

**Testimony Concerning  
Regulation of Over-The-Counter Derivatives**

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Committee on Banking, Housing and Urban Affairs  
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**I. Introduction**

Chairman Reed, Ranking Member Bunning, and Members of the Subcommittee:

I am pleased to have this opportunity to testify on behalf of the Securities and Exchange Commission concerning the regulation of over-the-counter (“OTC”) derivatives. The severe financial crisis that has unfolded over the last two years has revealed serious weaknesses in the structure of U.S. financial regulation. One of these is the gap in regulation of OTC derivatives, which under current law are largely excluded or exempted from regulation. The SEC is committed to working closely with this Committee, the Congress, the Administration, and fellow regulatory agencies to close this gap and restore a sound structure for U.S. financial regulation.

My testimony today on the regulation of OTC derivatives will reflect the SEC’s perspective as the country’s capital markets regulator. First, I will give an overview of the OTC derivatives markets, with particular focus on those derivatives products that are directly related to or based on securities or issuers of securities and therefore directly connected with the SEC’s statutory mandate. Second, I will outline an approach that

would address the existing gaps in regulatory oversight of these securities-related OTC derivatives.

I must tell you right at the start that, given the current limited regulation of OTC derivatives, no regulatory authority can give you a complete picture of OTC derivatives and how they have affected the regulated securities markets. One reason that we need legislation is that our sources of information about securities-related OTC derivatives products, participants, and trading are limited, particularly when contrasted with the tools we have to monitor the markets for other securities products subject to the federal securities laws.

The good news, however, is that the U.S. regulatory authorities have reached a broad consensus on the pressing need for a comprehensive regulatory framework for OTC derivatives. As reflected in Treasury Secretary Geithner's letter to the Congressional leadership on May 13, 2009, this consensus covers all of the basics of sound financial regulation in the 21st century, including recordkeeping and reporting requirements, appropriate capital and margin requirements, transparent and efficient markets, clearing and settlement systems that monitor and manage risk, business conduct and disclosure standards to protect the interests of market participants, and vigorous enforcement against fraud and other wrongdoing.

One important aspect of a new regulatory framework will be well-regulated central counterparties ("CCPs"). CCPs address concerns about counterparty risk by substituting the creditworthiness and liquidity of the CCP for the creditworthiness and liquidity of counterparties. For this reason, CCPs contribute generally to the goal of market stability. Through uniform margining and other risk controls, including controls

on market-wide concentrations that cannot be implemented effectively when counterparty risk management is decentralized, CCPs help protect the broader financial system. It is important to note that achieving standardization, a prerequisite for centralized clearing, may present significant challenges.

U.S. regulators agree on the objectives of a new regulatory framework for OTC derivatives that will protect the public interest, manage systemic risk, and promote capital formation and general economic welfare. Any new regulatory framework, however, should take into consideration the purposes that appropriately regulated derivatives can serve, including affording market participants the ability to hedge positions and effectively manage risk. My goal today is to assist the Congress as best I can in its efforts to craft legislation that empowers the respective regulatory authorities to do their jobs effectively in any new framework. I am confident that, working together, we will meet the challenge that is so important to the financial well-being of individual Americans.

## **II. Overview of Securities-Related OTC Derivatives**

A derivative is a financial instrument whose value is based on the value of an underlying “reference” (e.g., an asset such as a commodity, bond, equity, or currency, or an index of such assets, or an event). For example, in exchange for \$100 today, financial institution “A” will pay counterparty “B” \$150 if “something” happens (something can be almost anything: Z company defaults on its debt payments; the S&P 500 falls 10%; the Dow rises 5%). A derivative is “OTC” when it is not traded on a regulated exchange. An OTC derivative is “securities-related” when the reference is to an entity that is an issuer of securities (such as a public company), to a security itself (or a related event such

as a dividend payment), to a group or index of securities or issuers, or based on related aspects of a security or group or index of securities or issuers, such as price, yield, volatility, dividend payments, or value.

An OTC derivative is an incredibly flexible product that can, essentially, be engineered to achieve almost any financial purpose between two parties. Indeed, as I will discuss later, an OTC derivative can enable market participants to replicate the economics of either a purchase or sale of securities without purchasing or selling the securities themselves. Transactions occurring in the OTC derivatives markets can serve important economic purposes such as allowing market participants to hedge exposure and manage risk. When market participants engage in these types of transactions in the OTC derivatives markets, the transactions, which are substantially similar to traditional securities transactions, and the parties engaged in them, would fall outside the current reach of key provisions of the federal securities laws.

