

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-93284; File No. S7-07-21]

Order Granting Conditional Substituted Compliance in Connection With Certain Requirements Applicable to Non-U.S. Security-Based Swap Dealers Subject to Regulation in the Swiss Confederation

October 8, 2021

I. Overview

UBS AG and Credit Suisse AG (the “Swiss Firms”) submitted an application requesting that the Securities and Exchange Commission (“Commission”) determine, pursuant to the Securities Exchange Act of 1934 (“Exchange Act”) rule 3a71-6, that security-based swap dealers (“SBSDs”) subject to regulation in the Swiss Confederation (“Switzerland”) conditionally may satisfy requirements under the Exchange Act by complying with comparable Swiss requirements.¹ The Swiss Firms sought substituted compliance in connection with certain Exchange Act requirements related to risk control, internal supervision and compliance, and record keeping, reporting, and notification.² The Swiss Application incorporated comparability analyses between the relevant requirements in Exchange Act section 15F and the rules and

¹ See Letter from Colin Lloyd of Cleary Gottlieb Steen & Hamilton LLP on behalf of UBS AG and Credit Suisse AG to Vanessa Countryman, Secretary, Commission, dated August 10, 2021 (the “Swiss Application”). The Swiss Application is available on the Commission’s website at: <https://www.sec.gov/page/exchange-act-substituted-compliance-and-listed-jurisdiction-applications-security-based-swap>.

² “Risk control” includes requirements related to internal risk management, trade acknowledgment and verification, portfolio reconciliation and dispute resolution, portfolio compression and trading relationship documentation; “internal supervision and compliance” includes requirements related to diligent supervision, conflicts of interest, information gathering under Exchange Act section 15F(j), 15 U.S.C. 78o-10(j), and chief compliance officers; “record keeping, reporting, and notification” includes requirements related to making and keeping current certain prescribed records, preservation of records, reporting, and notification.

regulations thereunder and applicable Swiss law, as well as information regarding Swiss supervisory and enforcement frameworks.

On August 10, 2021, the Commission issued a notice of the Swiss Application, accompanied by a proposed order (the “proposed Order”) to make a positive substituted compliance determination in connection with the Swiss Application.³ The proposed Order incorporated a number of conditions to tailor the scope of substituted compliance consistent with the prerequisite that relevant Swiss requirements produce regulatory outcomes that are comparable to relevant requirements under the Exchange Act.

As discussed below, the Commission is adopting a final Order that has been modified from the proposal to make clarifying changes in response to comments.

II. Substituted Compliance Framework and Prerequisites

A. Substituted compliance framework and purpose

As the Commission has discussed previously,⁴ Exchange Act rule 3a71-6 provides a framework whereby non-U.S. SBSs and major security-based swap participants (“MSBSPs”) (together, “SBS Entities”) may satisfy certain requirements under Exchange Act section 15F by complying with comparable regulatory requirements of a foreign jurisdiction.⁵ Because substituted compliance does not constitute exemptive relief, but instead provides an alternative

³ See Exchange Act Release No. 92632 (Aug. 10, 2021), 86 FR 45770, 45792 (“Swiss Substituted Compliance Notice and Proposed Order”).

⁴ See Exchange Act Release No. 90765 (Dec. 22, 2020), 85 FR 85686, 85687 (Dec. 29, 2020) (“German Substituted Compliance Order”); Exchange Act Release No. 92484 (July 23, 2021), 86 FR 41612, 41612-13 (Aug. 2, 2021) (“French Substituted Compliance Order”); Exchange Act Release No. 92529 (July 30, 2021), 86 FR 43318, 43318-19 (Aug. 6, 2021) (“UK Substituted Compliance Order”); Exchange Act Release No. 47668 (August 20, 2021), 85 FR 47668, 47668-69 (Aug. 26, 2021) (“Spanish Substituted Compliance Notice and Proposed Order”).

⁵ See Exchange Act Release No. 77617 (Apr. 14, 2016), 81 FR 29960, 30079 (May 13, 2016) (“Business Conduct Adopting Release”).

method by which non-U.S. SBS Entities may comply with applicable Exchange Act requirements, the non-U.S. SBS Entities would remain subject to the relevant requirements under section 15F. The Commission accordingly will retain the authority to inspect, examine and supervise those SBS Entities' compliance and take enforcement action as appropriate. Under the substituted compliance framework, failure to comply with the applicable foreign requirements and other conditions to a substituted compliance order would lead to a violation of the applicable requirements under the Exchange Act and potential enforcement action by the Commission (as opposed to automatic revocation of the substituted compliance order).

