デリバティブ取引の投資勧誘規制【米国】

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詐欺行為禁止規定

- 1933年証券法17条（a）項（１）～（３）
  - （１）違反はscienterが要件となるが、（２）（３）違反はnegligenceで足りる。
    - *See* Aaron v. SEC, 446 U.S. 680 (1980)（文言上、17条（a）（１）は行為者の意図的な行為を問題視しているが、同（２）は行為者の行為の効果を問題視していることを指摘する）.
  - 投資者は、同項違反を根拠にbroker-dealerに損害賠償請求できない。

- 1934年証券取引所法10条（b）項並びに同法規則10b-5
  - Scienterが要件
  - 投資者は、規定違反を根拠にしてbroker-dealer（被告）に損害賠償請求することができる。その際に原告が立証責任を負う要件は以下のように整理されている。
    - ①被告が、原告が有価証券を取得又は売却するのと関連して、重要な事実について誤解を招く開示をしたか開示自体を行わなかったこと
    - ②被告が①の行為を行ったことについてscienterがあること
    - ③原告が被告によってなされた不実の情報開示又は情報の不開示を信頼することが合理的であること
    - ④投資者が③の信頼をしたことによって損害を被ったこと

詐欺行為禁止規定から導かれるbroker-dealerの義務

- 重要な情報の開示義務

- Suitability（適合性考慮義務）
  - 我が国における広義の適合性原則に相当？
  - Broker-dealerが顧客に対して有価証券の取引を推奨する(recommend)際には、顧客の経済状態、投資目的並びにリスク許容度に適合した（suitable）取引のみを推奨する義務を負う。
  - 投資者が適合性考慮義務違反を根拠に損害賠償請求をする際には、3頁の①～④の要件を立証することが必要となる。
    - *See* Banca Cremi, S.A. v. Alex. Brown & Sons, Inc., 132 F.3d 1017 (4th Cir. 1997)
    - ①の要件は、「推奨された取引が顧客に適合していないこと」と解釈される場合が多い。

FINRAの自主規制

- FINRA Rules 2111の適合性考慮義務
  - Reasonable-basis suitability（合理的根拠適合性）
  - Customer-specific suitability（特定顧客適合性）
  - Quantitative suitability（量的適合性）

- 適合性考慮義務の対象
  - Broker-dealerが推奨行為（recommendation）を行う場合に及ぶ。
    - FINRA Rulesに定義なし
    - 推奨行為に該当するか否かは、broker-dealerから顧客へのコミュニケーションが、合理的に考えて、ある行為を顧客が採る又は差し控えることの提案と評価できるかという点を客観的に審査することを通じて判断される。
  - 特定顧客適合性を除き、機関投資家を含む全ての投資家に等しく及ぶ。
    - FINRA Rules 2111(2)
  - 適合性考慮義務を顧客との契約等によって排除することは許されない。
    - FINRA Rules 2111.02

FINRA Rule 2111

- Reasonable-basis suitability（合理的根拠適合性）
  - 推奨行為を行うに際して、合理的な調査に基づき（based on reasonable diligence）、推奨行為の対象となる有価証券や投資戦略が少なくともある投資者（some investors）には適合していると信じることができる合理的な根拠を得ておくこと。
  - 要求される合理的な調査の内容は、推奨行為の対象となる有価証券や投資戦略の複雑さやリスクの程度並びにbroker-dealer及びその販売員のそれらに精通している程度によって決まる。
  - 合理的な調査の結果、broker-dealer及びその販売員等は推奨行為の対象となる有価証券や投資戦略の潜在的なリスクとリターンを理解できるようにならなければならない。推奨行為を行う際に、そのような理解が欠けている場合には、適合性に関する規則に違反していることになる。

FINRA Rule 2111

- Customer-specific suitability（特定顧客適合性）
  - Broker-dealer及びその販売員等は、投資目的やリスク許容度などの個々の投資者の属性に従い、推奨行為を行うとする特定の顧客に適合した推奨行為が行われていると信じるに足る程度の合理的な根拠を有していなければならない。
  - 機関投資家については特段の定めあり（FINRA Rule 2111(2)）

- Quantitative suitability（量的適合性）
  - 顧客の口座をコントロールできるbroker-dealerについては、個々の取引が顧客に適合しているか否かだけではなく、推奨しようとする一連の取引が全体として過剰ではなくかつ顧客に適合していること

FINRA Rulesのエンフォースメント

- FINRA Rulesを含むSROs（*Self Regulatory Organizations*）の規則違反自体を根拠として、投資者が損害賠償請求することはできない。
  - ただし、SROsの規則違反はscienterとの関連で考慮されている。

- FINRA RULE 2111に違反したbroker-dealerは、FINRAによる制裁の対象となる。
  - 詐欺行為禁止規定の場合と異なり、scienterは要求されていない。
  - FINRAが課すことができる制裁は、FINRA RULE 8310. Sanctions for Violation of the Rulesにおいて定められている通り、多様である。

２．デリバティブ取引の投資勧誘規制の構造

- デリバティブ取引が「有価証券（security)」に該当する場合には、連邦証券規制における投資勧誘規制の対象となる。
  - Dodd-Frank法の前後で、連邦証券規制の対象となるデリバティブ取引の範囲（特にスワップ取引に関する規制）が大きく変化した。

- Dodd-Frank法の前後で変化がない事項
  - 個別株又は株式インデックスを原資産とするオプションは有価証券に該当する。
  - 個別株又は株式インデックスの先物取引は証券規制ではなく商品先物取引の規制対象。
    - 商品先物取引制の対象となる場合には、商品取引所法 (Commodity Exchange Act)の下でCFTC (Commodity Futures Trading Commission)の監督に服する。また、デリバティブ取引を投資者に勧誘する業者は自主規制機関であるNFA (National Futures Association)による規制の対象となる。

Dodd-Frank法以前のスワップ取引に関する規制

- 連邦証券規制の適用
  - 「有価証券関連スワップ取引」（security-based swap agreements）と「有価証券関連以外のスワップ取引」（non security-based swap agreements）は、連邦証券規制における有価証券（security）から除外されていた。
  - 有価証券関連スワップ取引に限り、詐欺行為禁止規定の対象とされていた。

- スワップ取引の定義
  - Gramm-Leach-Bliley Act § 206(b)
  - 「スワップ契約とは、全体または一部が、一つのもしくは複数の商品、証券、通貨、金利またはその他のレート、指数あるいはその他の資産の価値、所有権、またはこれらの数量もしくはこれらに関連するイベントの発生に基づいて、あらゆる個別に交渉される契約、合意、保証 (warrant) 、手形 (note) 、あるいはオプション (option) を指す。ただし個別銀行商品（銀行口座、信用状、クレジットカード契約、銀行ローン等）は含まない」（三菱UFJリサーチ＆コンサルティング「諸外国の金融制度の概要〈米国、英国、シンガポール、香港、中国〉」（2010年3月）（*available at* http://www.fsa.go.jp/news/21/sonota/20100624-1/01.pdf）1頁）

Dodd-Frank法以前のスワップ取引に関する規制

- 商品先物取引規制の適用
  - 連邦証券規制が適用されないスワップ取引は商品先物取引規制の対象
  - Eligible contract participants (ECPs)の間でなされる相対取引(over-the-counter derivatives. OTCデリバティブ取引)のほとんどは、詐欺行為禁止規定（Dodd-Frank法による改正前の商品取引所法4b条）を含め、CFTCの規制対象から除外されていた。
    - ECPsは、銀行、保険会社、投資会社などいわゆるプロ投資家（sophisticated participants）を指す。
      - 総資産が1000万ドルを超える会社や個人も含まれる。
    - スワップ取引を対象とした広範な適用除外規定あり
      - 「有価証券関連以外のスワップ取引」（non security-based swap agreements）は、農産物を参照資産とする者を除き、適用除外の対象とされていた。
  - “[W]hen a transaction is properly formulated as a swap between eligible participants, CFTC has no residual or reserved jurisdiction.” (PHILIP MCBRIDE JOHNSON & THOMAS LEE HAZEN, DERIVATIVES REGULATION § 1.02[2][C](2004))

Dodd-Frank法以前のスワップ取引に関する規制

- Common Lawに基づく投資家の損害賠償請求
  - 商品先物取引規制によって制限されない。
  - 問題
    - 情報開示義務（積極的な助言義務又は適合性考慮義務など）の根拠
    - 「信頼」要件と顧客の専門知識
    - 各種のdisclaimersの存在

- 情報開示義務の根拠
  - 信認関係が存在する場合、brokerは顧客に対して、顧客に適合しない商品を推奨しない義務を負うという点で各州法の解釈は一致しているとの指摘がある（ALAN N. RECHTSCHAFFEN, CAPITAL MARKETS, DERIVATIVES AND THE LAW, 248 (OXFORD UNIVERSITY PRESS, 2009)）。
  - ただし、ある程度の専門知識を有するものの間で信認関係を認めることに慎重な立場が有力であるように思われる。
  - Ex. Procter & Gamble Co. v. Bankers Trust Co., 925 F. Supp. 1270, 1289 (S.D.Ohio. 1996)
    - “New York law is clear that a fiduciary relationship exists from the assumption of control and responsibility and is founded upon trust reposed by one party in the integrity and fidelity of another. No fiduciary relationship exists ... [where] the two parties were acting and contracting at arm's length. Moreover, courts have rejected the proposition that a fiduciary relationship can arise between parties to a business relationship.”