OTC derivatives are largely excluded from the securities regulatory framework by the Commodity Futures Modernization Act of 2000.<sup>1</sup> In a recent study on a type of securities-related OTC derivative known as a credit default swap, or CDS, the Government Accountability Office found that “comprehensive and consistent data on the overall market have not been readily available,” that “authoritative information about the

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<sup>1</sup> Section 2A of the Securities Act, Section 3A of the Exchange Act, and related provisions prohibit the SEC from: (1) promulgating, interpreting, or enforcing rules in a manner that imposes or specifies reporting or recordkeeping requirements, procedures, or standards as prophylactic measures against fraud or manipulation with respect to any security-based swap agreement; and (2) registering or requiring the registration of any security-based swap agreement. As noted below, some OTC derivatives products, such as certain equity-linked notes, always have been considered securities and currently are covered by the securities regulatory regime.

actual size of the CDS market is generally not available,” and that regulators currently are unable “to monitor activities across the market.”<sup>2</sup>

One source of information on OTC derivatives volume is the data collected by the Bank for International Settlements (“BIS”). BIS data cover the OTC derivatives exposure of major banks and dealers in the G10 countries. For all OTC derivatives in December 2008, BIS reported a notional amount outstanding of \$592 trillion and a gross market value outstanding of \$34 trillion. Interest rate contracts and foreign exchange contracts are the two largest sources of OTC derivatives volume. For those types of products that appear to be securities-related credit derivatives and equity derivatives in December 2008, BIS reported a notional amount outstanding of \$48.4 trillion and a gross market value outstanding of \$6.8 trillion. A notional amount of \$70 trillion and a gross market value of \$5 trillion are “unallocated” for December 2008. Clearly, this volume of largely unregulated financial activity is enormous, even when just considering the relatively small volume component that is securities-related.

Who are the major participants in the securities-related OTC derivatives markets? First, the markets are concentrated and appear to be almost exclusively “dealer-intermediated” – that is, one of a small number of major dealers is a party to almost all transactions, whether as a buyer or a seller. The customers of the dealers appear to be almost exclusively institutions. Many of these may be highly sophisticated, such as large hedge funds and other pooled short-term trading vehicles. As you know, many hedge funds have not been subject to direct regulation by the SEC and, accordingly, we have very little ability to obtain information concerning their trading activity at this point.

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<sup>2</sup> Government Accountability Office, “Systemic Risk: Regulatory Oversight and Recent Initiatives to Address Risk Posed by Credit Default Swaps,” GAO-09-397T (March 2009), at 2, 5, 27.

Other customers in the securities-related OTC derivatives markets have been institutions for which derivatives products may not be a suitable investment. In this regard, there is consensus among U.S. regulators reflected in Secretary Geithner's letter is to ensure that OTC derivatives are not marketed inappropriately to unsophisticated parties. The SEC and CFTC staff, together with other financial regulators, currently are considering a tiered approach to regulation, with scaling that could be based in the first instance on indicia of sophistication and financial thresholds, with requirements for additional disclosure and standards of care with respect to the marketing of derivatives to less sophisticated counterparties. Implementation of such a regulatory approach would depend on a Congressional grant of authority in this area.

Finally, what are the purposes for which securities-related OTC derivatives may be used? One example of a useful purpose for securities-related OTC derivatives is to manage the risk associated with a particular securities position. An investor with a large position in the debt of a company may seek to reduce or hedge some of the risk associated with that investment by purchasing credit protection in the CDS market. In addition, market participants also may use a securities-related OTC derivative to establish a short position with respect to the debt of a specific company. In particular, a market participant that does not own a bond or other debt instrument of a company may purchase a CDS as a way to short that company's debt.