Under rule 3a71-6, substituted compliance potentially is available in connection with certain section 15F requirements,⁶ but is not available in connection with antifraud prohibitions and certain other requirements under the Federal securities laws.⁷ SBS Entities in Switzerland accordingly must comply directly with those requirements notwithstanding the availability of substituted compliance for other requirements.

The substituted compliance framework reflects the cross-border nature of the security-based swap market, and is intended to promote efficiency and competition by helping to address potential duplication and inconsistency between relevant U.S. and foreign requirements.⁸ In

⁶ 17 CFR 240.3a71-6(d).

⁷ Swiss Substituted Compliance Notice and Proposed Order, 86 FR at 45771 n.5 (addressing unavailability of substituted compliance in connection with antifraud provisions, as well as provisions related to transactions with counterparties that are not eligible contract participants ("ECPs"), segregation of customer assets, required clearing upon counterparty election, regulatory reporting and public dissemination, and registration of offerings).

⁸ See generally Business Conduct Adopting Release, 81 FR at 30073 (noting that the cross-border nature of the security-based swap market poses special regulatory challenges, in that relevant U.S. requirements "have the potential to lead to requirements that are duplicative of or in conflict with applicable foreign business conduct requirements, even when the two sets of requirements implement similar goals and lead to similar results").

practice, substituted compliance may be expected to help SBS Entities leverage their existing systems and practices to comply with relevant Exchange Act requirements in conjunction with their compliance with relevant foreign requirements. As of August 6, 2021, market participants have been required to assess whether their security-based swap activities meet or exceed certain thresholds for registration with the Commission as SBS Entities, with the first registrations by SBSBs required by November 1, 2021, and by MSBSPs by December 1, 2021.⁹ Substituted compliance may be expected to assist such market participants in preparing for registration.

B. Scope of substituted compliance

The Swiss Application relates solely to entity-level requirements and for entity-level Exchange Act requirements a Covered Entity must choose either to apply substituted compliance pursuant to the Order with respect to all security-based swap business subject to the relevant Swiss requirements or to comply directly with the Exchange Act with respect to all such business; a Covered Entity may not choose to apply substituted compliance for some of the business subject to the relevant Swiss requirements and comply directly with the Exchange Act for another part of the business that is subject to the relevant Swiss requirements. Additionally, for entity-level Exchange Act requirements, if the Covered Entity also has security-based swap business that is not subject to the relevant Swiss requirements, the Covered Entity must either comply directly with the Exchange Act for that business or comply with the terms of another applicable substituted compliance order.

⁹ See “Key Dates for Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants,” available at <https://www.sec.gov/page/key-dates-registration-security-based-swap-dealers-and-major-security-based-swap-participants>.

C. Specific prerequisites

1. Comparability of Regulatory Outcomes

Rule 3a71-6, adopted by the Commission in 2016, describes the requirements for the Commission to make a substituted compliance determination. Under the rule, the Commission must determine that the analogous foreign requirements are comparable to otherwise applicable requirements under the Exchange Act (i.e., the relevant requirements in the Exchange Act and the rules and regulations thereunder), after accounting for factors such as “the scope and objectives of the relevant foreign regulatory requirements” and “the effectiveness of the supervisory compliance program administered, and the enforcement authority exercised” by the foreign authority.¹⁰ The comparability assessments are to be based on a “holistic approach” that “will focus on the comparability of regulatory outcomes rather than predicating substituted compliance on requirement-by-requirement similarity.”¹¹

¹⁰ Exchange Act rule 3a71-6(a)(2)(i).

¹¹ See Swiss Substituted Compliance Notice and Proposed Order, 86 FR at 45772; see also Business Conduct Adopting Release, 81 FR at 30078-79 (further recognizing that “different regulatory systems may be able to achieve some or all of those regulatory outcomes by using more or fewer specific requirements than the Commission, and that in assessing comparability the Commission may need to take into account the manner in which other regulatory systems are informed by business and market practices in those jurisdictions”). The Commission’s assessment of a foreign authority’s supervisory and enforcement effectiveness—as part of the broader comparability analysis—would be expected to consider not only overall oversight activities, but also oversight specifically directed at conduct and activity relevant to the substituted compliance determination. “For example, it would be difficult for the Commission to make a comparability determination in support of substituted compliance if oversight is directed solely at the local activities of foreign security-based swap dealers, as opposed to the cross-border activities of such dealers.” Business Conduct Adopting Release, 81 FR at 30079 (footnote omitted). In the Swiss Substituted Compliance Notice and Proposed Order, the Commission preliminarily concluded that this comparability prerequisite was met in connection with a number of requirements under the Exchange Act, in some cases with the addition of conditions to help ensure the comparability of regulatory outcomes.

