

March 28, 2016

Submitted Electronically

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549.

**Re: Use of Derivatives by Registered Investment Companies and Business
Development Companies (File Number S7-24-15)**

Dear Mr. Fields:

The International Swaps and Derivatives Association, Inc. (“**ISDA**”)¹ appreciates the opportunity to submit these comments with respect to the notice of proposed rulemaking published by the Securities and Exchange Commission (“**SEC**” or the “**Commission**”) (the “**Proposal**,” or the “**proposal**”)² regarding proposed Rule 18f-4 under the Investment Company Act of 1940 and the use of derivatives by registered investment companies and business development companies.

As the trade association for the global derivatives market, ISDA monitors regulatory developments that would affect the ability of market participants to use derivatives to, among other things, execute risk management, investment and funding strategies, stabilize funding costs and enhance customer returns.³

Therefore, ISDA appreciates the SEC’s efforts to address the safe and efficient use of derivatives by registered funds and business development companies (herein, “**funds**”) and rationalize its regulatory framework. However, as we will note below, we encourage

¹ Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 850 member institutions from 67 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and depositories, as well as law firms, accounting firms and other service providers. Additional information on ISDA is available at www.isda.org.

² *Use of Derivatives by Registered Investment Companies and Business Development Companies*, 80 Fed. Reg. 80883 (Dec. 28, 2015).

³ As a result of ISDA’s role in the market, this comment letter focuses only on the derivatives provisions of the Proposal (and not the financial commitment provisions).

the SEC to avoid any approach that fails to take into account the important risk management and other functions for which funds use derivatives,⁴ and we encourage the SEC to avoid any rule framework that would disincentivize the responsible use of derivatives.

As discussed in more detail in this letter, we respectfully request that the Commission reconsider the Proposal in the following respects:

- The Commission should abandon those aspects of the proposal, such as the portfolio limits, that would impose arbitrary and rigid limits on the extent to which a fund may enter into derivative transactions, which could limit the effective use of derivatives by funds and would force funds with certain business models to stop operating as public funds altogether. The proposed portfolio limits represent a radical departure from 35 years of flexible, principles-based guidance, and the SEC has not identified any corresponding benefit or policy objective, or any particular problem or issue that needs to and would be addressed by the portfolio limits of the Proposal. Specifically, we recommend that the SEC strike or significantly amend the proposed portfolio limitations.
- To the extent any final rule is adopted, the Commission should adopt such rule as a non-exclusive safe harbor. A non-exclusive safe harbor would allow for an appropriate degree of flexibility with respect to funds and their use of a range of derivatives, while still allowing appropriate oversight and regulation of their use of such instruments.
- ISDA recommends that the Commission revise the proposal to reflect a flexible, principles-based framework that focuses on risk management practices and disclosure requirements. We believe that this approach is consistent with the Commission's jurisdictional authority.
- Lastly, the Commission should finalize and evaluate the impact of earlier rulemaking programs, namely Dodd-Frank Title VII⁵ swaps rules, prior to pursuing additional derivatives rules for funds.

⁴ For a detailed account of such uses of derivatives, *see* comment letter on the Proposal submitted by the Investment Company Institute ("ICI Letter"), at page 6, *available at* <http://www.sec.gov/comments/s7-24-15/s72415.shtml>.

⁵ *See* Title VII, Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010) and implementing regulations promulgated by the Commission, the Commodity Futures Trading Commission, and the U.S. Prudential Regulators.

I. The SEC should abandon those aspects of the proposal, such as the portfolio limits, that would impose arbitrary and rigid limits on the extent to which a fund may enter into derivative transactions, which could limit the effective use of derivatives by many funds and would force funds with certain business models to stop operating as public funds altogether.

The Proposal generally seeks to impose either exposure-based or risk-based portfolio limits on the extent to which a fund can enter into derivatives transactions as part of their investment programs. Under the exposure-based portfolio limit, a fund would be required to operate such that its overall exposure to (i) derivatives transactions, (ii) financial commitment transactions and (iii) other transactions involving senior securities entered into other than in reliance on Rule 18f-4, does not exceed 150% of its net assets, measured immediately after entering into any such transaction. The risk-based portfolio limit would allow a fund to obtain exposure of up to 300% of its net assets, provided it satisfies a value-at-risk (“VaR”) test designed to measure whether the fund’s derivatives transactions, in aggregate, have the effect of reducing the fund’s exposure to market risk.

