MEMO# 25434

August 25, 2011

CFTC and SEC Seek Comment on Whether Stable Value Contracts are Swaps

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TO: CLOSED-END INVESTMENT COMPANY COMMITTEE No. 42-11
DERIVATIVES MARKETS ADVISORY COMMITTEE No. 34-11
PENSION COMMITTEE No. 26-11
PENSION OPERATIONS ADVISORY COMMITTEE No. 20-11
SEC RULES COMMITTEE No. 73-11
SMALL FUNDS COMMITTEE No. 33-11 RE: CFTC AND SEC SEEK COMMENT ON WHETHER STABLE VALUE CONTRACTS ARE SWAPS

The Commodity Futures Trading Commission and the Securities and Exchange Commission (together, “Commissions”) have published a request for comment regarding stable value contracts (“SVCs”). [*] Pursuant to Section 719(d) of the Dodd-Frank Act, the Commissions must jointly conduct a study to determine whether SVCs fall within the definition of a swap and, if so, whether an exemption for SVCs from the definition of a swap is appropriate and in the public interest. Until the effective date of any regulations enacted based on the Commissions’ study, the swap provisions in the Dodd-Frank Act will not apply to SVCs.

In the request for comment, the Commissions first set forth the definition of SVC from the Dodd Frank Act.

> Stable Value Contract – 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). (Section 719(d)(2) of the Dodd-Frank Act)

The Commissions' staffs then state their understanding that stable value funds ("SVFs") are "a type of investment commonly offered through 401(k) and other defined contribution plans with the objective of providing preservation of principal, liquidity, and current income at levels that are typically higher than those provided by money market funds." The staffs further state their understating that SVCs are components of SVFs that SVF sponsors or managers purchase from SVC providers that provide a guarantee to pay plan participants at "book value." Based on these understandings, the Commissions ask a series of questions related to whether SVCs would or should fall within the definition of a swap and what beneficial or adverse regulatory or legal consequences could result from their classification as, or exemption from the definition of, a swap.

The Commissions also seek general information regarding the structure, operation and use of SVCs and SVFs, including whether these financial products have been affected by the recent financial crisis and whether they pose systemic risk concerns. The Commissions ask questions regarding the current regulatory regime for SVCs and SVFs, exploring the current disclosure requirements and the financial and other protections for plan participants. Finally, the Commissions inquire about compliance issues that would need to be considered if the Commissions were to determine that SVCs were swaps.

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endnotes

[*] See Acceptance of Public Submissions Regarding the Study of Stable Value Contracts, SEC Release No. 34-65153 (August 18, 2011), available at http://www.sec.gov/rules/other/2011/34-65153.pdf. Comments are due to the Commissions thirty days after the request for comment is published in the Federal Register.