2. Memorandum of Understanding

Exchange Act rule 3a71-6(a)(2)(ii) further predicates the availability of substituted compliance on the Commission and the foreign financial regulatory authority or authorities entering into a supervisory and enforcement memorandum of understanding and/or other arrangement with the relevant foreign financial regulatory authorities “addressing supervisory and enforcement cooperation and other matters arising under the substituted compliance determination.”¹² Accordingly, the Commission and FINMA recently entered into a relevant memorandum of understanding.¹³ The memorandum of understanding must be in place when Covered Entities use substituted compliance to satisfy obligations under the Exchange Act.¹⁴

3. Certification and Opinion of Counsel

A party or group of parties that may potentially rely on a substituted compliance order may submit a substituted compliance application only if each such party provides a certification and opinion of counsel that the entity can, “as a matter of law, provide the Commission with prompt access to its books and records, and can, as a matter of law, submit to onsite inspection and examination by the Commission.”¹⁵ The Swiss Application included a certification and opinion of counsel and, in the Commission’s preliminary view, met this requirement.¹⁶ The Commission received no comments on this preliminary view and has not changed its view.

¹² See Exchange Act rule 3a71-6(a)(2)(ii).

¹³ The Commission and FINMA have entered into a memorandum of understanding to address substituted compliance cooperation, a copy of which is on the Commission’s website at www.sec.gov under the “Substituted Compliance” tab, which is located on the “Security-Based Swap Markets” page in the Division of Trading and Markets section of the site.

¹⁴ See para. (a)(8) of the Order.

¹⁵ See Exchange Act rule 3a71-6(c)(1)(ii).

¹⁶ See Swiss Substituted Compliance Notice and Proposed Order, 86 FR at 45771 n.8.

III. General Availability of Substituted Compliance Under the Order

A. Covered Entities

1. Proposed approach

Under the proposed Order, substituted compliance was only made available to “Covered Entities” – a defined term that would limit the scope of the substituted compliance determination to SBSBs that are subject to applicable Swiss requirements and oversight. Consistent with the parameters of substituted compliance under Exchange Act rule 3a71-6, the proposed “Covered Entity” definition provided that the relevant entity must be a security-based swap dealer registered with the Commission, and that the entity cannot be a U.S. person.¹⁷ The proposed “Covered Entity” definition further provided that the entity must be a systemically important bank authorized by FINMA to conduct banking activities in Switzerland.¹⁸ Each entity would also have to be supervised by FINMA under the intensive and continual supervision model as a Category 1 firm as that term is defined in BO Annex 3.¹⁹ These prongs of the definition were intended to help ensure that Covered Entities are subject to relevant Swiss requirements and oversight.

2. Commenter views and final provisions

No commenters addressed the proposed Covered Entity definition and the Commission is adopting the definition as proposed.

¹⁷ See Swiss Substituted Compliance Notice and Proposed Order, 86 FR at 45791.

¹⁸ Id.

¹⁹ Id.

B. Additional general conditions

1. Proposed approach

The proposed Order incorporated a number of additional general conditions and other prerequisites, to help ensure that the relevant Swiss requirements that form the basis for substituted compliance in practice will apply to the Covered Entity's security-based swap business and activities, and to promote the Commission's oversight over entities that avail themselves of substituted compliance:

- “Subject to and Complies with” applicability condition – For each relevant section of the proposed Order, a positive substituted compliance determination would be predicated on the entity being subject to and complying with the applicable Swiss requirements needed to establish comparability.²⁰
- Security-based swaps and transactions as “derivatives” or “derivative transactions” – For each relevant section of the proposed Order that requires the application of, and the Covered Entity's compliance with, provisions of FinMIA and FMIO, a positive substituted compliance determination would require that the relevant security-based swaps and security-based swap transactions are “derivatives” and/or “derivative transactions” for purposes of FinMIA article 2(c), or otherwise is described by the relevant language of that provision.²¹
- “Counterparty” status – For each section of the proposed Order that requires the application of, and the Covered Entity's compliance with, the provisions of FinMIA and FMIO, the proposed Order would require that the Covered Entity comply with the

²⁰ See Swiss Substituted Compliance Notice and Proposed Order, 86 FR at 45788.