The Commission acknowledges in the Proposal that the portfolio limits would almost certainly require a number of funds to leave the public market, without any identified benefits to the market, investor protection or overall financial stability. The Commission, in pursuing a regulatory program that would deprive the public market of these funds, some of which have been in business for many years, has not identified any harm for which it is trying to solve or benefit that it is seeking to provide. While the Commission’s Division of Economic and Risk Analysis (“DERA”) analysis estimates that approximately four percent of all funds sampled had aggregate exposure of 150% or more of net assets,⁶ we understand that the actual proportion of funds is materially larger.⁷ In light of these observations, we encourage the SEC to reconsider those aspects of the Proposal that would invalidate the business models of existing SEC-registered entities.

More generally, the SEC should ensure that the Proposal does not chill participation in the derivatives markets in the absence of any evidence of a compelling need for such a result and without providing any corresponding regulatory benefit or solving for a specifically articulated regulatory objective. ISDA strongly believes that derivatives are a vital component of risk management, hedging and investment strategies for funds, and, more importantly, that derivatives (and their availability to a wide range of market participants) are a vital component of deep, robust and healthy capital markets. If adopted as proposed, the rigidity of the artificial restrictions in the Proposal would severely adversely affect the investment flexibility of a large number of funds, which would deprive the investors in such funds of the benefits of valuable derivatives-based strategies, and would also result in a broader chilling of derivatives markets activity and in the development of new funds. This rigidity could also have a negative impact on

⁶ DERA White Paper, Figure 9.1.

⁷ See ICI Letter at page A-10.

liquidity in the derivatives market, and the Commission has not collected data to evaluate that risk. Therefore, we submit that the Commission should specifically reconsider the following overly prescriptive aspects of the Proposal:

- The Proposal does not differentiate between categories of derivatives, even though there is precedent for such differentiation in Title VII of Dodd-Frank and in other SEC regulations applicable to registered funds (*see, e.g.*, the Liquidity Risk Management proposal described below, which differentiates between more and less liquid OTC derivatives).⁸ In particular, different categories of derivatives may present significantly varied profiles in terms of tenor, liquidity of the underlying markets, risk exposure, how the derivatives are used in the funds' overall investment, risk management or funding strategies and various other factors. The Proposal is also overly focused on leveraging effects, and does not fully acknowledge that any one fund may use derivatives for more than one purpose (*i.e.*, certain derivatives may be used solely as a hedge of interest rate, foreign exchange, credit or other exposures obtained via other assets, while other derivatives may be properly used for yield enhancement, to adjust duration or other aspects of the portfolio design, or for a range of other portfolio management purposes), or how different uses of derivatives impact overall portfolios.⁹ We request that any final rules account for these differences.
- In addition, a gross "notional amount" assessment is not an effective or accurate metric for an exposure calculation.¹⁰ Among other things, notional amount does not differentiate between derivatives transactions based on different underlying assets or reflect the level of risk in a fund's derivatives portfolio and therefore does not appropriately measure (or even estimate) a funds' actual exposure under its derivatives transactions. The Commission itself acknowledges the shortcomings of using gross notional amounts in the Proposal.¹¹ We also suggest that there are other regulatory regimes currently in place that effectively regulate funds' derivatives use via methods other than a static notional amount calculation, and these regulatory programs do not produce the adverse consequences that the

⁸ See 80 Fed. Reg. at 62300.

⁹ For further analysis of funds' use of derivatives for non-speculative purposes, *see* the comment letter on the Proposal submitted by the Delta Strategy Group (the "Delta Strategy Letter"), at page 24, available at <http://www.sec.gov/comments/s7-24-15/s72415.shtml>.

¹⁰ For further discussion of the shortcomings of the gross notional metric, *see* Delta Strategy Letter at page 12.

