September 26, 2011

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

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

Re: Stable Value Contract Study; Release No. 34-65153 and File Number S7-32-31

Ladies and Gentlemen:

Better Markets, Inc.[1] appreciates the opportunity to comment on matters identified in the above-captioned release ("Release") of the Commodity Futures Trading Commission ("CFTC") and the Securities and Exchange Commission ("SEC") (the CFTC and the SEC being hereinafter collectively referred to as the "Commissions"). The Release seeks information relating to a Congressionally mandated study by the Commissions (the "Study") that must determine whether certain stable value contracts ("SVCs") fall under the definition of "swap" in the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").

INTRODUCTION AND SUMMARY

The Dodd-Frank Act requires the Commissions to determine in the Study whether SVCs fall within the definition of a swap. If SVCs are deemed to be swaps, then the Commissions must further determine whether exempting SVCs from the definition of a swap would be "appropriate and in the public interest."

As to the first issue, SVCs clearly do fall within the broad definition of a swap that Congress set forth in the Dodd-Frank Act. In fact, SVCs satisfy two of the three definitional tests: One focused on payments that depend upon the occurrence or nonoccurrence of

[1] Better Markets, Inc. is a nonprofit organization that promotes the public interest in the capital and commodity markets, including in particular the rulemaking process associated with the Dodd-Frank Act.

future economic contingencies, and one focused on an exchange of payments that transfers the financial risk associated with changes in the value of underlying investments, including instruments of indebtedness. No amount of data or argumentation related to the qualities, history, or utility of the SVC market can alter this conclusion.

It is equally clear that exempting SVCs from the definition would be inappropriate and contrary to the public interest, for a host of reasons. First, there is a very significant public interest involved here: Stable value funds (which incorporate SVCs) are offered in approximately half of all 401(k) plans. Investors, largely retirees or people planning for retirement, have put more than half a trillion dollars into stable value funds, where returns are guaranteed by SVCs, or into other investments whose returns are similarly guaranteed.[2]

Those investors deserve the same protections that the law intended other swap counterparties to have and there is no logical basis for denying them those benefits. The point is clear when one considers that these same investors **could** assure the same returns by using interest rate swaps to hedge against the risk of market value losses on debt and equity price swaps to address market losses on equity investments. The fact that SVCs offer the same protections, albeit in a different form, demonstrates that they are still fundamentally swaps and should be subject to regulation. (Of course, it goes without saying that if SVCs were found NOT to be swaps, then investors who used interest rate swaps and equity price swaps for similar purposes would all be sold unregulated SVCs rather than newly regulated swaps.)

Additionally, while SVCs have not generated high-profile scandals in recent years, the fact remains that they pose risks to our financial system and to the retail investors who rely on them heavily for retirement planning. It is quite clear that the protections Congress has established for all swaps markets are equally appropriate for SVCs. It is especially important that the Commissions subject SVCs to the business conduct standards, which require robust disclosure, and to the reporting requirements, which promote fairness, efficiency, and effective regulatory oversight.

In reality, assertions that SVCs are untainted by scandal and investor abuses are, at best, incomplete. Devices which have been touted as protection from market value losses have failed spectacularly in the past. For example, the demise of Executive Life in 1991 brought down $1.85 billion in guaranteed investment contracts ("GICs"), causing losses to thousands of investors in municipal bonds, the proceeds of which were invested in the GICs (the basic SVC structure).[3] And the widespread failure of auction rate notes in 2008 wreaked havoc among investors who relied on the auctions to value these instruments as

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2 Stable Value Investment Association Website, *available at* http://stablevalue.org/help-desk/faq/

3 T. Pare, "Who Got Killed by Executive Life?" Fortune Magazine, March 20, 1991, *available at* http://money.cnn.com/magazines/fortune/fortune_archive/1991/05/20/75024/index.htm

liquid and priced at market.[4] Clearly, guarantees of market value, like SVCs and derivatives of all kinds, are fraught with peril to investors.