Market participants take positions in a wide range of exchange-traded and OTC instruments. It is a market participant's overall (or net) economic exposure that plays a role in determining the risks to which it is exposed. Because OTC derivatives can be customized, a market participant could take a long position in an index – such as the S&P

100 index -- through a securities-related OTC derivative and a short position through another OTC derivative on a subset of the securities in the S&P 100 index. The flexibility to tailor OTC derivative contracts allows a participant to create an economic exposure to as large or small a portion of the market it chooses through one or a combination of contracts. This flexibility allowed by OTC derivatives is one of these contracts' strengths. Because of the link to regulated securities market, however, it is important that the SEC have the tools to see all related activity so that it is in the best position possible to detect and deter market abuses that can disrupt the integrity of the market.

### **III. Filling Regulatory Gaps in Oversight of Securities-Related OTC Derivatives**

Secretary Geithner's May 13 letter to the Congressional leadership outlined the Administration's plan for establishing a comprehensive framework for regulating OTC derivatives. The framework is designed to achieve four broad objectives: (1) preventing activities in the OTC derivatives markets from posing risk to the financial system; (2) promoting efficiency and transparency of those markets; (3) preventing market manipulation, fraud, and other market abuses; and (4) ensuring that OTC derivatives are not marketed inappropriately to unsophisticated parties.

Secretary Geithner recognized that multiple federal regulatory agencies would play critical roles in implementing the proposed framework, including the SEC and the CFTC. He emphasized that the securities and commodities laws should be amended to ensure that the SEC and CFTC, consistent with their respective missions, have the necessary authority to achieve – together with the efforts of other regulators – the four policy objectives for OTC derivatives regulation.

The final part of my testimony today is intended to follow up on Secretary Geithner's letter by recommending a straightforward and principled approach for achieving these policy objectives. Stated briefly, primary responsibility for "securities-related" OTC derivatives would be retained by the SEC, which is also responsible for oversight of markets affected by this subset of OTC derivatives. Primary responsibility for all other OTC derivatives, including derivatives related to interest rates, foreign exchange, commodities, energy, and metals, would rest with the CFTC.

Under this functional and sensible approach to regulation, OTC derivatives markets that are interconnected with the regulated securities markets would be incorporated within a unified securities regulatory regime. The direct link between securities-related OTC derivatives and securities is such that SEC regulation of the former is essential to the effectiveness of the SEC's statutory mission with respect to the securities markets. The securities regulatory regime is specifically designed to promote the Congressional objectives for capital markets, which include investor protection, the maintenance of fair and orderly markets, and the facilitation of capital formation. It is important that securities-related OTC derivatives be subject to the federal securities laws so that the risk of arbitrage and manipulation of interconnected markets is minimized.

Over the years, Congress has fashioned a broad and flexible regulatory regime for securities that long has accommodated a wide range of products and trading venues. The products include equities, debt, other fixed income securities, options on securities, exchange-traded funds and other investment companies, and many other types of derivative contracts on securities. Some of these securities products are among the most actively traded financial products in the world, with exchange-listed US equities currently



trading approximately 11 billion shares per day. Many other securities products trade rarely, if at all. In addition, securities products trade in many different ways in a wide variety of venues, depending on the particular features of the product. These venues include 11 national securities exchanges with self-regulatory responsibilities, more than 70 alternative trading systems that execute OTC transactions, and hundreds of broker-dealers that execute OTC transactions. Finally, securities products are cleared and settled in a variety of ways depending on the particular characteristics of the product.

The current securities laws are broad and flexible enough to regulate appropriately all of these varied securities products and trading venues. The regulatory requirements are specifically tailored to reflect the particular nature of products and venues and to promote the Congressional objectives for capital markets. Accordingly, securities-related OTC derivatives could be brought under the same umbrella of oversight as the related, underlying securities markets in a relatively straightforward manner with little need to “reinvent the wheel.” Specifically, Congress could make a limited number of discrete amendments to the statutory definition of a security to cover securities-related OTC derivatives. With these definitional changes, securities-related OTC derivatives could be incorporated within an existing regulatory framework that is appropriate for these products.

The rest of my testimony will elaborate on this basic approach. I first will discuss the close relationship between the regulated securities markets and the markets for securities-related OTC derivatives and then sketch an overview of how oversight of such instruments could be integrated with the SEC’s existing oversight of the securities markets.

