SECURITIES AND EXCHANGE COMMISSION

Release No. 34-80870

Commission Statement Concerning a Request for an Interpretation as to Whether a Particular Agreement is a Swap, Security-Based Swap, or Mixed Swap

AGENCY: Securities and Exchange Commission.

ACTION: Commission Statement.

SUMMARY: The Securities and Exchange Commission (the "Commission") is publishing this statement concerning a request for an interpretation as to whether a particular agreement is a swap, security-based swap, or mixed swap.

FOR FURTHER INFORMATION CONTACT: Andrew Bernstein, Senior Special Counsel, Office of Derivatives Policy, Division of Trading and Markets, at (202) 551-5870, or Andrew Schoeffler, Special Counsel, Office of Capital Markets Trends, Division of Corporation Finance, at (202) 551-3860; U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

STATEMENT:

This statement pertains to a letter that Commission staff received from Breakaway Courier Corporation ("Breakaway"), through its counsel, requesting a joint interpretation from the Commission and the Commodity Futures Trading Commission ("CFTC") pursuant to Rule 3a68-2 under the Securities Exchange Act of 1934 ("Exchange Act") as to whether a particular agreement, contract, or transaction (or class thereof) is a swap, security-based swap, or mixed swap.[1] Breakaway's request relates to a contract labeled as a Reinsurance Participation Agreement ("RPA"), which it has previously executed with Applied Underwriters Captive Risk

---

[1] *See* 17 CFR 240.3a68-2. The letter specifically refers to the corresponding rule for the CFTC's process, Rule 1.8 under the Commodity Exchange Act ("CEA"). 17 CFR 1.8.

Assurance Company, Inc. ("AUCRA").[2] According to Breakaway's submission, it entered into two RPAs with AUCRA, one of which has a stated effective date of July 1, 2009, and the other of July 1, 2012.

The Commission and the CFTC jointly adopted Exchange Act Rule 3a68-2 and CEA Rule 1.8 in 2012[3] pursuant to Section 712(d)(4) of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").[4] The rules established a process for parties to request a joint interpretation as to whether a particular agreement, contract, or transaction (or class thereof) is a swap, security-based swap, or a mixed swap. Among other things, the rules set forth the information required to be included in a request and a process for withdrawing a request. Rule 3a68-2 also includes requirements governing the manner and timing by which the two agencies must act after the receipt of a complete submission under the rule, if they determine to issue such joint interpretation. In addition, paragraph (e)(5) of Rule 3a68-2 provides that "[i]f the Commission and the [CFTC] do not issue a joint interpretation within the time period described in paragraph (e)(1) or (e)(3) [of the rule], each of the Commission and the [CFTC]

---

2 A copy of Breakaway's submission may be found at: https://www.sec.gov/rules/other/2017/2017-331-tm-exhibit.pdf.

3 *See* Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, Exchange Act Release No. 67453 (Jul. 18, 2012), 77 FR 48207 (Aug. 13, 2012) ("Product Definitions Adopting Release").

4 *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010). All references to "Title VII" in this statement shall refer to Title VII of the Dodd-Frank Act, which established a comprehensive new regulatory framework for swaps and security-based swaps.

shall publicly provide the reasons for not issuing such a joint interpretation within the applicable timeframes."[5]

Pursuant to paragraph (e)(5) of Rule 3a68-2, the Commission is declining to issue a joint interpretation with the CFTC in connection with Breakaway's request.[6] The Commission understands that the status of the RPAs is already subject to ongoing private litigation and that the petitioners' request may bear directly on that litigation. We believe that the Rule 3a68-2 process is not an appropriate vehicle for litigants such as Breakaway to obtain the views of the Commission in connection with issues in ongoing litigation, and we therefore decline Breakaway's request that we state an interpretive position as to the proper characterization of the RPAs.[7]

---

[5] Paragraph (e)(5) of CFTC Rule 1.8 contains identical language (other than reversing the references to the two commissions).

[6] Commission staff has consulted and coordinated with CFTC staff and understands that the CFTC will be issuing a separate statement on this matter.

[7] As we and the CFTC explained when we jointly adopted Rule 3a68-2 in 2012 (as well as the corresponding rule under the CEA), the purpose of the rule is to "afford market participants with the opportunity to obtain greater certainty from the Commissions regarding the regulatory status of particular Title VII instruments under the Dodd-Frank Act. This provision should decrease the possibility that market participants inadvertently might fail to meet the regulatory requirements applicable to a particular Title VII instrument." *See* Product Definitions Adopting Release, 77 FR at 48295. We and the CFTC also noted our belief that "it is essential that the characterization of an instrument be established prior to any party engaging in the transactions so that the appropriate regulatory schemes apply." *See* Product Definitions Adopting Release, 77 FR at 48297.

Finally, to help ensure that requests under Rule 3a68-2 are expeditiously routed to appropriate staff, the Commission encourages market participants to provide the requests to the Office of the Secretary, with copies to the Division of Trading and Markets and the Division of Corporation Finance.

By the Commission.

Brent J. Fields
Secretary

Date: June 7, 2017