Finally, as mentioned above, creating an exemption for SVCs will inevitably invite further abuses in the swaps markets. History proves that exemptions are like a bright light on a dark night attracting moths from miles and miles away: ingenious financial product designers will focus on constructing new derivatives that satisfy the exemption but that stretch far beyond any conceivable rationale for such an exemption. Like credit default swaps and too many other "innovations" over the last several decades, this exemption will almost certainly become a breeding ground for abuse.

Below, we elaborate on the general principles that must guide the Commissions as they address the two core questions presented by Congress. We then address several specific questions raised in the Release regarding the status of SVCs as swaps and the implications of regulating them as such. In doing so, we canvass the applicable definitions that the Commissions must apply in their analysis.

GUIDING PRINCIPLES FOR THE STUDY

With SVCs offered by more than 50 percent of 401(k) plans and more than $500 billion of investments guaranteed by them, the issues presented are extremely important, notwithstanding the unassuming role that SVCs play in our financial markets.

The proper regulatory treatment of SVCs is far more important than the relative unfamiliarity of SVCs might suggest. With respect to their potential impact on investors and the financial markets, SVCs are very widely used, predominantly in retirement investment vehicles.

For example, according to the Stable Value Investment Association, stable value funds (which incorporate stable value contracts) are offered in approximately half of all 401(k) plans, and investors on average allocate 15 to 20 percent of their 401(k) plan assets to stable value funds. In fact, investors have placed a total of over $520 billion in these products.

As well as being large, the market for SVCs is also comprised almost exclusively of average citizens planning for their retirements. Thus, defaults and abuses in the SVC market would not only cause systemic impact, but would also victimize individual retail investors who can hardly afford additional financial setbacks. While this is not directly relevant to the Study, which focuses on whether SVCs fall within the statutory definition of "swaps," it would be central to the subsequent consideration whether an exemption would be "appropriate and in the public interest."

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[4] G. Morgenson, "As Good as Cash Until It's Not." New York Times, March 9, 2008, *available at* http://www.nytimes.com/2008/03/09/business/09gret.html

Choosing the right regulatory treatment for SVCs is therefore extremely important. In terms of dollar volume as well as the type of investors affected, these products deserve close scrutiny, as Congress dictated, and they merit regulation as swaps.

The historical performance of SVCs should not determine their regulatory status.

In the regulatory reform process, SVCs have not garnered significant attention. Industry sources assert that they performed according to expectations and that they have not been specifically associated with systemic risk, scandal, or abuse.[5] However, the historically sound performance of SVCs and the lack of abuses associated with them are both irrelevant to the question of whether SVCs constitute swaps under the statutory definition. Moreover, these considerations deserve little weight even in deciding whether SVCs should be afforded exemptive relief.

In the first instance, claims about the pristine history of SVCs are, at best, incomplete. Devices which have been touted as protection from market value losses have failed spectacularly in the past. For example, the demise of Executive Life in 1991 brought down $1.85 billion in GICs, causing losses to thousands of investors in municipal bonds, the proceeds of which were invested in the GICs. [6] And the widespread failure of auction rate notes in 2008 wreaked havoc among investors which relied on the auctions to value these instruments as liquid and priced at market.[7] Clearly, guarantees of market value, like derivatives of all kinds, are fraught with peril to investors.

More fundamentally, the history of these instruments is irrelevant because the Dodd-Frank Act does not limit regulation of swaps only to those products that actually failed during the recent crisis. Past performance is simply not relevant to the question whether SVCs are "swaps." Logically, it amounts to the untenable argument that the regulation of SVCs as swaps is somehow unnecessary regardless of the **future** threats they pose.

Subjecting SVCs to regulation as swaps would undeniably provide two vitally important benefits: First, preventing future instability and abuses through application of the business conduct standards, and, second, promoting market transparency and efficiency through application of the reporting and exchange or SEF trading requirements. Both of these goals, discussed in greater detail below, are Congressional priorities embodied in the Dodd-Frank Act.