## **A. Relationship between the Securities Markets and Securities-Related OTC Derivatives**

In fashioning a regulatory framework for OTC derivatives, it is crucial to recognize the close relationship between the regulated securities markets and the now mostly unregulated markets for securities-related OTC derivatives. Securities-related OTC derivatives can be used to establish either a synthetic “long” exposure to an underlying security or group of securities, or a synthetic “short” exposure to an underlying security or group of securities. In this way, market participants can replicate the economics of either a purchase or sale of securities without purchasing or selling the securities themselves.

For example, an equity swap on a single equity security or on an index, such as one of the Dow stocks or the Dow itself, would give the holder of the “long” position all of the economic exposure of owning the stock or index, without actual ownership of the stock or index. This would include exposure to price movements of the stock or index, as well as any dividends or other distributions. Similarly, credit default swaps (“CDS”) can be used as synthetic substitutes for the debt securities of one or more companies. Indeed, any exchange of cash for a security can be structured as an OTC derivatives contract.

Because market participants can readily use securities-related OTC derivatives to serve as synthetic substitutes for securities, the markets for these OTC derivatives directly and powerfully implicate the policy objectives for capital markets that Congress has set forth in the federal securities laws. These objectives include investor protection, the maintenance of fair and orderly markets, and the facilitation of capital formation.

### **1. Investor Protection**

The current regulatory framework has permitted certain opaque securities-related OTC derivatives markets to develop outside of investor protection provisions of the securities laws. These provisions include requiring the disclosure of significant ownership provisions and recordkeeping and reporting (including those that serve as prophylactic measures against fraud, manipulation, or insider trading) that helps to promote enforcement of the securities laws.

The exclusion of certain securities-related OTC derivatives from most of the securities regulatory regime has detracted from the SEC's ability to uphold its investor protection mandate. For example, in investigating possible market manipulation during the financial crisis, the SEC has used its anti-fraud authority over security-based swaps to gather information about transactions in OTC derivatives as well as in the underlying securities. Yet investigations of these OTC derivative transactions have been far more difficult and time-consuming than those involving cash equities and options. Audit trail data on OTC derivative transactions is not readily available and must be reconstructed manually, in contrast to the data available in the equity markets. The SEC's enforcement efforts have been seriously complicated by the lack of a mechanism for promptly obtaining critical information – who traded, how much, and when – that is complete and accurate.

In addition, the SEC believes that it is important in the OTC derivatives market, as in the market for securities generally, that parties to transactions have access to financial information and other disclosures so they can evaluate the risks relating to a particular investment to make more informed investment decisions and can value and evaluate their OTC derivatives and their counterparty exposures. For example, this

information assists market participants in performing adequate due diligence on their investments and in valuing their OTC derivatives and their other risks.

A basic tenet of functional regulation of securities markets is to have a regulatory regime under which similar products and activities should be subject to similar regulations and oversight. Currently, securities are subject to transparency, active enforcement, and appropriate regulation of business conduct. Whereas securities-related OTC derivatives, which are interconnected with the securities markets (and in some cases are economic substitutes for securities) are not subject to most of these investor protection requirements. The securities laws are uniquely designed to address these issues and should be extended to OTC derivatives.

## **2. Fair and Orderly Markets**

Trading in securities-related OTC derivatives can directly affect trading in the securities markets. From an economic viewpoint, the interchangeability of securities and securities-related OTC derivatives means that they are driven by the same economic forces and are linked by common participants, trading strategies, and hedging activities.

For example, credit default swap, or CDS trading is closely related to trading in the underlying securities that compose the capital structure of the companies on which protection is written. Trading practices in the CDS market, whether legitimate or abusive, can affect the securities markets. The CDS market, however, lacks the level of transparency and other protections that characterize the regulated securities markets. As a result, the SEC has been unable to monitor effectively for trading abuses and whether purchasers of CDS protection on an issuer's debt have sold short the equity securities of that company as a trading strategy, effectively linking activities and changes in the CDS

market with those in the cash equity market. These activities in the CDS market could adversely impact the regulated securities markets. Any regulatory reform that maintained distinct regulatory regimes for securities markets and markets for securities-related OTC derivatives would suffer from this same limitation.

The SEC is considering whether reporting under the Exchange Act should apply to security-based OTC derivatives so that the ownership of and transactions in security-based derivatives would be considered ownership of and transactions in the underlying equity security. We are further evaluating whether persons using equity derivatives, such as an equity swap, should be subject to the beneficial ownership reporting provisions of the Exchange Act when accumulating substantial share positions in connection with change of control transactions.