Dodd-Frank法以前のスワップ取引に関する規制

- 「信頼」要件と顧客の専門知識
  - Common Law上のfraudを根拠に投資家が損害賠償請求する場合には、「信頼」要件の充足が問題となる。
  - 顧客に専門知識があり商品のリスクを自ら理解している場合には、それに反する推奨行為を信頼することは正当ではなく、「信頼」要件を欠くと判断される可能性がある。
    - Ex. Banca Cremi, S.A. v. Alex. Brown & Sons, Inc., 132 F.3d 1017, 1038-39 (4th Cir. 1997).
  - 連邦証券規制の詐欺行為禁止規定を根拠とする場合も同様の問題あり（後述）

- 各種のdisclaimersの存在
  - MBIA Ins. Corp. v Merrill Lynch, 27 Misc.3d 1233(A), (N.Y.Sup. 2010
    - Ex. “[The investor] is not relying on any advice, statements or recommendations (whether written or oral) of the other party regarding the Transaction. other than the written representation expressly made by that other party in this Agreement and in the Confirmation.”
  - 「信頼」要件に対する影響は？

Dodd-Frank法以降のスワップ取引に関する規制

- 有価証券関連スワップ（security-based swaps）は、証券取引所法上の有価証券に含まれることとされた。
  - Securities Act of 1933 § 2(a)(1), 15 U.S.C.A. § 77b (a)(1); Securities Exchange Act of 1934 § 3(a)(10), 15 U.S.C.A. § 78c(a)(10).
  - 有価証券関連スワップの「取得（”purchase”）」と「売却 (sale)」について、特則あり
    - Securities Act of 1933 § 2(a)(18), 15 U.S.C.A. § 77b (a)(18)

- 有価証券関連スワップの定義
  - Securities Exchange Act of 1934 § 3(a)(68), 15 U.S.C.A. § 78c(a)(68).
  - 商品取引所法第1a条(47)の「『スワップ』となる合意、または取引であり、次に該当するものを指す。
  - (i) 主として限定的な有価証券指数 (narrow-based security index) に基づくもの（そこからの利払いによるものや、それ自体の価値に基づくものを含む）
  - (ii) 主として単一銘柄の有価証券や貸付契約に基づくもの（そこからの利払いによるものや、それ自体の価値に基づくものを含む）
  - (iii) 主として、有価証券（単一銘柄）の発行者や限定的な有価証券指数を構成する銘柄の各発行者に関連するイベント（発行者の財務報告書、財務状況、または債務状況に直接的に影響するものに限る）の発生、非発生、発生の程度に基づくもの」（三菱UFJリサーチ＆コンサルティング「諸外国の金融制度の概要〈米国、英国、シンガポール、香港、中国〉」（2010年3月）（available at http://www.fsa.go.jp/news/21/sonota/20100624-1/01.pdf）2頁）

Dodd-Frank法以降のスワップ取引に関する規制

- 基本的に、有価証券関連スワップはSECの管轄に、有価証券関連スワップ以外のスワップはCFTCの管轄とされている。
  - デリバティブ・ディーラー（security-based swap dealer; registered swap dealer）と主要デリバティブ参加者（major security-based swap participant; major swap participant）に関する規制
  - Security-based swap agreement
    - CFTCの管轄であるが、連邦証券規制の詐欺行為禁止規定の対象にもなる。
    - 限定的ではない有価証券指数（”broad-based security indexes）やU.S. Treasury bondsなど1934年証券法の適用から除外される有価証券（exempted security）に基づくスワップなど。

- デリバティブ・ディーラー
  - ①自らをデリバティブにおけるディーラーとして示す者
  - ②デリバティブのマーケット・メイクを行う者
  - ③その通常の事業として自己の計算でカウンターパーティとの間で定期的にデリバティブを締結している者
  - ④デリバティブにおけるディーラーまたはマーケット・メイカーとして取引において一般的に知られることになる業務を行っている者
- 主要デリバティブ参加者
  - デリバティブ・ディーラーではないが、ある主要な類型のデリバティブについて”substantial position”を持つ者など。

Dodd-Frank法以降のスワップ取引に関する規制

- デリバティブ・ディーラーと主要デリバティブ参加者は、CFTC又はSECが規則で定める業務行為基準（business conduct standard）の遵守義務を負う。
  - 業務行為基準として定めなければならない事項について、1934年証券取引所法と商品取引所法は同様の内容を定めている。
  - Securities Exchange Act of 1934 § 15F(h), 15 U.S.C.A. § 78o-10(h); Commodity Exchange Act § 4s(h), 7 U.S.C.A. § 6s(h).

- 業務行為基準に関する規則制定の状況
  - CFTCの規則（13 CFR 23.400-）は2012年2月27日に最終決定されている。
    - Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties, 77 Fed. Reg. 9734 (Feb. 17, 2012).
  - SECによる規則は、2011年6月29日に規則案が提案されたが最終的な決定は未だなされていないようである。
    - https://www.sec.gov/spotlight/dodd-frank/derivatives.shtml

§ 23.410 Prohibition on fraud, manipulation and other abusive practices (a)(b).

- Commodity Exchange Act § 4s(h)(4)(A)(iii)に対応

- デリバティブ・ディーラーと主要デリバティブ参加者を対象とした一般的な詐欺行為禁止規定（(a)項(3)）
  - 規定違反の要件としてscienterを要しないことを前提として提案された。
  - 商品取引規制の一般的な詐欺行為禁止規定も適用される（Commodity Exchange Act § 4b, 6(c)(1) and (3), and 9(a)(2) , 7 U.S.C.A. § 6b, 9(c)(1) and (3), and 13(a)(2)）。

- （CFTCから）規定違反を主張されたデリバティブ・ディーラーは、以下の点の双方を反証することで責任を免れる（(b)項）。
  - Scienterの不存在
  - 内部手続きの遵守

§ 23.431 Disclosures of material information

- Commodity Exchange Act § 4s(h)(3)(B)に対応
  - デリバティブ・ディーラーと主要デリバティブ参加者間の取引は対象外
  - OTCデリバティブを主たる対象とする規制（(c)項）

- デリバティブ・ディーラーと主要デリバティブ参加者の相手方が、自分が引き受けるリスクの内容を正確に評価できるようにすることを目的とした規制
  - 取引開始前 (At a reasonably sufficient time prior to entering into a swap…)に開示義務が発生することが明示されている。

- 利益相反の存在に加えて、一定の範囲で、スワップ取引の時価（mid-market mark）の開示や将来情報の分析（scenario analysis）の提供も求められている。

§ 23.434 Recommendations to counterparties—institutional suitability.

- CFTCが、Commodity Exchange Act § 4s(h)(3)(D)に基づく裁量的権限を行使して制定した規定
- デリバティブ・ディーラー又は主要デリバティブ参加者間への推奨行為は対象外
- 内容
  - General suitability ((a)項(1))
    - 推奨しようとするスワップ取引のリスクとリターンを理解するために合理的な調査を行う義務
    - プロ投資家向けの特則（(b)(1)~(3)）
  - specific suitability ((a)項(2))
    - 合理的な根拠を持って相手方に適合するスワップ取引を推奨する義務
  - 推奨行為（recommendatio）についてガイダンスあり（17 CFR Pt. 23, Subpt. H, App. A）

§ 23.434 Recommendations to counterparties—institutional suitability.