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5 *See, e.g.*, Stable Value Investment Association Website, *available at* http://stablevalue.org/help-desk/faq/.

6 T. Pare, "Who Got Killed by Executive Life?" Fortune Magazine, March 20, 1991, *available at* http://money.cnn.com/magazines/fortune/fortune_archive/1991/05/20/75024/index.htm

7 G. Morgenson, "As Good as Cash Until It's Not." New York Times, March 9, 2008, *available at* http://www.nytimes.com/2008/03/09/business/09gret.html

Exemptions create loopholes that are inevitably exploited to evade regulatory requirements.

Exempting any derivative from regulation under the new framework established by the Dodd-Frank Act is a perilous step. Derivatives in general are fraught with risk, and they provide extremely powerful incentives for abuse, as they are among the most profitable financial instruments on the market.

If the Commissions were to find that the swap definition does not encompass SVCs or that they should be granted a regulatory exemption, the effect would be that this huge investment sector would remain a shadow market without regulation or transparency. As bad as this result would be, creating an exemption would have additional, far-reaching effects, by facilitating the evasion of regulation more generally.

As history has demonstrated time and again, any category or subcategory of these instruments exempted from regulation will almost certainly be exploited for the purpose of evading the new regulatory framework governing swaps in general. Cleverly designed new derivatives will emerge, structured to resemble SVCs on some level, but created for purposes that go well beyond the parameters Congress had in mind when it identified the products that must be studied pursuant to Section 719. Given the vast amounts of money to be made here, this result is entirely predictable.

This is yet another very important reason why an exemption for SVCs from the swap definition is decidedly unwise.

The Study must be carefully framed as it may guide future determinations about swaps.

The Commissions must keep in mind that this Study, albeit limited to SVCs, may well set a precedent for future swap analysis. The conclusions and principles enunciated in the Study will almost certainly influence the analysis of other financial instruments that may in the future become candidates for regulation as swaps.

It is therefore crucial that the findings in the Study be very carefully framed so that they do not, by design or accident, narrow the very broad definition of swap that Congress adopted in the Dodd-Frank Act.

COMMENTS

I. SVCs clearly fall within the definition of a swap under two of the tests set forth in the Dodd-Frank Act.

The primary focus of the Study is to determine whether SVCs fall within the definition of a swap in Section 721(a) of the Dodd-Frank Act. The answer is clearly yes, based on an analysis of the applicable terms. This conclusion is further supported by an examination of the total return swap: These products are expressly included in the statutory definition of a swap, and SVCs are in fact one type of total return swap.

The definition of "Stable Value Contract" to be applied in the Study is narrowly framed in the Dodd-Frank Act.

While the term "stable value contract" might be applied to transactions having a range of characteristics, the Dodd-Frank Act specifies a more narrow definition of the term for purposes of the Study:

> For purposes of this subsection, the term "stable value contract" means any contract, agreement, or transaction that provides **a crediting interest rate and guaranty or financial assurance of liquidity at contract or book value prior to maturity** offered by a bank, insurance company, or other State or federally regulated financial institution for the benefit of any individual or commingled **fund available as an investment in an employee benefit plan** (as defined in section 3(3) of the Employee Retirement Income Security Act of 1974, including plans described in section 3(32) of such Act) subject to participant direction, **an eligible deferred compensation plan** (as defined in section 457(b) of the Internal Revenue Code of 1986) that is maintained by an eligible employer described in section 457(e)(1)(A) of such Code, **an arrangement described in section 403(b) of such Code, or a qualified tuition program** (as defined in section 529 of such Code).[8]

An SVC is thus defined both structurally and in terms of its function as an investment device. As a result, the Study must focus on SVCs that are offered by a bank, insurance company, or financial institution for the benefit of one of the enumerated fund management entities.

However, as explained above, it must be kept in mind that principles enunciated in the Study may be used to interpret the swap definition with respect to other instruments sharing structural characteristics with SVCs. The Study must therefore be clear that its scope and intended applicability is precisely defined by the statutory definition of SVC.