²¹ Id.

applicable conditions of the Order regardless of whether the Covered Entity's counterparty is a "counterparty" for purposes of FinMIA article 93, or otherwise is described by the relevant language of that provision.²²

- Counterparty status as "company" – For each section of the proposed Order that requires the application of, and the Covered Entity's compliance with, the provisions of FMIO, the Covered Entity would be required to comply with the applicable conditions of the proposed Order regardless of whether a Covered Entity's counterparty were a "company" for purposes of FMIO article 77, or otherwise is described by the relevant language of that provision.²³
- Covered Entity as "bank" – For each condition of the proposed Order that requires the application of, and the Covered Entity's compliance with, the provisions of the BA and BO and/or other Swiss requirements adopted pursuant to those provisions, the Covered Entity would be required to be a "bank" for purposes of BA article 1a, or otherwise is described by the relevant language of that provision.²⁴
- Covered Entity as "systemically important" – For each condition of the proposed Order that requires the application of, and the Covered Entity's compliance with, the provisions of FINMA Circular 2017/1, the Covered Entity would be required to be "systemically important" for purposes of BA article 8(3), or otherwise is described by the relevant language of that provision.²⁵

22 Id.

23 Id.

24 Id.

25 Id.

- Covered Entity as “category 1” – For each condition of the proposed Order that required the application of, and the Covered Entity’s compliance with, the provisions of FINMA Circular 2017/1, the Covered Entity would be required to be supervised as “category 1,” as defined in BO articles 2(2) and 2(3) and BO Annex 3, or otherwise is described by the relevant language of those provisions.²⁶
- “Institution-specific approach” to operational risk quantification – For each condition in the proposed Order that requires the application of, and the Covered Entity’s compliance with, the provisions of FINMA Circular 2008/21 margins 45-107, the Covered Entity would be required to apply the “institution-specific approach” to quantifying capital requirements for operational risk, as defined in CAO article 94, or otherwise is described by the relevant language of those provisions, and as approved by FINMA.²⁷
- Memorandum of understanding – Consistent with the requirements of rule 3a71-6 and the Commission’s need for access to information regarding registered entities, substituted compliance under the proposed Order would be conditioned on the Commission having an applicable memorandum of understanding or other arrangement with FINMA addressing cooperation with respect to the Order at the time the Covered Entity makes use of substituted compliance.²⁸
- Notice of reliance on substituted compliance – To assist the Commission’s oversight of firms that avail themselves of substituted compliance, a Covered Entity relying on the Order would have to provide notice of its intent to rely on the Order by notifying the

²⁶ Id.

²⁷ Id.

²⁸ Id.

Commission in the manner specified on the Commission's website.²⁹ In the notice, the Covered Entity would need to identify each specific substituted compliance determination in the proposed Order for which the Covered Entity intends to apply substituted compliance.³⁰ If a Covered Entity were to elect not to apply substituted compliance with respect to a specific substituted compliance determination in the proposed Order, it would be required to comply with the Exchange Act requirements subject to that determination. Finally, a Covered Entity would have to promptly update its notice to the Commission if it intended to modify its reliance on the positive substituted compliance determinations in the proposed Order.³¹

²⁹ Id.

³⁰ See para. (a)(9) of the Order. If the Covered Entity intends to rely on all the substituted compliance determinations in a given paragraph of the Order, it can cite that paragraph in the notice. For example, if the Covered Entity intends to rely on the risk control determinations in paragraph (b) of the Order, it would indicate in the notice that it is relying on the determinations in paragraph (b). However, if the Covered Entity intends to rely on the internal risk management, trade acknowledgement and verification, and portfolio reconciliation determinations but not the portfolio compression determination, it would need to indicate in the notice that it is relying on paragraphs (b)(1)-(3) of the Order. In this case, paragraph (b)(4) of the Order (the portfolio compression determination) would be excluded from the notice and the Covered Entity would need to comply with the Exchange Act portfolio compression requirements. Further, as discussed below in section VI.B, the recordkeeping and reporting determinations in the Order have been structured to provide Covered Entities with a high level of flexibility in selecting specific requirements within those rules for which they want to rely on substituted compliance. For example, paragraph (d)(1)(i) of the Order sets forth the Commission's preliminary substituted compliance determinations with respect to the requirements of Exchange Act rule 18a-5, 17 CFR 240.18a-5. These determinations are set forth in paragraphs (d)(1)(i)(A) through (K). If a Covered Entity intends to rely on some but not all of the determinations, it would need to identify in the notice the specific determinations in this paragraph it intends to rely on (e.g., paragraphs (d)(1)(i)(A), (B), (C), (D), (G), (H), (I), and (K)). For any determinations excluded from the notice, the Covered Entity would need to comply with the Exchange Act rule 18a-5 requirement.

