackRock generally supports this approach, which is consistent with what it recommended in the CFTC Comment Letter. This standard would be more consistent with market practice and therefore more time and cost-effective to implement. In our view, the SEC should extend this approach to the Proposed Rule as a whole, so that SBS Dealers would be more able to rely on representations regarding the qualifications of a special entity's independent representative.

We support the SEC's inclination to limit an SBS Dealer's ability to rely on representations in certain circumstances, but we believe an actual knowledge standard is more appropriate than an objective reasonableness standard. Simply put, we believe that an SBS Dealer should be permitted to rely on representations unless it knows that the representation is not accurate. This standard would be easier to administer than the proposed alternative, which would permit an SBS Dealer to rely on a counterparty's representation unless the SBS Dealer has information that would cause a reasonable person to question the accuracy of the representation. For example, under the proposed reasonableness standard, the SBS Dealer will be forced to continuously analyze whether its collected information about a counterparty raises sufficient questions to require further diligence. Reasonable minds (*e.g.*, the SBS Dealer and the independent representative) may differ on the relevance of the available information, and this will result in protracted discussions and negotiations between the SBS Dealer and the representative – all to the detriment of the client.

Absent knowledge that a representation is inaccurate, an SBS Dealer should never be required to undertake further diligence regarding the qualifications or independence of a representative. The additional diligence would be intrusive, time consuming and unnecessary. Requiring an SBS Dealer to conduct this type of diligence also would confuse the role of the SBS Dealer, who, absent an advisory relationship, is engaging in an arm's-length transaction with its counterparty, and should not be called upon to evaluate the experience and capabilities of the special entity representative. Moreover, this type of requirement would come very close to having the SBS Dealer "approve" the special entity's representative. In our view, the special entity is best situated to evaluate the qualifications of its own representative.

Further, we believe that for Plans, the required representation should be limited to a statement that the representative is, and has acknowledged to the Plan that it is, an ERISA fiduciary and qualifies as a qualified professional asset manager ("QPAM") within the meaning of Prohibited Transaction Class Exemption 84-14 (the "QPAM Exemption") or an in-house asset manager ("INHAM") within the meaning of Prohibited Transaction Class Exemption 96-23 (the "INHAM Exemption"). ERISA imposes statutory duties on

Plan fiduciaries that more than satisfy the requirements of the Proposed Rule. As an ERISA fiduciary, a Plan representative has a statutory duty to act solely in the best interests of the Plan and its participants and beneficiaries and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. Further, an ERISA fiduciary is prohibited under Section 406(b) of ERISA from engaging in self-dealing transactions, including transacting with a party in whom the fiduciary has an interest that may affect its best judgment as a fiduciary.[9] In addition, both QPAMs and INHAMs are subject to regulatory oversight by other agencies, including the SEC or the Office of the Comptroller of the Currency.[10] Considering the high standard of care applicable to an ERISA fiduciary, ERISA's broad prohibited transaction rules, and the specific requirements needed to qualify as a QPAM or INHAM, we believe that additional representations should be unnecessary; they would only result in increased costs and time in completing negotiations and documentation, without any corresponding benefit or protection to the Plan.

If the SEC requires more than a representation that the independent representative to a Plan is a fiduciary and a QPAM or INHAM (or in cases where the special entity is not a Plan), then, at a minimum, the SEC should explicitly state that "appropriate and timely disclosure of material information concerning the security-based swap" as required by Section 15Fh-5(a)(4) of the Proposed Rule does not require that information be provided before executing a trade. Advance notification should not be necessary where the special entity has granted the independent representative the discretionary authority to make trading decisions and is relying on the representative to make decisions in its best interests. It also may be counterproductive, particularly in volatile markets where speed of execution is critical.

II. *The Proposed Rule Establishes a New Standard of Independence that is Unnecessary*

The SEC's proposed Rule 15Fh-2(c) does not adopt the troubling "material relationship" requirement proposed in the CFTC External Business Conduct Release and instead substitutes a rule that would "deem" a representative to be independent if it is not, and within one year was not, an associated person of the SBS Dealer and the representative has not received more than ten percent of its gross revenues over the past year, directly or indirectly, from the SBS Dealer. However, the SEC's proposal lacks clarity and would require significant and costly enhancements to compliance systems. Compliance with this rule would be particularly problematic in instances where a corporate transaction changes the identity of associated persons during the look-back year. Notably, prior to 2005, the QPAM Exemption had a one-year look back rule, which the DOL eliminated in response to industry concerns regarding workability in light of consolidation and changes in the financial services industry. The goal of ensuring independence is satisfied if the representative and the SBS Dealer are not "associated persons" at the time of the transaction. We believe that the burden of complying with the one-year lookback would outweigh any benefits.

In addition, the "gross revenue test" should be limited to direct revenue received by the representative from the SBS Dealer only and not its affiliates. In any event, the Proposed

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9 *See* DOL Regulation 2550.408b-2(e).