- FINRA Rule 2011との共通性
  - General suitability = Reasonable-basis suitability（合理的根拠適合性）
  - Specific suitability = Customer-specific suitability（特定顧客適合性）
- “[I]n proposing § 23.434, the Commission considered that a suitability obligation is a common requirement for professionals in other markets and in other jurisdictions, including the banking and securities markets. Thus, to promote regulatory consistency, the Commission proposed to adopt a suitability obligation for swap dealers and major swap participants, modeled, in part, on existing obligations for banks and broker-dealers dealing with institutional clients.” (77 Fed. Reg. 9770)

その他

- Securities Exchange Act of 1934 § 9(j), 15 U.S.C.A. 15 U.S.C.A. § 78i(j)
  - 有価証券関連スワップの取引を対象とした詐欺行為禁止規定
  - SECは、スワップ契約締結後に当事者間で継続的になされる金銭の受渡し等に関連する詐欺的行為の規制を対象とした規則を提案済。
  - ただし、現時点で最終決定には至っていない模様
    - https://www.sec.gov/spotlight/dodd-frank/derivatives.shtml

- デリバティブ・ディーラーや主要デリバティブ参加者に関するSECの規則が未制定でも、「有価証券（security）」であるスワップ取引は1933年証券法17条（a）項（1）～（3）や1934年証券取引所法10条（b）項並びに同法規則10b-5の対象となる。

３．投資勧誘規制の意義と限界

- デリバティブ取引の投資勧誘における被勧誘者
  - 個人投資家というよりも、金融取引に関してある程度の専門知識を有する投資者（以下「プロ投資家」）ではないか？
  - いわゆるOTCデリバティブ取引の参加者は、“eligible contract participant” (ECP)に限られる。
    - Securities Exchange Act of 1934 § 6(l), 15 U.S.C.A. § 78f(l) ; Commodity Exchange Act § 2(e), 7 U.S.C.A. 2(e).
- プロ投資家とデリバティブ・ディーラーの関係
  - 伝統的に独立当事者間取引に相当すると考えられてきた。
  - 業務行為基準は、プロ投資家とデリバティブ・ディーラーの関係を信認関係にするのではとの実務家らの懸念あり
    - CFTCは、そのような意図を明示的に否定している（77 Fed. Reg. 9759）。
  - ただし、独立当事者間取引か信認関係かとは別に、broker-dealerの顧客に対する義務を強化する動きがある。

３．投資勧誘規制の意義と限界

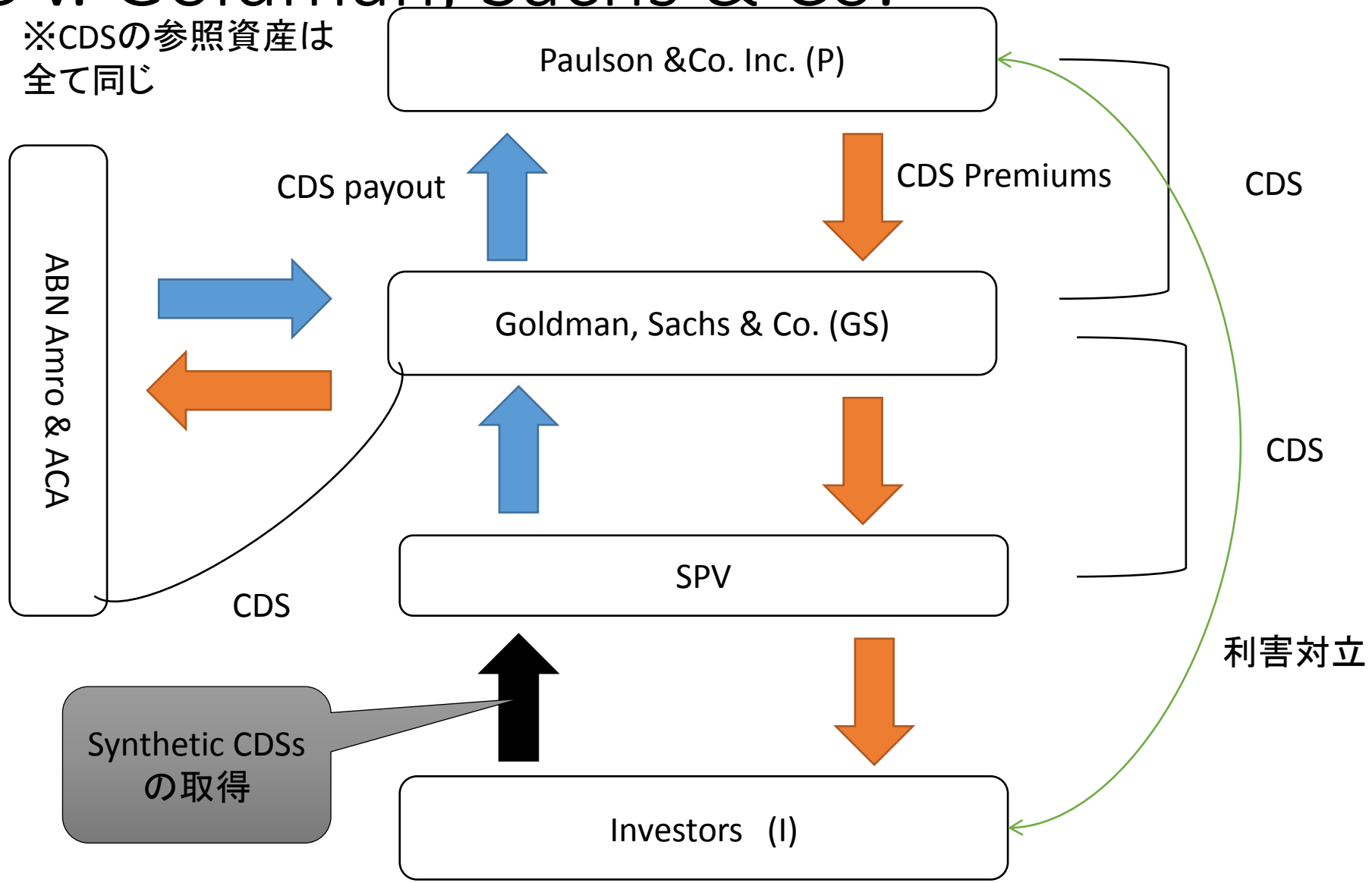
- SEC, STUDY ON INVESTMENT ADVISERS AND BROKER-DEALERS, AS REQUIRED BY SECTION 913 OF THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT (JANUARY 2011).
  - broker-dealerは一般顧客（retail investors）に助言を行う際にinvestment adviserと同様の信認義務を負うべき。
  - 報告書では、一般顧客以外に信認義務による保護の対象を広げることにも興味が示されている。

- FINRA Regulatory Notice 12-25, Suitability, Additional Guidance on *FINRA's New Suitability Rule* (May 2012)
  - FINRA Rule 2111により、Broker-dealerは顧客の最大の利益に適うように推奨行為を行うこと（顧客の利益よりも自分の利益を優先してはならないこと）が義務づけられている。
  - Brokerが顧客の適合性に合致しているか否かよりも高い手数料を得ることができるか否かを重視することが問題視されている。