¹¹ See 80 Fed. Reg. 80903.

Proposal would bring.¹² Similarly, a range of other regulatory initiatives that seek to address the level of risk exposure incurred by derivatives market participants, by reference to notional exposures or other measures, expressly exclude or exempt hedging positions from the relevant calculations.¹³ For the foregoing reasons, we request that, in any final rules, the Commission develop a metric for calculating exposure that accounts for different underlying assets and more accurately reflects the risk in a funds' derivatives portfolio.¹⁴

- ISDA strongly supports the allowance of netting in the Proposal's definition of "exposure." However, the definition provides for netting only of perfectly offsetting transactions,¹⁵ which is too narrow and does not reflect the effects of portfolio netting on actual exposure or portfolio netting practices performed by the risk management teams that actually manage a fund's exposures from an economic perspective.¹⁶
- The Proposal does not provide flexibility for funds to return to compliance if they temporarily exceed the rigid portfolio threshold limits (*i.e.*, 150% or 300%) due to market movements, fund redemptions, idiosyncratic events, or other reasons. We request that any final rules either provide for cure periods or flexibility to enter into transactions necessary to come back within limits.
- The Proposal's definition of "qualifying coverage assets" that may be used to "cover" derivatives exposure is too restrictive, consisting of cash and cash equivalents in most circumstances, notwithstanding that the Commission staff has permitted funds to cover with any liquid assets for the past 20 years.¹⁷ This definition should be rationalized and broadened to include additional types of assets, including, at a minimum, those categories of assets that may be posted as collateral under the margin requirements for uncleared swaps as adopted by both the U.S. Prudential

¹² See, *e.g.*, the netting and hedging exemptions applicable to funds and their derivatives use under the rules of the European Securities and Markets Authority and the capital and margin calculation requirements for registered swap dealers.

¹³ These include, for example, the test for determining whether an entity's swap exposure requires it to register as a major swap participant.

¹⁴ For additional explanation of these issues, see ICI Letter at page 39.

¹⁵ 80 Fed. Reg. 80995.

¹⁶ For an alternative approach to accounting for netting, see ICI Letter, at page 52.

¹⁷ Proposed Rule 18f-4(c)(8). See also Merrill Lynch Asset Management, L.P., SEC Staff No-Action Letter (July 2, 1996), available at <http://www.sec.gov/divisions/investment/imseniorsecurities/merrilllynch070196.pdf>.

Regulators¹⁸ and the Commodity Futures Trading Commission (“CFTC”).¹⁹ Even the SEC’s proposal relating to margin for uncleared swaps,²⁰ which is not yet finalized, would recognize a range of eligible collateral beyond the limited subset of cash and cash equivalents that are proposed to be included under the “qualifying coverage assets” definition. Aside from the approaches taken by the regulators with respect to margin, we note that requiring funds to utilize cash or cash equivalents only will restrict their flexibility by requiring the funds either to reduce the amount of cash available for investment or to liquidate other assets to generate cash at times when such action might be adverse to their interests. A broader set of “qualifying coverage assets” would allow funds more flexibility in “covering” their exposure, without a significant decrease in the quality of assets.

- ISDA strongly supports the Proposal’s allowance for netting of payment obligations in the calculation of exposure that funds must cover with “qualifying coverage assets.” However, the definition of “netting agreement” in the proposal is vague in that, unlike other regulatory definitions of “master netting agreements,” it does not clarify when parties must be able to net. Consistent with industry practice and other derivatives rulemakings (*e.g.*, capital and margin requirements in the United States) we request that any final rules expressly clarify that netting must be possible at close-out and therefore, “netting agreements” include ISDA Master Agreements and the relationships between central counterparties and funds for cleared derivatives transactions.²¹
- Under the Proposal, a fund that seeks to comply with the 300% risk-based portfolio limit would be required to demonstrate, through a VaR-based test, that its use of derivatives reduces the fund’s exposure to market risk,²² while a firm relying on the 150% exposure-based test is not subject to this requirement for any aspect of its derivatives portfolio. While VaR may be

¹⁸ The U.S. Prudential Regulators are the Office of the Comptroller of the Currency; the Board of Governors of the Federal Reserve System; the Federal Deposit Insurance Corporation; the Farm Credit Administration; and the Federal Housing Finance Agency.