10 A QPAM must be an investment adviser registered under the Investment Advisers Act of 1940 (the "Adviser's Act"), a bank as defined in Section 202(a)(2) of the Adviser's Act, a savings and loan association or an insurance company and must satisfy specific capital requirements. An INHAM must be a registered investment adviser under the Adviser's Act.

Rule does not clearly delineate what constitutes "indirect" compensation. If broadly construed, the term could encompass revenue received by the representative or an affiliate (such as a parent company) that has no relationship to entering into security-based swaps and would not in any way affect the independence of the parties (*e.g.*, interest paid on a corporate loan from the representative's parent to the SBS Dealer's parent). As an administrative matter, determining what would comprise indirect compensation and establishing a compliance system to track that indirect compensation represents a significant and time consuming burden, the costs of which would likely be passed on to special entities.

As we commented to the CFTC, with respect to Plans relying on the QPAM Exemption in entering into a security-based swap, this new independence requirement would need to be satisfied in addition to the independence requirements contained in the QPAM Exemption. In our view, if the requirements of the QPAM Exemption are satisfied with respect to a security-based swap entered into on behalf of a Plan, the separate independence requirements in the Proposed Rule should not apply. The multiple different rules that are designed to achieve a similar purpose will only increase the administrative burden of compliance with the Proposed Rule, without any corresponding benefit.

Lastly, the independent representative should not be required to be independent of the special entity. In 2010, the QPAM Exemption was amended to permit affiliates of a plan sponsor to act as a QPAM on behalf of the plan sponsor's Plan, subject to additional protections. Adding a further independence requirement to the SEC's Proposed Rule would make this relief unavailable with respect to security-based swaps and would be inconsistent with the legislative history of the business conduct standard provisions of the Dodd-Frank Act.

III. *Suggestions with Respect to the Safe Harbor from the Definition of Advisor*

Under Section 15Fh-2(a) of the Proposed Rule, an SBS Dealer will not be considered an advisor to a special entity if (a) the special entity represents that it will rely on advice from an independent representative and not the SBS Dealer, (b) the SBS Dealer has a reasonable basis to believe that the special entity is advised by a qualified independent representative, and (c) the SBS Dealer discloses to the special entity that it is not undertaking to act in the special entity's best interest. This "safe harbor" approach provides a useful means for an SBS Dealer to avoid designation as an advisor, which is critical to enabling Plans to continue to enter into security-based swaps.

BlackRock does not believe that any particular level of specificity should be required in these representations, which are relatively straightforward. Additional diligence should not be required before the SBS Dealer may rely on these representations, because any such diligence would interfere with the relationship between the special entity and its independent advisor and could result in the SBS Dealer second-guessing the special entity's choice of representative.

As a technical matter, we note that when a Plan and its representative rely upon the QPAM Exemption in entering into a security-based swap, one of the conditions of the QPAM Exemption is that the QPAM – not the Plan – must make the decision to enter into the transaction. Thus, requiring the special entity to represent that it will rely on advice from the qualified representative could be viewed as inconsistent with the requirements of the QPAM Exemption. Thus, we suggest that Section 15Fh-1(a)(1)(ii) be revised to provide that either the special entity will rely on advice from a qualified independent

representative **or,** if the special entity or its representative is relying on the QPAM Exemption or the INHAM Exemption, the decision to enter into the transaction is made by a QPAM or INHAM.

IV. *The Requirement that an Advisor Act in the "Best Interests" of a Special Entity Should be Eliminated from the Proposed Rule*

Similar to the CFTC External Business Conduct Release, Section 15Fh-4(b) of the Proposed Rule requires that, if a SBS Dealer acts as an advisor, it must act in the best interests of the special entity. This requirement is troubling because an SBS dealer could meet the definition of an advisor while acting as a counterparty in an arm's length transaction. Because we are concerned that an SBS Dealer might become an unwitting advisor to its counterparties by providing basic information, we believe the "best interests" requirement should be omitted from any final rules the SEC adopts in this area.

Requiring that an SBS Dealer act in the best interests of a counterparty who is a special entity would confuse the roles of the parties and have an adverse impact on the flow of information regarding investment and trading strategies. Special entities engage independent representatives to develop investment strategies and to provide advice and make decisions regarding the swaps that will best enable them to achieve their investment objectives. Sophisticated asset managers, including BlackRock, are fully capable of assessing whether a swap is in the best interests of its client, including a special entity.

The requirement that an SBS Dealer act in the best interests of a special entity when acting as an advisor could pose particularly acute problems for Plans. Absent an express exemption from the DOL, the requirement would almost certainly result in the SBS Dealer being considered a fiduciary for ERISA purposes. This could effectively preclude Plans from entering into security-based swaps. Congress clearly did not intend to prevent Plans from transacting in these instruments (as manifested by the carve-out from the Major SBS Participant definition for certain security-based swap positions held by Plans), and the SEC should revise the Proposed Rule to ensure that Plans will be able to enter into security-based swaps. Put differently, the SEC should not adopt a rule that stands an arm's-length relationship on its head by turning an SBS Dealer into an ERISA fiduciary. To avoid this result, if the SEC retains the best interests requirement, it should specifically state that acting in the best interests of a counterparty should not be interpreted to mean that the SBS Dealer is acting as an ERISA fiduciary.