Other sources provide helpful guidance regarding the nature of SVCs.

The Study entails a comparison of the characteristics of SVCs with the broad definitional elements of a swap, as set forth in the Dodd-Frank Act. This comparison should encompass not only the technical definitional elements that apply, but also the essential,

[8] Dodd-Frank Act, Section 719(c)(2) (emphasis added).

commonly understood characteristics of the SVC. An appreciation of the nature of SVCs is informed by other sources that describe and characterize SVCs. For instance, a basic understanding of SVCs requires a broader appreciation of the stable value funds of which they are a component. The Department of Labor provides additional, helpful guidance on this issue:

> Frequently, a Stable Value Fund is a fixed income investment fund managed by an investment fund manager with a wrap contract that guarantees book value to participants for participant-initiated events, such as transfers to other investment options and plan distributions.
>
> Fund managers typically invest in highly rated corporate debt and highly rated structured securities such as asset-backed securities, commercial mortgage-backed securities, residential mortgage-backed securities, and other similar fixed income investments. The fair market value of these Stable Value Funds fluctuates on a daily basis, but their book value or net asset value (NAV) does not fluctuate.[9]

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An important component of a Stable Value Fund is insurance contract-known as "wrap contracts" or "wrappers" that plan sponsors purchase from banks, insurers, or other financial companies. The wrappers generally guarantee that participants will receive principal and accumulated interest even if the bonds held in a fund's portfolio decline in value. In other words, the plan participants are able to transact at book value (principal plus accrued interest) rather than at the more volatile market value. Generally, if a stable value portfolio falls below the rate of return set by the wrapper, the insurer pays the difference.

There are numerous types of Stable Value Fund contracts, including traditional GICs, separate accounts contracts and synthetic GICs. Stable Value Funds may hold one contract type or a combination of contracts. Traditional GICs are contracts with an insurance company that guarantee a fixed rate of return backed by the assets of the insurer's general account. The contract guarantees the rate of return regardless of the performance of the underlying assets, which the insurance company owns and holds within their general account. Separate account contracts are contracts with an insurance company that guarantee a rate of return backed by assets held in a segregated account separate from the insurer's general account. The rate of return may be fixed, indexed, or reset periodically based on the actual performance of the underlying assets. The insurance company owns

9 United States Department of Labor, Report on Stable Value Funds and Retirement Security in the Current Economic Conditions, *available at http://www.dol.gov/ebsa/publications/2009ACreport3.html.*

these assets, but the assets are set aside in a separate account for the exclusive benefit of the participating plan.[10]

The Stable Value Investment Association ("SVIA") describes SVC structures in terms which are consistent with the Labor Department description. The SVIA also describes typical terms under which the guaranteed level of return provided by a "wrap" (the SVC) can be terminated, generally a credit event affecting the underlying investments.[11]

From the foregoing, it is clear that SVCs involve three principal components:

- The underlying pool of investments, typically bonds or equities;
- The "wrap," which is provided by a bank or insurance company and guarantees the investment value of the underlying pool; and
- The termination right allowing the wrap provider to terminate its guarantee under specified conditions.

Furthermore, the descriptive information indicates that retirement funds using SVCs always have access to the underlying assets for which the wrap provider issues its guarantee of protection. Assuming that the Study determines that the swap definition encompasses SVCs, the Commissions' inquiry into whether exempting SVCs from the definition of a swap would be "appropriate and in the public interest" must examine whether this is factual. If investors might in any way lose the current value of the underlying securities, the risk to the public is even greater.