¹⁹ See U.S. Prudential Regulators, *Margin and Capital Requirements for Covered Swap Entities*, 80 Fed. Reg. 74839 (Nov. 30, 2015); CFTC, *Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants*, 81 Fed. Reg. 635 (Jan. 6, 2016) (each listing ten categories of eligible collateral for initial margin).

²⁰ See SEC, *Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker-Dealers*, 77 Fed. Reg. 70214.

²¹ For additional explanation of these issues, see ICI Letter at page 13.

²² See proposed Rule 18f-4(a)(1).

a good measure of risk in many circumstances, to a risk manager, VaR is a system and one of many models and tools used as a guide to approximate risk. The system is run periodically (usually daily) to generate an approximate risk exposure. For purposes of showing that the use of derivatives reduces a fund's exposure to market risk, VaR is helpful but is not a sufficiently insightful measure of real risk and therefore it should not be the standalone risk measurement metric for this purpose. In ISDA's view, more flexibility should be afforded for registered funds to develop principles-based risk management and stress-testing measures that are tailored to their particular circumstances, provided that these measures are fully disclosed to investors.²³

As a result of the foregoing, ISDA recommends that the Commission strike the portfolio limitations or, at the very least, implement a more risk-sensitive and flexible approach that accounts for a fund's particular use of derivatives within its overall investment, risk management and funding strategies and the relevant market realities.

II. To the extent the Proposal is adopted, the SEC should frame the rule as a non-exclusive safe harbor, in order to allow for greater flexibility, while still providing appropriate oversight and regulation of funds' use of financial instruments.

As noted above, 35 years of practice has shown the usefulness of retaining flexibility in interpreting Section 18 (whether to address changes in investor preferences for financial products, developments in portfolio investment strategies, the identification of previously unseen market, economic and other risks (and opportunities) or changes in the derivatives markets responsive to the foregoing). Moreover, risk management practices have changed significantly over that period, and continue to evolve, including in response to the recent overhaul of derivatives regulation in the United States and globally, some of which is not yet fully implemented. It is important for any Commission rules regarding funds' use of derivatives to take such changes into account in order to accommodate further developments in this area and avoid adverse impacts on liquidity in the overall derivatives market.

There is useful SEC precedent for the successful implementation of non-exclusive safe harbor rules. Market participants have tended to operate within these safe harbors,²⁴ and having the latitude to deviate from the safe harbors has permitted the development of practices outside the safe harbors that are tailored to be consistent with regulatory and

²³ For an alternative approach, *see* ICI Letter, at page 57.

²⁴ *See, e.g.*, the safe harbor private offering exemption of Rule 506 of Regulation D, the safe harbor for issuer repurchases of Rule 10b-18 under the Securities Exchange Act and the safe harbor for offshore sales of equity securities of Regulation S.

public policy goals. As the Commission noted when originally adopting the safe harbor set forth in Rule 10b-18:

“The Commission wishes to stress, however, that the safe harbor is not mandatory nor the exclusive means of effecting issuer purchases without manipulating the market. As a safe harbor, new Rule 10b-18 will provide clarity and certainty for issuers and broker-dealers who assist issuers in their repurchase programs. If an issuer effects its repurchases in compliance with the conditions of the rule, it will avoid what might otherwise be substantial and unpredictable risks of liability under the general anti-manipulative provisions of the federal securities laws. . . .