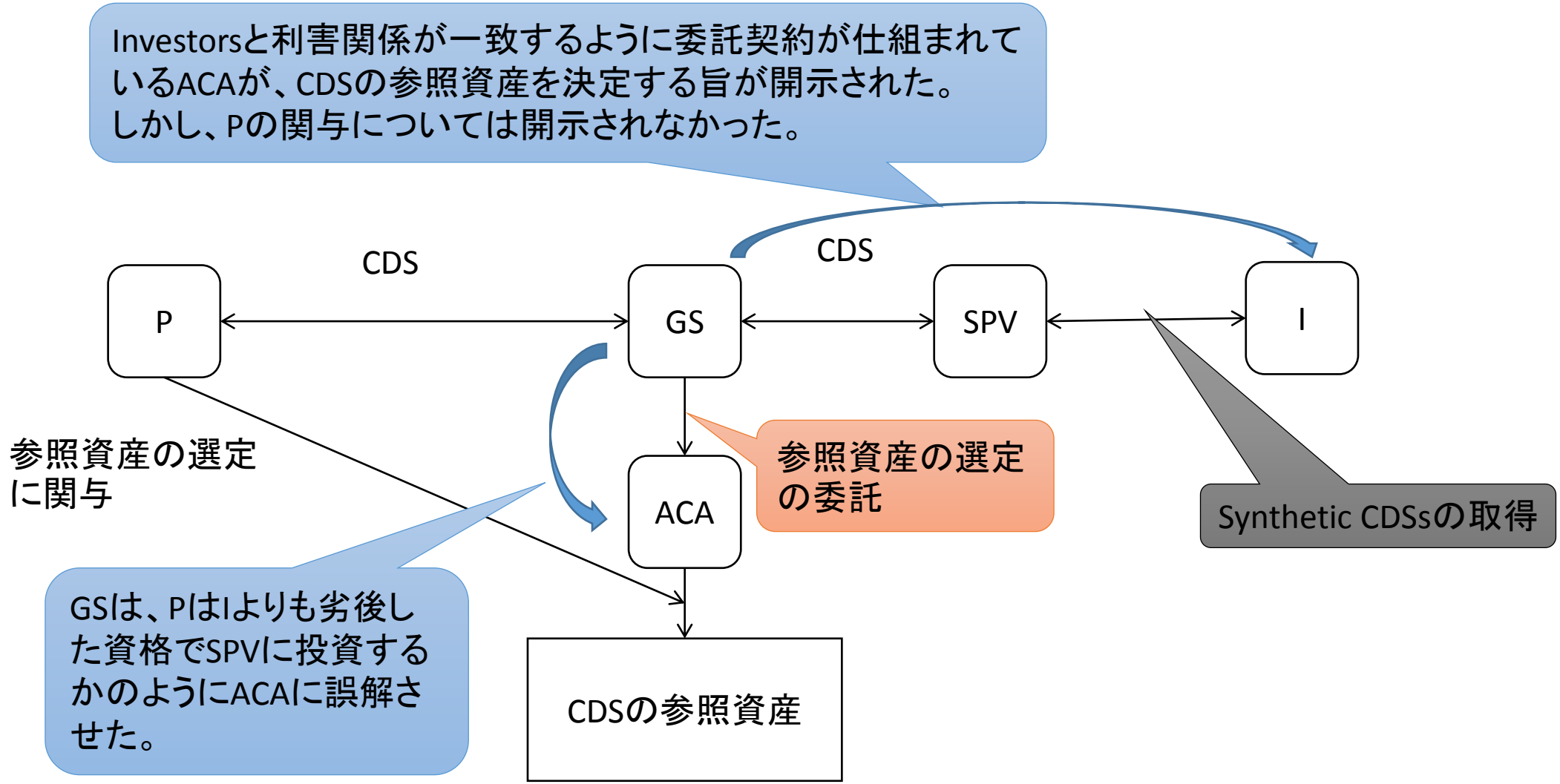
SEC v. Goldman, Sachs & Co.

- SECによる提訴（2010年4月16日）
  - Goldman, Sachs & Co.（GS）が発行したSynthetic CDSsの組成に、Synthetic CDSの投資家と対立するポジションを有することになるPaulson &Co. Inc.が関与していたにも関わらず、そのことが投資者に対して開示されなかったことが、1933年証券法17条と1934年取引所法10条(b)項及びSEC規則10b-5に違反するとして、民事制裁金の支払い等を求める訴訟を提起した。
  - Synthetic CDSsを購入する投資家の利益と対立する当事者がSynthetic CDSsの組成に関与していたという事実は、詐欺行為禁止規制においてbroker-dealerに開示義務が課される重要な情報であると評価した。
- SECとGSの間で和解が成立（2010年7月15日）
  - GSは、開示資料に不完全な情報が含まれていたことを認めるとともに、以下のように述べた。
    - “[I]t was a mistake for the . . . materials to state that the reference portfolio was 'selected by' ACA Management LLC without disclosing the role of Paulson & Co. Inc. in the portfolio selection process and that Paulson's economic interests were adverse to CDO investors.”

SEC v. Goldman, Sachs & Co.



SEC v. Goldman, Sachs & Co.



プロ投資家に対する投資勧誘規制の意義

- プロ投資家に対してであっても、顧客との利益相反に対しては厳格な態度がとられている。
  - GSの目的は、Synthetic CDSsの販売ではなく、Paulson &Co. Inc.にCDSを売ることであったことが示唆されている。
  - デリバティブ・ディーラーが推奨行為の対象となるスワップ取引と関連し、顧客以外から何らかの利益を得ることは、CFTCの業務行為基準において、開示義務の対象とされている（§ 23.431(a)(3)(ii)）。

- 利益相反という点では、顧客に対する義務が信認義務か否かは重視されていないのではないか？

- OTCデリバティブについては、プロ投資家であっても理解が容易ではない商品があることが規制の前提とされている。
  - “The statute and the disclosure rules are intended to level the information playing field by requiring swap dealers and major swap participants to provide sufficient information about a swap to enable counterparties to make their own informed decisions about the appropriateness of entering into the swap.” (77 Fed. Reg. 9758-59)
  - 推奨行為を行う際の適合性考慮義務の意義

プロ投資家に対する適合性考慮義務の意義

- 顧客がプロ投資家である場合も原則として適合性考慮義務あり
  - 13 CFR § 23.434は、顧客がデリバティブ・ディーラー又は主要デリバティブ参加者である場合を除く。
  - プロ投資家について、特定顧客適合性に関する義務の緩和が認められる(FINRA Rule 2111 (b); 13 CFR § 23.434(b))
- Ex. FINRA 2111
  - ①broker-dealerが、合理的な根拠を持って、プロ投資家は一般的に並びにある有価証券に関する特定の取引及び投資戦略に伴うリスクを自分自身で評価することができると信じていること
  - ②プロ投資家が、broker-dealer又はその販売員による推奨行為の是非を評価するに際して、独立した判断を行っていると明示的に述べる（affirmatively indicates）こと。
    - NASDとNYSEの自主規制部門の統合プロセスの中で付加された要件
    - ただし、機関投資家が特定顧客適合性による保護を放棄することを明示することまでは要求されていない（Proposed Rule Change to Adopt FINRA Rules 2090 (Know Your Customer) and 2111 (Suitability) in the Consolidated FINRA Rulebook, SR-FINRA-2010-039, at 38-40）。
- 義務の緩和のためには、プロ投資家側の積極的な行動（②の要件）が必要とされている。
  - ただし、②が満たされても①が満たされなければ義務は免除されない。

適合性考慮義務違反に基づく損害賠償請求（@連邦証券規制）

- 特定顧客適合性の考慮義務が適用されないプロ投資家については、broker-dealerの推奨行為に対する「合理的な信頼」が否定される可能性あり。
- 特定顧客適合性の考慮義務が適用される場合でも、推奨行為に対する信頼が正当か又は合理的かが個別に争われる。
  - “An investor's reliance on a broker's omission or misstatement is never justified when the “investor's conduct rises to the level of recklessness.” (*Banca Cremi, S.A. v. Alex. Brown & Sons, Inc.*, 132 F.3d 1017, 1028(4th Cir. 1997))
  - 信頼が正当であるか否かを判断する際に、原告の金融取引に関する専門知識は重要な考慮要素となる。
  - 専門知識以外には、原告と被告の間に長期的な取引関係が存在するか、原告には関連する情報を他の手段で入手できる可能性があるか、被告は原告のfiduciaryと言えるか、被告による詐欺的行為の隠蔽、原告が詐欺的行為を発見する機会の存否、原告側の要望で取引が始まったか又は原告が取引を急がせたかどうか、不実開示が具体的か一般的かなどが挙げられており、これらが総合考慮される。

適合性考慮義務違反に基づく損害賠償請求（@連邦証券規制）

- Scienterの立証責任はプロ投資家が損害賠償請求する場合も大きな障壁となる。
- 適合性考慮義務違反の原因は、無能力、不注意又は偏った判断にある場合にはscienterは認められない。
  - Ex. 証券会社が商品の審査を適切に行っていなかった場合；証券会社の調査部門から提供された商品に関する情報を証券外務員（Registered Representative）が理解していなかった場合
- 投資家は、scienterの立証が要求されない1933年証券法17条（a）項(2)(3)違反を根拠に損害賠償請求できない。

SEC＆FINRAによるエンフォースメント

- プロ投資家に対しても合理的根拠適合性の考慮義務は排除されないので、その違反に対してSEC又はFINRAによるエンフォースメントが行われる可能性がある。

- SECは、1933年証券法17条（a）項(2)(3)を根拠にエンフォースメントを行うことができる。
  - 一般的に言って、SECは過失による適合性考慮義務違反（特に合理的根拠適合性）を比較的容易に認定する傾向にありそう。

- FINRAは、scienterを立証することなくエンフォースメントを行うことができる。

1. 詐欺行為禁止規定

1-1 Securities Act of 1933 § 17 (a), 15 U.S.C.A. § 77q

- (a)Use of interstate commerce for purpose of fraud or deceit
  - It shall be unlawful for any person in the offer or sale of any securities (including security-based swaps) or any security-based swap agreement (as defined in section 78c(a)(78) of this title) by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly
  - (1) to employ any device, scheme, or artifice to defraud, or
  - (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
  - (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

1-2 Securities Exchange Act of 1934 §10(b), 15 U.S.C.A. § 78j(b)

- It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
  - (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement [FN1] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

1-3 SEC Rule 10b-5, 17 C.F.R. 240.10b-5

- It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
  - (a) To employ any device, scheme, or artifice to defraud,
  - (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
  - (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
- in connection with the purchase or sale of any security.