<u>The definition of a swap set forth in the Dodd-Frank Act is very broad.</u>

The definition[12] of a swap that must be applied in the Study is extraordinarily broad, and it is comprised of three components. The two that are relevant here include the following, which encompass any agreement, contract, or transaction—

> (ii) that provides for any purchase, sale, payment, or delivery (other than a dividend on an equity security) that is dependent on the occurrence, non-occurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence; or
>
> (iii) that provides on an executory basis for the exchange, on a fixed or contingent basis, of 1 or more payments based on the value or level of 1 or more interest or other rates, currencies, commodities,

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10 *Id.*

11 *See* SVIA Website, Frequently Asked Questions, *available at* http://stablevalue.org/help-desk/faq/

12 Dodd-Frank Act, Section 721(a) [subsection numbered 47].

> securities, instruments of indebtedness, indices, quantitative measures, or other financial or economic interests or property of any kind . . . and that transfers, as between the parties to the transaction, in whole or in part, the financial risk associated with a future change in any such value or level . . . . [13]

SVCs clearly fall under the swaps definition.

The SVC, which is essentially a wrap agreement provided by a bank or insurance company, is beyond question within both prongs of the swap definition quoted above.

First, the SVC provides for payment that is dependent upon the "occurrence" or "nonoccurrence" of the crediting interest rate and liquidity anticipated from the underlying debt instruments in the stable value fund. Accordingly, part (ii) of the swap definition clearly applies.

Second, the SVC provides, on an executory basis, for the exchange of payments based on the value or level of the interest rates and principal amounts associated with the underlying debt instruments in the stable value fund, and it further transfers the risk of future changes in those values or levels from the investor to the issuer of the SVC. The value of the investment is fixed to the investor and the wrap provider receives the market value on liquidation. Accordingly, part (iii) of the swap definition also clearly applies.

An analysis of total return swaps confirms the conclusion that SVCs are swaps.

SVCs are perhaps best described as total return swaps, which are expressly included in the long list of instruments defined as swaps in the Dodd-Frank Act. Total return swaps are defined by the International Swaps and Derivatives Association ("ISDA") as follows:

> A total return swap is an agreement in which one party (total return payer) transfers the total economic performance of a reference obligation to the other party (total return receiver). Total economic performance includes income from interest and fees, gains or losses from market movements, and credit losses.[14]

This, of course, accurately captures the essence of the SVC, an agreement pursuant to which a bank or insurance company assumes the performance obligations associated with a collection of debt securities and guarantees that performance to the retirement fund participants. With respect to both the SVC and the total return swap, the economic

13 *Id.*

14 ISDA Product Descriptions and Frequently Asked Questions, *available at* http://www.isda.org/educat/faqs.html#28

performance guarantee encompasses both principal and interest. Understood in this light, the inclusion of SVCs under the swap definition is incontrovertible.

<u>Any distinctions between swaps and SVCs are purely matters of form, not substance.</u>

To the extent there are any distinctions between SVCs and swaps, they are matters of form only and they do not alter the conclusion that SVCs are swaps and should be regulated as such. Forms of documents are irrelevant, and termination rights and rules such as those typical to SVCs obviously are included in swaps.

If the definition of swap in the law was supposed to do anything, it was to guard against letting form dictate substance—again—to disastrous consequences. Nor are rules relating to permissible investments or tax consequences relevant to the legally mandated study. Those rules are not germane to the regulatory regime established by the Dodd-Frank Act or the regulatory mandates of the Commissions or the study.

<u>The proposed rules and the interpretive guidance set forth in the Product Definitions Proposing Release help further clarify the status of SVCs as swaps.</u>

The Release specifically asks whether the Product Definitions Proposing Release is helpful in evaluating whether SVCs fall within the definition of a swap. That Release does in fact provide useful guidance, largely by clarifying which instruments do **not** constitute swaps. For example, the Product Definition Proposing Release focuses largely on the distinction between insurance products and swaps and that analysis is useful and appropriate. The requirements of an insurable interest and recovery on proof of loss lead to the conclusion that, structurally, SVCs are financial markets instruments not insurance products (especially to the extent that the wrap provider has any control over the actual liquidation of the investments to which the wrap relates).