### **3. Capital Formation**

Facilitating capital formation depends on the existence of fair and efficient secondary markets for investors. Purchasers in the primary offering of a company are attracted by secondary markets that enable them to liquidate their positions readily. Less efficient markets can cause potential investors in companies either to find other uses for their funds or to demand a higher rate of return to compensate them for a less efficient secondary market. If a disparity in the regulatory requirements for securities and securities-related OTC derivatives cause securities markets to operate less efficiently, it will harm those companies that depend on the U.S. securities markets to access the capital that is essential for innovation and growth, as well as harming investors and the capital markets as a whole.

Because many securities-related OTC derivatives are allowed to trade outside of the securities regulatory regime, the SEC generally is unable to promote transparency in the trading of these products and efficiency in pricing. As noted above, companies whose securities are affected by the excluded products could suffer from the absence of transparency and efficiency. Moreover, manipulative activities in the markets for securities-related OTC derivatives can affect US issuers in the underlying equity market, thereby damaging the public perception of those companies and raising their cost of capital. To protect the integrity of the markets, trading in all securities-related OTC derivatives should be fully subject to the US regulatory regime designed to facilitate capital formation. Nevertheless, it is important to remember that derivatives transactions, including OTC derivatives transactions, allow parties to hedge and manage risk, which itself can promote capital formation. To the extent the ability to manage risk is inappropriately limited, it can discourage market participation, including by investors.

## **B. Regulatory Oversight of Securities-Related OTC Derivatives**

To provide a unified, consistent framework for securities regulation, Congress should subject securities-related OTC derivatives to the federal securities laws. This result can be achieved simply by clarifying the definition of “security” to expressly include securities-related OTC derivatives, and removing the current express exclusion of swaps from that definition. The SEC then would have authority to regulate securities-related OTC derivatives regardless of how the products are traded, whether on an exchange or OTC, and regardless of how the products are cleared.

### **1. Definition of Securities-Related OTC Derivatives**

OTC derivatives can be categorized generally as securities-related or non-securities-related, based on the different types of underlying assets, events, or interests to which they are related. Securities-related OTC derivatives would include equity derivatives and credit and other fixed income derivatives. Non-securities-related derivatives would include interest rate derivatives, foreign currency derivatives, and all non-financial derivatives. By including securities-related OTC derivatives under the umbrella of the federal securities laws, the SEC would have responsibility over the portion of the OTC derivatives market that is vital to promote its mission of investor protection, the maintenance of fair and orderly markets, and the facilitation of capital formation.

In addition, the SEC would continue to regulate those types of OTC derivatives that always have been considered securities, such as OTC security options, certain OTC notes (including equity-linked notes), and forward contracts on securities. These particular types of OTC derivatives always have been included in the definition of security and current law recognizes this fact by excluding these derivatives from the definition of “swap agreement” in Section 206A of the Gramm-Leach-Bliley Act.

## **2. Regulation of OTC Derivatives Dealers and Major OTC Participants**

Under our recommended approach, major participants in the OTC derivatives markets would be subject to oversight and supervision to ensure there are no gaps. To reduce duplication, OTC derivatives dealers that are banks would be subject to prudential supervision by their federal banking regulator. All other OTC derivatives dealers in securities-related OTC derivatives would be subject to supervision and regulation by the SEC. The SEC would have authority to set appropriate capital requirements for these

OTC derivatives dealers. This approach would permit existing OTC derivatives dealers that are banks to continue to engage in OTC derivatives activities without being subject to the full panoply of broker-dealer regulation, while ensuring that all currently unregulated OTC derivatives dealers in securities-related OTC derivatives are subject to appropriate supervision and regulation. Should Congress establish a new systemic risk regulator or systemic risk council, that entity also could help monitor institutions that might present systemic risk.

In addition, the SEC would have authority to establish business conduct standards and recordkeeping and reporting requirements (including an audit trail) for all securities-related OTC derivatives dealers and other firms with large counterparty exposures in securities-related OTC derivatives (“Major OTC Participants”). This “umbrella” authority would help ensure that the SEC has the tools it needs to oversee the entire market for securities-related OTC derivatives. Major OTC Participants also would be required to meet appropriate standards for the segregation of customer funds and securities.

