



AMERICAN BENEFITS  
COUNCIL

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*Submitted via regulations.gov*

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Commodity Futures Trading Commission  
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Elizabeth M. Murphy  
Secretary  
Securities and Exchange Commission  
100 F St., NE  
Washington, DC 20549-1090

**Re: Stable Value Contract Study  
SEC File Number S7-32-11**

Dear Ms. Warfield and Ms. Murphy:

I am writing today on behalf of the American Benefits Council (the "Council") with respect to (1) the study required by section 719(d) of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") regarding stable value contracts and (2) the request for comment issued by the Commodity Futures Trading Commission and the Securities and Exchange Commission in connection with such study (collectively referred to as the "Commissions").

**We write to reemphasize the continued importance stable value contracts have with respect to our country's retirement security and reiterate that these contracts are not swaps. We also emphasize that this is the best approach because the use of exemptive authority to relieve stable value contracts of the burdens of swap regulation, while a reasonable second-best solution, could have unintended consequences.**

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

Under the Dodd-Frank Act, the Commissions are to conduct a joint study to determine (1) whether stable value contracts fall within the definition of a swap under the Dodd-Frank Act, and (2) if so, whether an exemption from such definition is appropriate and in the public interest. On September 26, 2011, the Council submitted a comment letter in response to the Commissions' initial request<sup>1</sup> for comment. In that letter, we explained that:

- Stable value contracts are a critical component of our country's 401(k) and other defined contribution plans, and these products fulfilled their economic and contractual obligations throughout the crisis.
- The financial institutions that issue stable value contracts (as defined for purposes of the study) are already subject to significant regulatory oversight. Application of the swap regulatory regime to stable value contracts could make the applicable costs prohibitive, thus undercutting their value to participants and perhaps eliminating their viability.
- Congress did not evidence any intent to treat stable value contracts as swaps.

As noted in the Commissions' recent extension of the comment period for the study<sup>2</sup>, at the time of the Commissions' initial request for comment, proposed regulations defining the terms "swap" and "security-based swap" were pending final adoption.

**Stable value contracts support an extremely popular, conservative investment option under qualified defined contribution plans, such as 401(k) plans.** According to a recent survey, there are \$645.6 billion in stable value fund assets as of December 31, 2011.<sup>3</sup> In fact, we understand from our members that in many plans, the stable value fund is the largest single fund, particularly in mature plans with a large retiree population. The popularity of the stable value option is attributable to two key factors. First, principal is preserved under stable value contracts, providing critical protection against the daily fluctuations that occur in the equity and bond markets. Second, stable

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<sup>1</sup> See Letter of the Council, dated September 26, 2011, available at <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=48389&SearchText=>.

<sup>2</sup> Acceptance of Public Submissions Regarding the Study of Stable Value Contracts, 77 Fed. Reg. 60,113 (Oct. 2, 2012).

<sup>3</sup> See Gina Mitchell, *Stable Value Investment and Policy Survey Covers \$645.6 Billion in Assets*, SVIA Stable Times, Vol. 16, Issue 1 (2012), <http://stablevalue.org/wp-content/uploads/2012/06/First-Half-2012-Stable-Times-Vol-16.pdf>. According to another survey, in defined contribution plans in 2011, stable value funds, along with guaranteed investment contracts, attracted approximately \$1.35 billion in inflows, up from \$355 million in 2010. See Darla Mercado, *Updated Stable Value Funds Making a Comeback*, Pensions & Investments (March 12, 2012), <http://www.pionline.com/article/20120312/REG/120309922> (citing Aon Hewitt data).

value contracts can offer participants a relatively higher yield because they can focus on fixed income securities with a longer term than other investments. This higher yield makes stable value contracts very appealing and valuable to participants.

The above features of stable value contracts have made them especially attractive (1) to risk-averse participants, such as retirees and near-retirees who have shorter investment horizons and cannot ride out fluctuations in the market<sup>4</sup>, and (2) as a component of any portfolio, offering diversification for participants who have substantial exposure to the equity and/or bond markets. In fact, many retirees find stable value funds especially helpful because the predictable and substantial income can be matched up with fixed monthly expenses. Losing this secure source of funds to pay such expenses would be extremely disruptive for retirees.<sup>5</sup>

**Application of the definition of a swap to stable value contracts.** In the Council's initial comment letter, we noted that General Account Contracts, Separate Account Contracts, and Traditional GICs clearly do not fall within even the broadest definition of a swap.<sup>6</sup> Such contracts are simply standard insurance contract payment promises, i.e., promises to pay backed by a regulated insurance company. Synthetic Wrap Contracts and Synthetic GICs (together referred to as "Synthetic Contracts"), on the other hand, could, on a very literal basis, fit within the statutory definition of swap.<sup>7</sup> Under a Synthetic Contract, a payment could be triggered by a financial contingency – generally, the liability of a Plan to make distributions at book value (i.e., distributions of principal and accumulated interest) from the Plan's stable value subaccount, in conditions specified by the contract.