２. FINRA Suitability Rule

2-1 FINRA RULES 2090. Know Your Customer

- Every member shall use reasonable diligence, in regard to the opening and maintenance of

every account, to know (and retain) the essential facts concerning every customer and concerning the authority of each person acting on behalf of such customer.

2-2 FINRA RULES 2111. Suitability

- (a) A member or an associated person must have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer, based on the information obtained through the reasonable diligence of the member or associated person to ascertain the customer's investment profile. A customer's investment profile includes, but is not limited to, the customer's age, other investments, financial situation and needs, tax status, investment objectives, investment experience, investment time horizon, liquidity needs, risk tolerance, and any other information the customer may disclose to the member or associated person in connection with such recommendation.
- (b) A member or associated person fulfills the customer-specific suitability obligation for an institutional account, as defined in Rule 4512(c), if (1) the member or associated person has a reasonable basis to believe that the institutional customer is capable of evaluating investment risks independently, both in general and with regard to particular transactions and investment strategies involving a security or securities and (2) the institutional customer affirmatively indicates that it is exercising independent judgment in evaluating the member's or associated person's recommendations. Where an institutional customer has delegated decisionmaking authority to an agent, such as an investment adviser or a bank trust department, these factors shall be applied to the agent.

2-3 FINRA Rule 2111 Supplementary Material

- .01 General Principles. Implicit in all member and associated person relationships with customers and others is the fundamental responsibility for fair dealing. Sales efforts must therefore be undertaken only on a basis that can be judged as being within the ethical standards of FINRA's rules, with particular emphasis on the requirement to deal fairly with the public. The suitability rule is fundamental to fair dealing and is intended to promote ethical sales practices and high standards of professional conduct.
- .02 Disclaimers. A member or associated person cannot disclaim any responsibilities under the suitability rule.
- .03 Recommended Strategies. The phrase "investment strategy involving a security or securities" used in this Rule is to be interpreted broadly and would include, among other things, an explicit recommendation to hold a security or securities. However, the following communications are excluded from the coverage of Rule 2111 as long as they do not include (standing alone or in combination with other communications) a recommendation of a particular security or securities:
  - (a) General financial and investment information, including (i) basic investment concepts,

such as risk and return, diversification, dollar cost averaging, compounded return, and tax deferred investment, (ii) historic differences in the return of asset classes (e.g., equities, bonds, or cash) based on standard market indices, (iii) effects of inflation, (iv) estimates of future retirement income needs, and (v) assessment of a customer's investment profile;

- (b) Descriptive information about an employer-sponsored retirement or benefit plan, participation in the plan, the benefits of plan participation, and the investment options available under the plan;
- (c) Asset allocation models that are (i) based on generally accepted investment theory, (ii) accompanied by disclosures of all material facts and assumptions that may affect a reasonable investor's assessment of the asset allocation model or any report generated by such model, and (iii) in compliance with Rule 2214 (Requirements for the Use of Investment Analysis Tools) if the asset allocation model is an "investment analysis tool" covered by Rule 2214; and
- (d) Interactive investment materials that incorporate the above.

- .04 Customer's Investment Profile. A member or associated person shall make a recommendation covered by this Rule only if, among other things, the member or associated person has sufficient information about the customer to have a reasonable basis to believe that the recommendation is suitable for that customer. The factors delineated in Rule 2111(a) regarding a customer's investment profile generally are relevant to a determination regarding whether a recommendation is suitable for a particular customer, although the level of importance of each factor may vary depending on the facts and circumstances of the particular case. A member or associated person shall use reasonable diligence to obtain and analyze all of the factors delineated in Rule 2111(a) unless the member or associated person has a reasonable basis to believe, documented with specificity, that one or more of the factors are not relevant components of a customer's investment profile in light of the facts and circumstances of the particular case.
- .05 Components of Suitability Obligations. Rule 2111 is composed of three main obligations: reasonable-basis suitability, customer-specific suitability, and quantitative suitability.

  - (a) The reasonable-basis obligation requires a member or associated person to have a reasonable basis to believe, based on reasonable diligence, that the recommendation is suitable for at least some investors. In general, what constitutes reasonable diligence will vary depending on, among other things, the complexity of and risks associated with the security or investment strategy and the member's or associated person's familiarity with the security or investment strategy. A member's or associated person's reasonable diligence must provide the member or associated person with an understanding of the potential risks

and rewards associated with the recommended security or strategy. The lack of such an understanding when recommending a security or strategy violates the suitability rule.

- (b) The customer-specific obligation requires that a member or associated person have a reasonable basis to believe that the recommendation is suitable for a particular customer based on that customer's investment profile, as delineated in Rule 2111(a).
- (c) Quantitative suitability requires a member or associated person who has actual or de facto control over a customer account to have a reasonable basis for believing that a series of recommended transactions, even if suitable when viewed in isolation, are not excessive and unsuitable for the customer when taken together in light of the customer's investment profile, as delineated in Rule 2111(a). No single test defines excessive activity, but factors such as the turnover rate, the cost-equity ratio, and the use of in-and-out trading in a customer's account may provide a basis for a finding that a member or associated person has violated the quantitative suitability obligation.

- .06 Customer's Financial Ability. Rule 2111 prohibits a member or associated person from recommending a transaction or investment strategy involving a security or securities or the continuing purchase of a security or securities or use of an investment strategy involving a security or securities unless the member or associated person has a reasonable basis to believe that the customer has the financial ability to meet such a commitment.
- .07 Institutional Investor Exemption. Rule 2111(b) provides an exemption to customer-specific suitability regarding institutional investors if the conditions delineated in that paragraph are satisfied. With respect to having to indicate affirmatively that it is exercising independent judgment in evaluating the member's or associated person's recommendations, an institutional customer may indicate that it is exercising independent judgment on a trade-by-trade basis, on an asset-class-by-asset-class basis, or in terms of all potential transactions for its account.

2-4 FINRA RULE 4512 (c)

- (c) For purposes of this Rule, the term "institutional account" shall mean the account of:
  - (1) a bank, savings and loan association, insurance company or registered investment company;
  - (2) an investment adviser registered either with the SEC under Section 203 of the Investment Advisers Act or with a state securities commission (or any agency or office performing like functions); or
  - (3) any other person (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least $50 million.

2-5 FINRA RULE 8310. Sanctions for Violation of the Rules

- (a) Imposition of Sanction
  - After compliance with the Rule 9000 Series, FINRA may impose one or more of the

following sanctions on a member or person associated with a member for each violation of the federal securities laws, rules or regulations thereunder, the rules of the Municipal Securities Rulemaking Board, or FINRA rules, or may impose one or more of the following sanctions on a member or person associated with a member for any neglect or refusal to comply with an order, direction, or decision issued under the FINRA rules:

- ✧ (1) censure a member or person associated with a member;
- ✧ (2) impose a fine upon a member or person associated with a member;
- ✧ (3) suspend the membership of a member or suspend the registration of a person associated with a member for a definite period or a period contingent on the performance of a particular act;
- ✧ (4) expel a member, cancel the membership of a member, or revoke or cancel the registration of a person associated with a member;
- ✧ (5) suspend or bar a member or person associated with a member from association with all members;
- ✧ (6) impose a temporary or permanent cease and desist order against a member or a person associated with a member; or
- ✧ (7) impose any other fitting sanction.

- (b) Assent to Sanction
  - Each party to a proceeding resulting in a sanction shall be deemed to have assented to the imposition of the sanction unless such party files a written application for appeal, review, or relief pursuant to the Rule 9000 Series.

３．Dodd-Frank 法以前のデリバティブ取引に関する規制関連

Gramm-Leach-Bliley Act, Pub. Law. 106-102, §206(b)

- (b)DEFINITION OF SWAP AGREEMENT.
  - For purposes of subsection(a)(6), the term ‘‘swap agreement’’ means any individually negotiated contract, agreement, warrant, note, or option that is based, in whole or in part, on the value of, any interest in, or any quantitative measure or the occurrence of any event relating to, one or more commodities, securities, currencies, interest or other rates, indices, or other assets, but does not include any other identified banking product, as defined in paragraphs (1) through (5) of subsection (a).

4．Dodd-Frank 法におけるデリバティブ取引の定義

4-1 Securities Act of 1933 § 2(a), 15 U.S.C.A. § 77b (a)

- (17) The terms “swap” and “security-based swap” have the same meanings as in section 1a of Title 7.
- (18) The terms “purchase” or “sale” of a security-based swap shall be deemed to mean the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar

transfer or conveyance of, or extinguishing of rights or obligations under, a security-based swap, as the context may require.