This distinction is not only logical but extremely important. If the Commissions were to allow SVCs to be categorized as insurance, the Commissions would facilitate massive evasion of the swaps regulatory regime.

<u>II. Exempting SVCs from regulation as swaps would be inappropriate and would run directly counter to the public interest.</u>

The Release seeks comment on what facts and policy considerations might support exempting or not exempting SVCs from the definition of a swap. In light of the statutory mandate, this question is certainly appropriate. However, even at the outset of the Study, there is clearly no justification on factual or policy grounds for exempting SVCs from the swaps definition.

As discussed above in the section on guiding principles, and notwithstanding their seemingly benign nature, exempting SVCs from regulation as swaps cannot be justified from the standpoint of market stability, investor protection, and market fairness and efficiency. Moreover, the extraordinary potential for abuse that invariably comes with any regulatory exemption counsels strongly against leaving this particular type of swap—the SVC—outside the regulatory scheme.

Regulation of SVCs will prevent future instability and investor abuse.

While the Study is limited to the specific question whether SVC's fall within the swap definition, an affirmative result requires the Commissions to consider whether an exemption would be "appropriate and in the public interest." Regulation will help ensure that SVCs do not cause systemic disruptions or widespread investor harms in the future. Recall that at one time, mortgage-backed securities and credit wraps offered by AIG were considered high quality and reliable investment vehicles. Confidence in those financial products turned out to be ill-founded to say the least. From this and similar lessons, Congress made the determination in the Dodd-Frank Act to close regulatory gaps, so that future crises in the financial markets could be averted, along with the terrible and intractable economic hardships we are experiencing to this day.

Applying business conduct standards would help provide this valuable layer of prophylactic regulation. Those standards establish duties of care, prohibit abusive practices, and require extensive disclosure of information about swaps transactions. In reality, counterparty risk associated with SVCs is potentially significant and the Business Conduct Standards must apply to ensure adequate disclosure and standards of fair dealing.

Current practices are clearly not adequate. Evidence of this can be found in the disclosure template provided by the SVIA to market participants through its website. That template is limited almost exclusively to disclosure of fees, without regard to other material facts including risks and conflicts of interest.[15] That is plainly insufficient to protect investors, and disclosure will only be adequate if the rules and regulations for swaps apply to this type of swap as well.

In addition, the counterparty credit risk will remain shrouded in the shadows if proper reporting is not required. The study must consider whether there is any material distinction between out of the money exposure on an interest rate swap or on a SVC which guarantees a market interest rate level. The facts of each product demonstrate beyond question that there is no material distinction.

Regulation of SVCs will also promote a much more transparent and fair marketplace.

As a separate matter, the regulation of SVCs would also promote much greater transparency, price efficiency, and competition in the SVC market, leading ultimately to lower prices for investors. Reporting requirements would help ensure widespread availability of pricing data regarding SVCs, resulting in fairer and better pricing for the benefit of those investors who wish to use these products. To the extent a viable exchange

15 Available via website at http://stablevalue.org/.

trading environment evolves, even greater efficiency and competition will result. All of these factors militate strongly in favor of regulating SVCs as swaps.

The practical effects of being under the swap regulations would vary depending on the particular rule, but all would be beneficial. The Business Conduct Standards would protect investors, especially important in light of the common uses of SVCs. Reporting would provide important insight into the accumulated risks in the large SVC market and would also promote real price competition. If the use of SVCs evolved so that clearing and electronic matching made sense, these trading mechanisms would confer even more benefits.

<u>Counterarguments premised on potential business model disruptions are without merit.</u>

Some might argue that the threat of mandatory clearing and exchange trading of SVCs will disrupt an otherwise smoothly functioning OTC market, injecting unnecessary costs and burdens. But, this is an inherently flawed argument (no matter how often and vociferously made) because, under the Dodd-Frank Act, mandatory clearing and exchange trading is premised on the willingness of clearinghouses and exchanges or swap execution facilities to list, trade, and clear any given swap. That willingness, in turn, signifies that there is sufficient liquidity and interest in the swap, and an economic purpose for clearing and exchange trading them.