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<sup>4</sup> See *Plan Asset Allocation, Account Balances, and Loan Activity in 2010*, Investment Company Institute, Vol. 17, No. 10 (December 2011), <http://www.ici.org/pdf/per17-10.pdf> (finding that individuals in their 60s allocated 16.5% of their account balance to stable value funds).

<sup>5</sup> Stable value funds are generally not available outside the plan context because of securities law requirements.

<sup>6</sup> Please see our September 26, 2011 letter, for a definition of the five main types of stable value products: synthetic wrap contracts, general account contracts, separate account contracts, guaranteed investment contracts ("GICs"), and synthetic GICs.

<sup>7</sup> Section 1a(47)(A)(ii) of the Commodity Exchange Act, 7 U.S.C. 1a(47)(A)(ii) states that –

Except as provided in subparagraph (B), the term "swap" means 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, nonoccurrence, or the extent of the occurrence of an event or a contingency associated with a potential financial, economic, or commercial consequence....

**The Commissions’ final regulations defining swaps reiterate Congress’ intent to exclude insurance products from the definition of swap.** In the preamble to their final regulations regarding the definition of a swap, the Commissions reiterated that the inclusion of insurance products in the broad definition of swap would be inconsistent with Congressional intent because –

- Insurance companies are heavily regulated;
- There is no evidence that the Dodd-Frank Act intended to interfere with these existing regulatory systems; and
- Insurance contracts have never been thought of as swaps, and in the absence of Congressional intent to treat them as such, the Commission did not propose to do so.

The same analysis is applicable to all stable value contracts. By definition, all Synthetic Contracts that are subject to the study are issued by a “bank, insurance company, or other State or federally regulated financial institution.” Thus, all Synthetic Contracts subject to the study are issued by a regulated entity. Moreover, there is no evidence that Congress intended to interfere with the existing regulatory system in light of the fact that stable value contracts have never been thought of as swaps.

**The rationale behind the “Product Test” for insurance products in the final regulations supports excluding Synthetic Contracts from the definition of swap.** In our prior letter, we pointed out that the proposed regulations supported our position, and the final regulations made no changes that call that into question. The preamble to the final regulations state that “[t]he Commissions do not interpret this clause to mean that products historically treated as insurance products should be included within the swap or security-based swap definition.”<sup>8</sup> Although the final regulations continue to defer to this instant study, Synthetic Contracts fit conceptually within what the final regulations call the “Product Test”:

- The Plan has an insurable interest and a risk of loss, i.e., a decline in the value of the securities under conditions specified in the contract (*see, e.g.*, Reg. § 1.3(xxx)(4)(i)(A)(1));

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<sup>8</sup> *See* Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 Fed. Reg. 48,208, 48,212 (August 13, 2012).

- In order to collect on the Synthetic Contract, the Plan must incur that loss and prove it (*see, e.g.*, Reg. § 1.3(xxx)(4)(i)(A)(2));
- Synthetic Contracts are not traded on an organized market or over-the-counter, and, in fact cannot even be assigned (*see, e.g.*, Reg. § 1.3(xxx)(4)(i)(A)(3)); and
- Synthetic Contracts subject to the study are only provided by regulated companies. (*see, e.g.*, Reg. § 1.3(xxx)(4)(i)(B)). Insurance companies and banking institutions are regulated entities. Likewise, defined contribution plans that acquire or participate in stable value funds are regulated by ERISA's fiduciary standard of care when entering into the contract and by significant disclosure rules. Governmental plans exempt from ERISA are subject to state laws that impose their own standards, which may be similar to ERISA.

**The Commissions should conclude that stable value contracts are not swaps rather than the Commissions using their exemptive authority to relieve stable value contracts from swap regulation.** If the Commissions nonetheless determine that Synthetic Contracts are swaps or security-based swaps at least under certain circumstances, we urge the Commissions to use their authority to exempt such Contracts from the definition of a swap or security-based swap, again for the reasons stated above. But for the reasons set forth in this and our previous comment letter, we strongly believe that stable value contracts are not swaps, and prefer that result to the exemption approach.

We fear that any treatment of stable value contracts as swaps could have consequences in other areas despite the Commissions having exercised their exemptive authority. For example, current or future legislation or regulation at the Federal or State level could simply cross reference the definition of a swap in the Dodd-Frank Act. If the Commissions use their exemptive authority, there would be at the least substantial uncertainty as to whether stable value contracts are picked up by such cross references. The 401(k) and similar defined contribution plans across the country and the participants they benefit do not need that type of uncertainty and the costs that flow from such uncertainty.

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We urge the Commissions to clarify that stable value contracts are not swaps or security-based swaps for the reasons discussed above and in our prior submission.

Thank you for your consideration of our views.

Sincerely,

A handwritten signature in black ink, appearing to read "Jan Jacobson". The signature is fluid and cursive, with the first name "Jan" being more prominent and the last name "Jacobson" following in a similar style.

Jan Jacobson  
Senior Counsel, Retirement Policy