[However,] the safe harbor is not the exclusive means by which issuers and their affiliated purchasers may effect purchases of the issuer's stock in the marketplace. Given the greatly varying characteristics of the markets for the stock of different issuers, there may be circumstances under which an issuer could effect repurchases outside of the guidelines that would not raise manipulative concerns. **This is especially the case in the context of the uniform volume guidelines, which cannot easily reflect those varying market characteristics.**”²⁵

Adopting the rules set forth in the Proposal (subject to the comments above regarding certain overly restrictive aspects of the Proposal) as a non-exclusive safe harbor would provide the market with the benefit of clarity and certainty without unduly limiting appropriate development of new products or implementation of appropriate hedging, risk management, funding and investment strategies, which is critical for end users, such as funds, as well as other market participants. These parties have relied on the depth and flexibility of the derivatives markets, which would be adversely affected if funds’ participation in such markets, and their ability to tailor their use of derivatives for hedging, risk management, funding and investment strategies, is limited by an inflexible final rule. If adopted as proposed, the comprehensive, uniform and rigid approach of the Proposal would impede the appropriate use of derivatives by large numbers of funds, would prevent many funds from continuing to pursue strategies that they have been using for the benefit of their investors for many years and could adversely affect liquidity in the overall derivatives market to the detriment of funds and other market participants.

III. ISDA recommends that the SEC revise the proposal to reflect a flexible, principles-based rule framework that focuses on risk management practices and disclosure requirements.

Section 18 of the Investment Company Act restricts funds from issuing or selling any “senior security,” defined (unless otherwise provided) to mean “any bond, debenture, note, or similar obligation or instrument constituting a security and evidencing

²⁵ 47 Fed.Reg. 53333, at 53334 (Nov. 26, 1982) (*emphasis added*).

indebtedness, and any stock of a class having priority over any other class as to distribution of assets or payment of dividends.”²⁶ The Commission states in the Proposal that “where the fund has entered into a derivatives transaction and has a future payment obligation—a conditional or unconditional contractual obligation to pay in the future — [the SEC] believe[s] that such a transaction involves an evidence of indebtedness that is a senior security for purposes of section 18.”²⁷ This assertion may be challenged, especially as to whether a bilateral executory contract constitutes a “security” within the meaning of Section 18. We do not believe that the benefits that the Commission may realize from a thoughtful approach to funds’ use of derivatives should be put at risk by an unnecessary and, depending on the outcome of the final rules, arguably overly expansive assertion of jurisdictional authority. Therefore, we encourage the SEC to ensure that any rulemakings addressing derivatives are supported by the purpose and intent of the underlying statutory language.

For example, in reviewing the SEC’s historical precedent in interpreting and applying Section 18, we observe that SEC Release 10666 did not unequivocally conclude that the instruments it covered (none of which were derivatives) were “senior securities.”²⁸ It stated only that such instruments shared some of the characteristics of senior securities or that they “may” involve the issuance of senior securities, and that, if a fund’s obligations relating to such instruments were “covered” by segregated assets, the SEC staff would not raise the issue of compliance with Section 18.²⁹ As a result, while arguably ambiguous, there was no legal determination that derivatives are “senior securities.” If the Commission elects to treat derivatives positions in a manner that parallels the treatment of other instruments that are senior securities, it should do so in a manner that is consistent with its historical regulatory approach, which has been tailored to embrace flexibility and promote the development of new products and risk management, hedging, funding and investing strategies. Markets and investors have benefitted from the variety of methods by which funds and advisers have sought to use various derivatives for hedging and monetization purposes without market disruptions or endemic losses among retail investment products. The current Proposal, which seeks to formalize and rationalize the regulation of the use of derivatives by funds, is an important and logical next step in this regulatory progression, but we caution that it must incorporate the same spirit of flexibility and principles-based regulation that has historically guided most of the SEC’s actions in this area.

²⁶ Section 18(g), Investment Company Act.

²⁷ 80 Fed. Reg. 80890.

²⁸ See Securities Trading Practices of Registered Investment Companies, Investment Company Act Release No. 10666 (Apr. 18, 1979).

²⁹ See 44 Fed. Reg. 25132.

IV. Procedurally, prior to pursuing additional derivatives rules for funds, the SEC should finalize and evaluate the impact of other derivatives rulemakings applicable to funds and the derivatives market generally, namely the Dodd-Frank Title VII swaps rules that have been or are being implemented by the Commission and other U.S. regulators.