4-2 Securities Exchange Act of 1934 § 3(a)(68)(69), 15 U.S.C.A. § 78c(a)(68)(69).

(68) Security-based swap

- (A)In general
- Except as provided in subparagraph (B), the term "security-based swap" means any agreement, contract, or transaction that—
  - (i) is a swap, as that term is defined under section 1a of the Commodity Exchange Act (without regard to paragraph (47)(B)(x) of such section); and
  - (ii) is based on—
    - (I) an index that is a narrow-based security index, including any interest therein or on the value thereof;
    - (II) a single security or loan, including any interest therein or on the value thereof; or
    - (III) the occurrence, nonoccurrence, or extent of the occurrence of an event relating to a single issuer of a security or the issuers of securities in a narrow-based security index, provided that such event directly affects the financial statements, financial condition, or financial obligations of the issuer.
- (C) Exclusions
  - The term "security-based swap" does not include any agreement, contract, or transaction that meets the definition of a security-based swap only because such agreement, contract, or transaction references, is based upon, or settles through the transfer, delivery, or receipt of an exempted security under paragraph (12), as in effect on January 11, 1983, (other than any municipal security as defined in paragraph (29) as in effect on January 11, 1983, unless such agreement, contract, or transaction is of the character of, or is commonly known in the trade as, a put, call, or other option.

(69) Swap

- The term "swap" has the same meaning as in section 1a of the Commodity Exchange Act (7 U.S.C. 1a).

4-3 Commodity Exchange Act §1a, 7 U.S.C.A. 1a(42)(47)

(42) Security-based swap

- The term "security-based swap" has the meaning given the term in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)).

(47) Swap

- (A)In general
- Except as provided in subparagraph (B), the term "swap" means any agreement, contract, or transaction—

- (i) that is a put, call, cap, floor, collar, or similar option of any kind that is for the purchase or sale, or based on the value, of 1 or more interest or other rates, currencies, commodities, securities, instruments of indebtedness, indices, quantitative measures, or other financial or economic interests or property of any kind;
- (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 contingency associated with a potential financial, economic, or commercial consequence;
- (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, securities, instruments of indebtedness, indices, quantitative measures, or other financial or economic interests or property of any kind, or any interest therein or based on the value thereof, 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 without also conveying a current or future direct or indirect ownership interest in an asset (including any enterprise or investment pool) or liability that incorporates the financial risk so transferred, including any agreement, contract, or transaction commonly known as—
  - (I) an interest rate swap;
  - (II) a rate floor;
  - (III) a rate cap;
  - (IV) a rate collar;
  - (V) a cross-currency rate swap;
  - (VI) a basis swap;
  - (VII) a currency swap;
  - (VIII) a foreign exchange swap;
  - (IX) a total return swap;
  - (X) an equity index swap;
  - (XI) an equity swap;
  - (XII) a debt index swap;
  - (XIII) a debt swap;
  - (XIV) a credit spread;
  - (XV) a credit default swap;
  - (XVI) a credit swap;
  - (XVII) a weather swap;
  - (XVIII) an energy swap;

- ✧ (XIX) a metal swap;
- ✧ (XX) an agricultural swap;
- ✧ (XXI) an emissions swap; and
- ✧ (XXII) a commodity swap;

➢ (iv) that is an agreement, contract, or transaction that is, or in the future becomes, commonly known to the trade as a swap;

➢ (v) including any security-based swap agreement which meets the definition of "swap agreement" as defined in section 206A of the Gramm-Leach-Bliley Act (15 U.S.C. 78c note) of which a material term is based on the price, yield, value, or volatility of any security or any group or index of securities, or any interest therein; or

➢ (vi) that is any combination or permutation of, or option on, any agreement, contract, or transaction described in any of clauses (i) through (v).

- (B) Exclusions
  - ➢ The term "swap" does not include—
    - ✧ (i) any contract of sale of a commodity for future delivery (or option on such a contract), leverage contract authorized under section 23 of this title, security futures product, or agreement, contract, or transaction described in section 2(c)(2)(C)(i) or 2(c)(2)(D)(i) of this title;
    - ✧ (ii) any sale of a nonfinancial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically settled;
    - ✧ (iii) any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities, including any interest therein or based on the value thereof, that is subject to—
      - (I) the Securities Act of 1933 (15 U.S.C. 77a et seq.); and
      - (II) the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.);
    - ✧ (iv) any put, call, straddle, option, or privilege relating to a foreign currency entered into on a national securities exchange registered pursuant to section 6(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78f(a));
    - ✧ (v) any agreement, contract, or transaction providing for the purchase or sale of 1 or more securities on a fixed basis that is subject to—
      - (I) the Securities Act of 1933 (15 U.S.C. 77a et seq.); and
      - (II) the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.);
    - ✧ (vi) any agreement, contract, or transaction providing for the purchase or sale of 1 or more securities on a contingent basis that is subject to the Securities Act of 1933 (15 U.S.C. 77a et seq.) and the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), unless the agreement, contract, or transaction predicates the purchase or sale on the

occurrence of a bona fide contingency that might reasonably be expected to affect or be affected by the creditworthiness of a party other than a party to the agreement, contract, or transaction;

- ✧ (vii) any note, bond, or evidence of indebtedness that is a security, as defined in section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1));
- ✧ (viii) any agreement, contract, or transaction that is—
  - (I) based on a security; and
  - (II) entered into directly or through an underwriter (as defined in section 2(a)(11) of the Securities Act of 1933 (15 U.S.C. 77b(a)(11)) [FN4] by the issuer of such security for the purposes of raising capital, unless the agreement, contract, or transaction is entered into to manage a risk associated with capital raising;
- ✧ (ix) any agreement, contract, or transaction a counterparty of which is a Federal Reserve bank, the Federal Government, or a Federal agency that is expressly backed by the full faith and credit of the United States; and
- ✧ (x) any security-based swap, other than a security-based swap as described in subparagraph (D).

5. Dodd-Frank 法におけるデリバティブ・ディーラーの業務行為基準関連

5-1 Commodity Exchange Act§4s(h), 7 U.S.C.A. § 6s(h)

- (1)In general
  - ➢ Each registered swap dealer and major swap participant shall conform with such business conduct standards as prescribed in paragraph (3) and as may be prescribed by the Commission by rule or regulation that relate to—
    - ✧ (A) fraud, manipulation, and other abusive practices involving swaps (including swaps that are offered but not entered into);
    - ✧ (B) diligent supervision of the business of the registered swap dealer and major swap participant;
    - ✧ (C) adherence to all applicable position limits; and
    - ✧ (D) such other matters as the Commission determines to be appropriate.
- (3) Business conduct requirements
  - ➢ Business conduct requirements adopted by the Commission shall—
    - ✧ (A) establish a duty for a swap dealer or major swap participant to verify that any counterparty meets the eligibility standards for an eligible contract participant;
    - ✧ (B) require disclosure by the swap dealer or major swap participant to any counterparty to the transaction (other than a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant) of—
      - (i) information about the material risks and characteristics of the swap;

- (ii) any material incentives or conflicts of interest that the swap dealer or major swap participant may have in connection with the swap; and
- (iii)(I) for cleared swaps, upon the request of the counterparty, receipt of the daily mark of the transaction from the appropriate derivatives clearing organization; and
  - (II) for uncleared swaps, receipt of the daily mark of the transaction from the swap dealer or the major swap participant;

✧ (C) establish a duty for a swap dealer or major swap participant to communicate in a fair and balanced manner based on principles of fair dealing and good faith; and

✧ (D) establish such other standards and requirements as the Commission may determine are appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter.

5-2 Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties 13 CFR 23.400-

§ 23.410 Prohibition on fraud, manipulation and other abusive practices.

- (a)It shall be unlawful for a swap dealer or major swap participant—
  - (3) To engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative.
- (b) Affirmative defense. It shall be an affirmative defense to an alleged violation of paragraph (a)(2) or (3) of this section for failure to comply with any requirement in this subpart if a swap dealer or major swap partici-pant establishes that the swap dealer or major swap participant:
  - (1) Did not act intentionally or recklessly in connection with such alleged violation; and
  - (2) Complied in good faith with written policies and procedures reasonably designed to meet the particular requirement that is the basis for the alleged violation.
  -

§ 23.431 Disclosures of material information.