We further suggest that acting in the best interests of a special entity be defined as complying with Section 15Fh-3(g) of the Proposed Rule and NASD Rule 2010(d). These rules require that communications be based on principles of fair dealing and good faith, be fair and balanced and provide a sound basis for evaluating the facts in regard to any particular transaction. This standard effectively requires the SBS Dealer to provide "both sides of the story" and provides protection to the special entity without converting the SBS Dealer into a fiduciary.

V. *The SEC's Exemptions for Transactions Executed on an Exchange Are Too Narrow*

The SEC has proposed an exception from the requirements in Section 15Fh-4 (acting in the best interests of a special entity) and 15Fh-5 (independence of the special entity) if the transaction is executed on an Exchange and the SBS Dealer does not know the identity of the counterparty at any time up to and including execution of the transaction. Similarly,

certain requirements of Section 15Fh-3 of the Proposed Rule (*i.e.*, verifying that the counterparty is an eligible contract participant and providing certain disclosure) apply only if the counterparty knows the identity of the SBS Dealer. In our view, these exceptions are drawn too narrowly and may discourage market participants from executing security-based swaps on electronic platforms. Specifically, the proposed disclosure requirements may impair execution times, vitiating a primary advantage of electronic trading. These consequences would be contrary to one of the key objectives of the Dodd-Frank Act, which is to facilitate electronic trading and clearing. As discussed above, we believe that the Proposed Rule (as well as the CFTC External Business Conduct Release) should not apply to any swaps or security-based swaps that are executed on Exchanges regardless of when the identity of the counterparties becomes known.[11]

VI. *The Requirement to Provide a Daily Mark Should Not Make the SBS Dealer a Fiduciary*

Section 15Fh-3 of the Proposed Rule specifies the circumstances under which an SBS Dealer would be required to provide a daily mark to its counterparty. The Proposed Fiduciary Definition provides that an "appraisal" concerning the value of securities or other property provided to a Plan may be considered "advice". Thus, there is a risk that the provision of a daily mark as required by the Proposed Rule could cause an SBS Dealer to be considered a fiduciary under the DOL's Proposed Fiduciary Definition. In the preamble to the Proposed Rule, the SEC recognized the issue and indicated that it was coordinating with the DOL.[12] We urge the SEC to state expressly that the provision of a daily mark is not an appraisal or valuation, but rather is a daily pricing requirement that will assist the counterparty in timely assessing the performance of its positions.

VII. *The SEC Should Clarify the Definition of Special Entity*

The SEC has requested comments on the scope of the term "special entity" in Section 15Fh-2(e) of the Proposed Rule.[13]

BlackRock urges the SEC to confirm that collective investment vehicles or pooled funds in which a Plan invests are not themselves special entities when the vehicles or funds enter into a security-based swap with an SBS Dealer. These vehicles or funds may contain assets of Plans, but nothing in the special entity statutory provisions suggests that Congress intended those vehicles or funds to be special entities. Instead, the special entity provisions focus on instances where Plans are the swap counterparty. The SEC should not attempt to expand the statute's reach beyond its literal language to extend the special entity provisions to swaps entered into by these collective investment vehicles or pooled funds.

The SEC should further clarify that the Proposed Rule does not apply to foreign pension and employee benefit plans. We do not believe Congress intended the special entity definition to include these foreign entities. Moreover, extending the reach of the Proposed Rule to foreign pension and employee benefit plans that have no connection with the

[11] We recognize, however, that some trades might be bilaterally negotiated and the Exchange merely used to process the trade. It may be appropriate to apply the requirements of the Proposed Rule in these circumstances. Negotiated trades executed on an Exchange will be subject to the rules of the Exchange and, thus, it should be relatively straight forward to identify and separate them from the majority of fungible trades conducted through the Exchange. This approach could be easily understood by market participants and monitored for compliance by regulators.

[12] 76 Fed. Reg. 137, at 42410, n. 99.

[13] If the SEC determines to expand the entities that are '"employee benefit plans" as suggested by some of its questions, we believe that it should seek further public comment on a specific proposal. A determination of special entity status is of such importance to SBS Dealers, Major SBS Participants and special entities alike that it should not be announced only in a final rule.

United States represents an unnecessary attempt to extend the SEC's authority outside the United States and creates the potential for conflict with other regulatory regimes.

Conclusion

We believe that the Proposed Rule represents an important step in providing safeguards for the financial markets and that it provides workable solutions to many of the issues raised by the CFTC's External Business Conduct Release. However, as set forth above, we remain concerned regarding the potential adverse impact of a number of the provisions of the Proposed Rule. Accordingly, we recommend that the SEC adopt the changes outlined above.

BlackRock welcomes the opportunity to further discuss its views on this important topic with the SEC staff.

Sincerely,

Joanne Medero