Thus, there is no reason to fear the application of clearing or exchange trading requirements to SVCs: That functionality either will not emerge, or it will provide tangible and beneficial economic benefits as determined by the market.

<u>An exemption for SVCs from regulation as swaps will spawn a host of swaps products designed purely for the purpose of evading the Dodd-Frank Act.</u>

Finally, exempting SVCs from regulation raises the very real specter of regulatory evasion. Transactions that are substantively swaps will be characterized as exempt SVCs to avoid the requirements of the law. Banks and insurance companies could simply circumvent the reach of the Dodd-Frank Act by creative product design, labeling, and documentation.

<u>The ancillary legal consequences of regulating SVCs as swaps are not at issue and should not control the outcome of the Study.</u>

The Releases poses a series of questions regarding the regulatory or legal consequences that might arise under the tax laws, the bankruptcy code, and other areas of law if SVCs are regulated as swaps. While it will be argued that these factors must be included in the consideration of what is "appropriate" or "in the public interest," none (individually or collectively) are anywhere near as weighty as the public interest considerations detailed above.

There is little doubt that the potential and supposedly deleterious impact of regulating SVCs as swaps will be catalogued in enormous detail by entities that reap huge profits from issuing SVCs now without being subject to the regulatory requirements that Congress established for swaps generally. There is also no doubt that these ostensible negative impacts will be cast as contrary to the public interest, but when carefully scrutinized, many of these alleged impacts will be revealed as little more than the private interests of the SVC sponsors seeking to make sure that nothing changes for them in a dark, unregulated, and lucrative market.

In addressing these arguments, the Commissions must constantly bear three points in mind.

First, these considerations are not relevant to the core Congressional mandate: The Commissions have been tasked first and foremost with determining whether SVCs fall within the definition of a swap."[16] This mandate does not pose the question whether the inclusion of SVCs as swaps could have adverse effects under tax, bankruptcy, or ERISA law.

Second, such arguments must be heavily discounted, as industry forecasts regarding the burdens and ancillary consequences of regulation are always grossly exaggerated.

Third and finally, to the extent regulating SVCs as swaps truly does create potential conflicts with other bodies of law, the Commission must always consider the availability of alternative remedies for addressing those concerns, whether legislative or regulatory.

<u>Market and product service issues are similarly irrelevant.</u>

The balance of the questions posed by the Release under the heading above are designed to understand specific structural features of SVCs and potential beneficial uses for them as an investment device. There is little doubt that the responses from wrap providers and investors will provide useful background information which will enhance the study.

This information, however, should in no way be determinative of the outcome of the study: an answer to the question posed by the law. This outcome must be driven by an analysis of the substantive characteristics of SVCs, which compellingly demonstrate that they fall within the Dodd-Frank Act definition of "swap." In addition, determining whether SVCs should be exempted from the swap definition should be driven by the clear benefits of regulation: creating transparency and fairness in a now opaque market, protecting vulnerable investors from abuse, and ensuring that the SVC market never poses a systemic risk.

[16] Dodd-Frank Act, Section 719(d)(1)(A).

CONCLUSION

The Study must directly address the specific questions posed by the law. To dilute the scope of the Dodd-Frank Act by finding that SVCs fall outside of the swap definition would be a dangerous path that invites years of innovative evasion of the law for substantively similar products, leading to market instability, and investor abuses.

Unless and until all swaps are treated like swaps, the Commissions are undermining the comprehensive regulatory framework that Congress envisioned and that our markets clearly need. The transparency and fairness established in the Business Conduct Standards and the swap data reporting requirements would help prevent future market failures or disruptions, help protect investors, and help promote better and more efficient pricing for these widely used products. Exempting SVCs from regulation would forego these benefits, and would create a loophole that would facilitate evasion of the law. This result indisputably would be inappropriate and contrary to the public interest.

We hope these comments are helpful.

Sincerely,

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