

Coding Manual – Topic 402
Topic Authority: Brendan M. Schulman

I. Full Text of Request for Production:

402. All documents or communications that describe, discuss, refer to, report on, or relate to whether the purchase, sale, trading, or exchange of over-the-counter derivatives, or any other actual or contemplated financial instruments or products, is, was, would be, or will be legal or illegal, or permitted or prohibited, under any existing or proposed rule(s), regulation(s), law(s), standard(s), or other proscription(s), whether domestic or foreign.

II. Coding Instructions

A. General Instructions

In essence, Request 402 broadly seeks documents concerning the current or prospective **legality or illegality** of the **trading of financial products**.

- A document should be marked **Responsive** if all of the following are true:

1. **Describes / discusses / refers to / reports on / relates to**
2. [Whether or not it is] **legal / illegal / permitted / prohibited**
3. [by] **rule / regulation / law / standard / proscription**
[whether existing or proposed, domestic or foreign]
4. [to] **purchase / sale / trade / exchange**
5. [any] **financial instrument / financial product / OTC derivative**

- A document is **Responsive** even if it makes only implicit reference to these parameters.

For example, no specific rule or regulation need be cited specifically. If the document references the permissibility of a financial instrument transaction, and meets the other criteria, it is **Responsive**. Keep in mind that if a transaction is *regulated*, it is implicitly *legally permitted* under specified circumstances.

Therefore, a document that examines current or prospective *regulations* relating to a relevant transaction would be **Responsive**.

- If the document does not meet any one of these five parameters, it should be marked **Non-Responsive**.

For example, if a document refers to the trade of OTC derivatives but does not relate to whether that instrument is was or would be legal, illegal, permitted or prohibited, the document is **Non-Responsive**.

III. Guidance on Financial Instruments and Derivatives:

The request seeks documents relating to “financial instruments,” including “over-the-counter derivatives.” The following is some guidance on these terms.

- A. The International Swaps and Derivatives Association defines “derivatives” as follows:

“A derivative is a risk transfer agreement, the value of which is derived from the value of an underlying asset. The underlying asset could be an interest rate, a physical commodity, a company’s equity shares, an equity index, a currency, or virtually any other tradable instrument upon which parties can agree.”

- B. The International Swaps and Derivatives Association defines “over-the-counter” derivatives as follows:

“OTC derivatives, which are sometimes called swap agreements or swaps, are negotiated privately between the two parties and then booked directly with each other.”

- C. Note, however, that Request 402 broadly relates to “any other actual or contemplated financial instruments or products.” Thus, OTC derivatives are only one type of financial instrument that would fall within the scope of the Request. However, we might expect many of the documents to relate to OTC derivatives specifically, so careful attention should be paid when reviewing documents in which an OTC derivative transaction are referenced.

- D. *Note on exchanges:* A reference to a platform, system or exchange used to transact relevant financial instruments could make a document Responsive even if that document does not mention an actual instrument or product being transacted. For example, a document that relates to the legality or regulation of EnronOnline would be Responsive because EnronOnline was used to transact financial instruments.

- E. *Note on consumer transactions:* A cash or consumer credit-card transaction for the purchase of end-user goods or services is **Non-Responsive**.

For example, a document expressing concern about the legality of the actual or contemplated scalping of football tickets is **Non-Responsive**. Similarly, a document concerning the illegality of the purchase of alcohol by a minor is **Non-Responsive**.

- F. *Note on gambling and contests:* A wager or gambling transaction that is premised upon a sporting contest or a pure game of chance (such as lottery ticket, blackjack or fantasy football) is **Non-Responsive** because it is not a “financial instrument” or “financial product,” nor is it considered a derivative under the definition above.

For example, a document expressing concern about the legality of “fantasy football” activities is **Non-Responsive**. Similarly, an email concerning a raffle or drawing that indicates that the contest is only valid in states where not prohibited by law is **Non-Responsive**. However, the factor of chance does not alone render a document about a transaction non-responsive. For example, a document concerning the legality of weather derivative products is **Responsive** because those products are used to hedge or protect various assets against adverse weather conditions and is therefore considered a financial product rather than a gambling contest. If you are unsure whether a transaction is considered a gambling contest or a financial product, mark the document as **Responsive**.

IV. Examples

The following examples are intended to be illustrative and not exhaustive of the kinds of documents that would be deemed **Responsive**:

- A. A draft letter to the Commodities Futures Trading Commissions regarding the regulatory and legislative outlook on OTC derivatives.
- B. An email discussing the scrutiny that regulatory authorities give to electronic trading systems that provide price index information.
- C. A memorandum summarizing research on the regulation of futures and options trading of financial gas contracts.
- D. A request to local counsel for legal advice on issues relating to the trading of derivative transactions over the Internet.
- E. A list of questions concerning whether regulators in Japan have made any statements concerning the marketing of weather derivatives.

V. Date Restrictions

There is no date restriction in Request 402. Therefore, a document bearing any date *or no date at all* may be considered Responsive (if it meets the criteria for responsiveness).

VI. Privilege

We are not undertaking a privilege review at this stage. Therefore, a document should be marked as “Responsive” or “Non-Responsive” *whether or not* the document appears to be privileged.