- (a)At a reasonably sufficient time prior to entering into a swap, a swap dealer or major swap participant shall disclose to any counterparty to the swap (other than a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant) material information concerning the swap in a manner reasonably designed to allow the counterparty to assess:
  - (1) The material risks of the particular swap, which may include market, credit, liquidity, foreign currency, legal, operational, and any other applicable risks;
  - (2) The material characteristics of the particular swap, which shall include the material economic terms of the swap, the terms relating to the operation of the swap, and the rights and

obligations of the parties during the term of the swap; and

- (3) The material incentives and conflicts of interest that the swap dealer or major swap participant may have in connection with a particular swap, which shall include:
  - (i) With respect to disclosure of the price of the swap, the price of the swap and the mid-market mark of the swap as set forth in paragraph (d)(2) of this section; and
  - (ii) Any compensation or other incentive from any source other than the counterparty that the swap dealer or major swap participant may receive in connection with the swap.

- (b) Scenario Analysis. Prior to entering into a swap with a counterparty (other than a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant) that is not made available for trading, as provided in Section 2(h)(8) of the Act, on a designated contract market or swap execution facility, a swap dealer shall:
  - (1) Notify the counterparty that it can request and consult on the design of a scenario analysis to allow the counterparty to assess its potential exposure in connection with the swap;
  - (2) Upon request of the counterparty, provide a scenario analysis, which is designed in consultation with the counterparty and done over a range of assumptions, including severe downside stress scenarios that would result in a significant loss;
  - (3) Disclose all material assumptions and explain the calculation methodologies used to perform any requested scenario analysis; provided however, that the swap dealer is not required to disclose confidential, proprietary information about any model it may use to prepare the scenario analysis; and
  - (4) In designing any requested scenario analysis, consider any relevant analyses that the swap dealer undertakes for its own risk management purposes, including analyses performed as part of its "New Product Policy" specified in § 23.600(c)(3).
- (c) Paragraphs (a) and (b) of this section shall not apply with respect to a transaction that is:
  - (1) Initiated on a designated contract market or a swap execution facility; and
  - (2) One in which the swap dealer or major swap participant does not know the identity of the counterparty to the transaction prior to execution.
- (d) Daily mark. A swap dealer or major swap participant shall:
  - (1) For cleared swaps, notify a counterparty (other than a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant) of the counterparty's

right to receive, upon request, the daily mark from the appropriate derivatives clearing organization.

- (2) For uncleared swaps, provide the counterparty (other than a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant) with a daily mark, which shall be the mid-market mark of the swap. The mid-market mark of the swap shall not include amounts for profit, credit reserve, hedging, funding, liquidity, or any other costs or adjustments. The daily mark shall be provided to the counterparty during the term of the swap as of the close of business or such other time as the parties agree in writing.
- (3) For uncleared swaps, disclose to the counterparty:
  - (i) The methodology and assumptions used to prepare the daily mark and any material changes during the term of the swap; provided however, that the swap dealer or major swap participant is not required to disclose to the counterparty confidential, proprietary information about any model it may use to prepare the daily mark; an
  - (ii) Additional information concerning the daily mark to ensure a fair and balanced communication, including, as appropriate, that:
    - (A) The daily mark may not necessarily be a price at which either the counterparty or the swap dealer or major swap participant would agree to replace or terminate the swap;
    - (B) Depending upon the agreement of the parties, calls for margin may be based on considerations other than the daily mark provided to the counterparty; and
    - (C) The daily mark may not necessarily be the value of the swap that is marked on the books of the swap dealer or major swap participant.

§ 23.434 Recommendations to counterparties-institutional suitability.

- (a) A swap dealer that recommends a swap or trading strategy involving a swap to a counterparty, other than a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant, must:
  - (1) Undertake reasonable diligence to understand the potential risks and rewards associated with the recommended swap or trading strategy involving a swap; and
  - (2) Have a reasonable basis to believe that the recommended swap or trading strategy involving a swap is suitable for the counterparty. To establish a reasonable basis for a recommendation, a swap dealer must have or obtain information about the counterparty, including the counterparty's investment profile, trading objectives, and ability to absorb

potential losses associated with the recommended swap or trading strategy involving a swap.

- (b) Safe Harbor. A swap dealer may fulfill its obligations under paragraph (a)(2) of this section with respect to a particular counterparty if:
  - (1) The swap dealer reasonably determines that the counterparty, or an agent to which the counterparty has delegated decision-making authority, is capable of independently evaluating investment risks with regard to the relevant swap or trading strategy involving a swap;
  - (2) The counterparty or its agent represents in writing that it is exercising independent judgment in evaluating the recommendations of the swap dealer with regard to the relevant swap or trading strategy involving a swap;
  - (3) The swap dealer discloses in writing that it is acting in its capacity as a counterparty and is not undertaking to assess the suitability of the swap or trading strategy involving a swap for the counterparty; and
  - (4) In the case of a counterparty that is a Special Entity, the swap dealer complies with § 23.440 where the recommendation would cause the swap dealer to act as an advisor to a Special Entity within the meaning of § 23.440(a).
- (c) A swap dealer will satisfy the requirements of paragraph (b)(1) of this section if it receives written representations, as provided in § 23.402(d), that:
  - (1) In the case of a counterparty that is not a Special Entity, the counterparty has complied in good faith with written policies and procedures that are reasonably designed to ensure that the persons responsible for evalu-ating the recommendation and making trading decisions on behalf of the counterparty are capable of doing so; or
  - (2) In the case of a counterparty that is a Special Entity, satisfy the terms of the safe harbor in § 23.450(d).

17 CFR Pt. 23, Subpt. H, App. A

Appendix A—Guidance on the Application of §§ 23.434 and 23.440 for Swap Dealers That Make Recommen-dations to Counterparties or Special Entities

The following provides guidance on the application of §§ 23.434 and 23.440 to swap dealers that make rec-ommendations to counterparties or Special Entities.

Section 23.434—Recommendations to Counterparties—Institutional Suitability

- A swap dealer that recommends a swap or trading strategy involving a swap to a counterparty, other than a swap dealer, major swap participant, security-based swap dealer or major security-based swap participant, must undertake reasonable diligence to understand the potential risks and rewards associated with the

recom-mended swap or trading strategy involving a swap—general suitability (§ 23.434(a)(1))—and have a reasona-ble basis to believe that the recommended swap or trading strategy involving a swap is suitable for the coun-terparty—specific suitability (§ 23.434(a)(2)). To satisfy the general suitability obligation, a swap dealer must undertake reasonable diligence that will vary depending on, among other things, the complexity of and risks associated with the swap or swap trading strategy and the swap dealer's familiarity with the swap or swap trading strategy. At a minimum, a swap dealer's reasonable diligence must provide it with an understanding of the potential risks and rewards associated with the recommended swap or swap trading strategy.

- Recommendation. Whether a communication between a swap dealer and a counterparty is a recommendation will turn on the facts and circumstances of the particular situation. There are, however, certain factors the Commission will consider in reaching such a determination. The facts and circumstances determination of whether a communication is a "recommendation" requires an analysis of the content, context, and presentation of the particular communication or set of communications. The determination of whether a "recommendation" has been made, moreover, is an objective rather than a subjective inquiry. An important factor in this regard is whether, given its content, context, and manner of presentation, a particular communication from a swap deal-er to a counterparty reasonably would be viewed as a "call to action," or suggestion that the counterparty enter into a swap. An analysis of the content, context, and manner of presentation of a communication requires ex-amination of the underlying substantive information transmitted to the counterparty and consideration of any other facts and circumstances, such as any accompanying explanatory message from the swap dealer. Addi-tionally, the more individually tailored the communication to a specific counterparty or a targeted group of counterparties about a swap, group of swaps or trading strategy involving the use of a swap, the greater the likelihood that the communication may be viewed as a "recommendation."
- Safe harbor. A swap dealer may satisfy the safe harbor requirements of § 23.434(b) to fulfill its counterpar-ty-specific suitability duty under § 23.434(a)(2) if: (1) The swap dealer reasonably determines that the coun-terparty, or an agent to which the counterparty has delegated decision-making authority, is capable of inde-pendently evaluating investment risks with regard to the relevant swap or trading strategy involving a swap; (2) the counterparty or its agent represents in writing that it is

exercising independent judgment in evaluating the recommendations of the swap dealer; (3) the swap dealer discloses in writing that it is acting in its capaci-ty as a counterparty and is not undertaking to assess the suitability of the recommendation; and (4) in the case of a counterparty that is a Special Entity, the swap dealer complies with § 23.440 where the recommendation would cause the swap dealer to act as an advisor to a Special Entity within the meaning of § 23.440(a).