### **3. Trading Markets and Clearing Agencies**

Trading markets and clearing organizations for securities-related OTC derivatives would be subject to registration requirements as exchanges and clearing agencies. Importantly, however, the conditional exemption from exchange registration the SEC provided under Regulation ATS would be available to trading systems for securities-related OTC derivatives. Among other things, Regulation ATS lowers barriers to entry for trading systems in securities because the systems need not assume the full self-regulatory responsibilities associated with being a national securities exchange. Both



registered exchanges and ATSS are subject to important transparency requirements. Consequently, expanding the SEC's authority over securities-related OTC derivatives would promote improved efficiency and transparency in the markets for securities-related OTC derivatives.

Similarly, the regulatory regime for securities clearing agencies would ensure that CCPs for securities-related OTC derivatives impose appropriate margin requirements and other necessary risk controls. The SEC's historic regulation of clearing agencies under Section 17A of the Exchange Act has resulted in the most efficient, lowest cost clearing in the world. Indeed, the solid performance of securities clearing systems during the financial crisis bears out that they have the resilience to withstand difficult economic conditions. In addition, the regulation of securities clearance and settlement would directly affect market structure and competition in the trading markets for securities-related OTC derivatives. For example, the SEC's statutory mandate governing clearing agencies prohibits clearing agencies from engaging in anti-competitive practices, such as imposing unreasonable limitations on access to services. Clearing agencies cannot exclude participants merely for executing their trades in a cleared product in a particular venue. This fair access requirement allows for multiple, competing markets, including OTC trading systems and OTC dealers, to trade the same securities and clear through a single clearing organization. The securities clearing system would support both the goal of having the greatest number of OTC derivatives centrally cleared, while retaining flexibility to allow variation in trading venues to meet the trading needs of different instruments and participants.

The SEC already has taken a number of actions to help further the centralized clearing for OTC derivatives, including exempting three CCPs from the requirement to register as securities clearing agencies. These exemptions were issued to speed the operation of central clearing for CDS. They are temporary and subject to conditions designed to ensure that important elements of Commission oversight apply, such as recordkeeping and Commission staff access to examine clearing facilities. In addition, to further the goal of transparency, each clearing agency is required to make publicly available on fair, reasonable, and not unreasonably discriminatory terms end-of-day settlement prices and any other pricing or valuation information that it publishes or distributes.

One important issue is how to deal with those OTC derivative contracts that may be ineligible for central clearing. OTC derivatives may be ineligible for clearing for a variety of reasons, including customized terms and an inability of CCPs to effectively manage the risks. In many cases, there are legitimate economic reasons to engage in customized transactions. Participants in individual transactions, however, should not be permitted to externalize the costs of their decisions, such as by creating additional systemic risk. Regulatory requirements often have costs, but they are costs incurred to protect the public interest and the general economic welfare. One way for regulators to help ensure market participants incorporate all the risks in the terms of a transaction would be to impose appropriate margin and capital requirements on the participants in customized transactions to reflect the risks they pose to market systems generally. This is an area in which the various functional regulators for particular entities could consult closely with any systemic risk agency that Congress might establish.

In addressing all of these issues with respect to OTC derivatives, moreover, the U.S. must coordinate its efforts with those of regulatory authorities abroad as they seek to address similar issues. The global financial crisis is a potent reminder of the extent to which economies around the world are linked by financial practices and market participants. A sound regulatory approach for managing the systemic risk of such practices and participants benefits from the implementation of complementary measures on an international basis.

## **V. Conclusion**

Bringing securities-related OTC derivatives under the umbrella of the federal securities laws would be based on sound principles of functional regulation, would be relatively straightforward to implement, and would promote Congressional policy objectives for the capital markets. A clear delineation of primary regulatory responsibility for OTC derivatives also would help avoid regulatory gaps from arising in the future. Finally, integrating oversight of securities-related OTC derivatives with oversight of the related, underlying securities markets would minimize the extent of dislocation with respect to existing participants and current practices in the OTC derivatives markets, while still achieving the objectives for OTC derivatives regulation set forth in Secretary Geithner's letter to the Congressional leadership.

Thank you for the opportunity to address issues of such importance for the strength and stability of the U.S. financial system, and the integrity of the U.S. capital markets. I would be pleased to answer your questions.