We observe that the SEC continues to work diligently to finalize its Title VII security-based swaps rulemakings.³⁰ However, as SEC Commissioner Aguilar noted in September of 2015, “the presumptive regulatory regime for the [security-based swaps] market is still a work-in-progress.”³¹ While the SEC has made meaningful progress, we suggest that it is premature to introduce additional prescriptive limitations on funds’ use of derivatives without first completing the Title VII security-based swaps rules and observing the ramifications of those rules, along with the impact of multiple other Title VII regulatory programs (*e.g.*, the CFTC’s Title VII rulemakings and the U.S. Prudential Regulators’ margin rules), that impact the use of derivatives by funds.

In addition to the SEC’s Title VII rulemakings, numerous other reforms under Title VII and similar foreign regimes have been or will be implemented, including capital and margin requirements. These rulemakings will apply broadly to derivatives market participants including, in many instances (either directly or indirectly), funds and/or their counterparties. Therefore, we suggest that the Commission take additional time to assess the impact on funds of the full implementation of these broad market-wide reforms and the ramifications on the overall derivatives market prior to introducing additional prescriptive limitations on funds’ use of derivatives. In fact, certain of these rulemakings address the same concerns that the Commission is focused on under the Proposal. For example, the margin rules adopted by the U.S. Prudential Regulators and the CFTC are designed to reduce the exposure of market participants to derivatives by requiring collateralization of such exposure. We respectfully submit that the Commission should allow some time for consideration of the effects of these rules on the risk exposure of funds and other market participants prior to moving forward on the Proposal. The Commission itself acknowledges that it lacks sufficient information to understand fully the impact of risk-based limits in particular on funds’ use of derivatives.³² We believe

³⁰ See, *e.g.*, *Applications by Security-Based Swap Dealers or Major Security-Based Swap Participants for Statutorily Disqualified Associated Persons to Effect or Be Involved in Effecting Security-Based Swaps*, Exchange Act Release No. 75612 (Aug. 5, 2015); *Ownership Limitations and Governance Requirements for Security-Based Swap Clearing Agencies, Security-Based Swap Execution Facilities, and National Securities Exchanges with Respect to Security-Based Swaps under Regulation MC*, Exchange Act Release No. 63107 (Oct. 14, 2010); *Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants*, Exchange Act Release No. 64766 (June 29, 2011).

³¹ [Finishing the Work of Regulating Security-Based Derivatives](#), September 15, 2015.

³² See 80 Fed. Reg. 80923.

that such an understanding should be a first step to determining whether the limitations in the Proposal are necessary and, if they are, formulating appropriate limitations.

Similarly, we also note that the SEC is pursuing other proposals (*see, e.g.*, the Investment Company Reporting Modernization Proposal³³ and the Liquidity Risk Management Program Proposal³⁴) that parallel, to varying degrees, the policy objectives that are sought to be addressed by the Proposal. We suggest that the Commission evaluate more carefully (through further requests for public comment on rule program sequencing and timing, public roundtables or otherwise) whether it is more appropriate to first finalize these efforts, and incorporate the lessons learned, prior to focusing specifically on derivatives. That is, ISDA shares Commissioner Piwowar's concerns, expressed in the Commission's meeting, that the Proposal is premature and would benefit from the completion of and experience gained under the other rulemakings, especially in light of the Commission's failure to identify in this proposal the problems sought to be solved or the benefits sought to be achieved.³⁵

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ISDA appreciates the opportunity to provide these comments. If we may provide further information, please do not hesitate to contact the undersigned or ISDA staff.

Sincerely,



Steven Kennedy
Global Head of Public Policy

cc: Securities and Exchange Commission
Adam Bolter, Jamie Lynn Walter, and Erin C. Loomis, Senior Counsels;
Thoreau A. Bartmann, Branch Chief;
Brian McLaughlin Johnson, Senior Special Counsel;
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³³ 80 Fed. Reg. 33589.

³⁴ 80 Fed. Reg. 62274.

³⁵ See [Dissenting Statement at Open Meeting on Use of Derivatives by Registered Investment Companies and Business Development Companies](#), December 11, 2015.