- To reasonably determine that the counterparty, or an agent to which the counterparty has delegated deci-sion-making authority, is capable of independently evaluating investment risks of a recommendation, the swap dealer can rely on the written representations of the counterparty, as provided in § 23.434(c).Section 23.434(c)(1) provides that a swap dealer will satisfy § 23.434(b)(1)'s requirement with respect to a counter-party other than a Special Entity if it receives representations that the counterparty has complied in good faith with the counterparty's policies and procedures that are reasonably designed to ensure that the persons respon-sible for evaluating the recommendation and making trading decisions on behalf of the counterparty are capa-ble of doing so. Section § 23.434(c)(2) provides that a swap dealer will satisfy § 23.434(b)(1)'s requirement with respect to a Special Entity if it receives representations that satisfy the terms of § 23.450(d) regarding a Special Entity's qualified independent representative.
- Prong (4) of the safe harbor clarifies that § 23.434's application is broader than § 23.440—Requirements for Swap Dealers Acting as Advisors to Special Entities. Section 23.434 is triggered when a swap dealer recom-mends any swap or trading strategy that involves a swap to any counterparty. However, § 23.440 is limited to a swap dealer's recommendations (1) to a Special Entity (2) of swaps that are tailored to the particular needs or characteristics of the Special Entity. Thus, a swap dealer that recommends a swap to a Special Entity that is tailored to the particular needs or characteristics of the Special Entity may comply with its suitability obliga-tion by satisfying the safe harbor in § 23.434(b); however, the swap dealer must also comply with § 23.440 in such circumstances.

6. その他

6-1 Securities Exchange Act of 1934 § 9(j), 15 U.S.C.A. 15 U.S.C.A. § 78i(j)

(j)It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange, to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security-based swap, in connection with which such person

engages in any fraudulent, deceptive, or manipulative act or practice, makes any fictitious quotation, or engages in any transaction, practice, or course of business which operates as a fraud or deceit upon any person. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such transactions, acts, practices, and courses of business as are fraudulent, deceptive, or manipulative, and such quotations as are fictitious.

6-2 Commodity Exchange Act

§1a(18)(47), 7 U.S.C.A. 1a(18)(47)

- (18) Eligible contract participant
- The term "eligible contract participant" means—
  - (A) acting for its own account—
    - (i) a financial institution;
    - (ii) an insurance company that is regulated by a State, or that is regulated by a foreign government and is subject to comparable regulation as determined by the Commission, including a regulated subsidiary or affiliate of such an insurance company;
    - (iii) an investment company subject to regulation under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.) or a foreign person performing a similar role or function subject as such to foreign regulation (regardless of whether each investor in the investment company or the foreign person is itself an eligible contract participant);
    - (iv) a commodity pool that—
      - (I) has total assets exceeding $5,000,000; and
      - (II) is formed and operated by a person subject to regulation under this chapter or a foreign person performing a similar role or function subject as such to foreign regulation (regardless of whether each investor in the commodity pool or the foreign person is itself an eligible contract participant) provided, however, that for purposes of section 2(c)(2)(B)(vi) of this title and section 2(c)(2)(C)(vii) of this title, the term "eligible contract participant" shall not include a commodity pool in which any participant is not otherwise an eligible contract participant;
    - (v) a corporation, partnership, proprietorship, organization, trust, or other entity—
      - (I) that has total assets exceeding $10,000,000;
      - (II) the obligations of which under an agreement, contract, or transaction are guaranteed or otherwise supported by a letter of credit or keepwell, support, or other agreement by an entity described in subclause (I) , in clause (i), (ii), (iii),

(iv), or (vii), or in subparagraph (C); or

- (III) that—
  - (aa) has a net worth exceeding $1,000,000; and
  - (bb) enters into an agreement, contract, or transaction in connection with the conduct of the entity's business or to manage the risk associated with an asset or liability owned or incurred or reasonably likely to be owned or incurred by the entity in the conduct of the entity's business;

✧ (vi) an employee benefit plan subject to the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.), a governmental employee benefit plan, or a foreign person performing a similar role or function subject as such to foreign regulation—

- (I) that has total assets exceeding $5,000,000; or
- (II) the investment decisions of which are made by—
  - (aa) an investment adviser or commodity trading advisor subject to regulation under the Investment Advisers Act of 1940 (15 U.S.C. 80b-1 et seq.) or this chapter;
  - (bb) a foreign person performing a similar role or function subject as such to foreign regulation;
  - (cc) a financial institution; or
  - (dd) an insurance company described in clause (ii), or a regulated subsidiary or affiliate of such an insurance company;

✧ (vii)(I) a governmental entity (including the United States, a State, or a foreign government) or political subdivision of a governmental entity;

- (II) a multinational or supranational government entity; or
- (III) an instrumentality, agency, or department of an entity described in subclause (I) or (II);
  - except that such term does not include an entity, instrumentality, agency, or department referred to in subclause (I) or (III) of this clause unless (aa) the entity, instrumentality, agency, or department is a person described in clause (i), (ii), or (iii) of paragraph (17)(A); (bb) the entity, instrumentality, agency, or department owns and invests on a discretionary basis $50,000,000 or more in investments; or (cc) the agreement, contract, or transaction is offered by, and entered into with, an entity that is listed in any of subclauses (I) through (VI) of section 2(c)(2)(B)(ii) of this title;

✧ (viii)(I) a broker or dealer subject to regulation under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) or a foreign person performing a similar role or function

subject as such to foreign regulation, except that, if the broker or dealer or foreign person is a natural person or proprietorship, the broker or dealer or foreign person shall not be considered to be an eligible contract participant unless the broker or dealer or foreign person also meets the requirements of clause (v) or (xi);

- (II) an associated person of a registered broker or dealer concerning the financial or securities activities of which the registered person makes and keeps records under section 15C(b) or 17(h) of the Securities Exchange Act of 1934 (15 U.S.C. 78o-5(b), 78q(h));
- (III) an investment bank holding company (as defined in section 17(i) of the Securities Exchange Act of 1934 (15 U.S.C. 78q(i)) [FN2];

✧ (ix) a futures commission merchant subject to regulation under this chapter or a foreign person performing a similar role or function subject as such to foreign regulation, except that, if the futures commission merchant or foreign person is a natural person or proprietorship, the futures commission merchant or foreign person shall not be considered to be an eligible contract participant unless the futures commission merchant or foreign person also meets the requirements of clause (v) or (xi);

✧ (x) a floor broker or floor trader subject to regulation under this chapter in connection with any transaction that takes place on or through the facilities of a registered entity (other than an electronic trading facility with respect to a significant price discovery contract) or an exempt board of trade, or any affiliate thereof, on which such person regularly trades; or

✧ (xi) an individual who has amounts invested on a discretionary basis, the aggregate of which is in excess of—

- (I) $10,000,000; or
- (II) $5,000,000 and who enters into the agreement, contract, or transaction in order to manage the risk associated with an asset owned or liability incurred, or reasonably likely to be owned or incurred, by the individual;

➢ (B)(i) a person described in clause (i), (ii), (iv), (v), (viii), (ix), or (x) of subparagraph (A) or in subparagraph (C), acting as broker or performing an equivalent agency function on behalf of another person described in subparagraph (A) or (C); or

✧ (ii) an investment adviser subject to regulation under the Investment Advisers Act of 1940 [15 U.S.C.A. § 80b-1 et seq.], a commodity trading advisor subject to regulation under this chapter, a foreign person performing a similar role or function subject as such to foreign regulation, or a person described in clause (i), (ii), (iv), (v), (viii), (ix), or (x) of subparagraph (A) or in subparagraph (C), in any such case acting as

investment manager or fiduciary (but excluding a person acting as broker or performing an equivalent agency function) for another person described in subparagraph (A) or (C) and who is authorized by such person to commit such person to the transaction; or

- (C) any other person that the Commission determines to be eligible in light of the financial or other qualifications of the person.

§ 2(e), 7 U.S.C.A. 2(e)

- (e) Limitation on participation
- It shall be unlawful for any person, other than an eligible contract participant, to enter into a swap unless the swap is entered into on, or subject to the rules of, a board of trade designated as a contract market under section 7 of this title.

6-3 Securities Exchange Act of 1934

§3(a)(65), 15 U.S.C.A. § 78c(a)(65)

- (65) Eligible contract participant
- The term "eligible contract participant" has the same meaning as in section 1a of the Commodity Exchange Act (7 U.S.C. 1a).

§6(l), 15 U.S.C.A. § 78f(l)

- (l) Security-based swaps
- It shall be unlawful for any person to effect a transaction in a security-based swap with or for a person that is not an eligible contract participant, unless such transaction is effected on a national securities exchange registered pursuant to subsection (b).