³¹ A Covered Entity would modify its reliance on the positive substituted compliance determinations in the Order, and thereby trigger the requirement to update its notice, if it adds or subtracts determinations for which it is applying substituted compliance or completely discontinues its reliance on the Order.

- Notification related to changes in capital category – Covered Entities with a prudential regulator would need to apply substituted compliance with respect to the requirements of Exchange Act rule 18a-8(c) and the requirements of Exchange Act rule 18a-8(h) as applied to Exchange Act rule (c).³² Exchange Act rule 18a-8(c) generally requires every security-based swap dealer with a prudential regulator that files a notice of adjustment of its reported capital category with the Federal Reserve Board, the Office of the Comptroller of the Currency, or the Federal Deposit Insurance Corporation to give notice of this fact to the that same day by transmitting a copy to the Commission of the notice of adjustment of reported capital category in accordance with Exchange Act rule 18a-8(h).³³ Exchange Act rule 18a-8(h) sets forth the manner in which every notice or report required to be given or transmitted pursuant to Exchange Act rule 18a-8 must be made. While Exchange Act rule 18a-8(c) is not linked to an Exchange Act capital requirement, it is linked to capital requirements in the U.S. promulgated by the prudential regulators. In its application, the Swiss Firms cited various Swiss provisions as providing similar outcomes to the notifications requirements of Exchange Act Rule 18a-8.³⁴ This general condition would be designed to clarify that a prudentially regulated Covered Entity must provide the Commission with copies of any notifications regarding changes in the Covered Entity’s capital situation required by Swiss law. The intent is to align the notification requirement with the Swiss capital requirements applicable to the Covered Entity.

³² See Swiss Substituted Compliance Notice and Proposed Order, 86 FR at 45788.

³³ 17 CFR 240.18a-8(c) and (h).

³⁴ See FINMASA article 29(2); CAO articles 14, 42(3), 101, and 130(4); and Liquidity Ordinance articles 17b and 26(2).

2. Commenter Views and Final Provisions

The Commission did not receive comments addressing the substance of the proposed Order's additional general conditions, and the Commission is issuing those general conditions largely as proposed.³⁵ In the Commission's view, the conditions are structured appropriately to predicate a positive substituted compliance determination on the applicability of relevant Swiss requirements needed to establish comparability, as well as on the continued effectiveness of the requisite memorandum of understanding, and the provision of notice to the Commission regarding the Covered Entity's intent to rely on substituted compliance. The Commission did receive one comment recommending two typographical changes to the general conditions, which the Commission is incorporating in the Order.³⁶

IV. Substituted Compliance for Risk Control Requirements

A. Proposed approach

The Swiss Application in part requested substituted compliance in connection with risk control requirements relating to:

- Internal risk management – Internal risk management system requirements that address the obligation of registered entities to follow policies and procedures reasonably designed to help manage the risks associated with their business activities.

³⁵ See paras. (a)(1) through (10) of the Order.

³⁶ See Letter from Gordon Kiesling, Managing Director, UBS AG, Thomas Bischof, Managing Director, UBS AG, Maria Chiodi, Managing Director, Credit Suisse AG, and Drew Shoemaker, Managing Director, Credit Suisse AG (Sept. 10, 2021) ("Swiss Firms' Letter") at Annex (proposing edits to paragraphs (a)(2) and (a)(6) of the Order to add the word "whether" to (a)(2) and to change "is" to "are" in (a)(6)).

- Trade acknowledgment and verification – Trade acknowledgment and verification requirements intended to help avoid legal and operational risks by requiring definitive written records of transactions and procedures to avoid disagreements regarding the meaning of transaction terms.
- Portfolio reconciliation and dispute reporting – Portfolio reconciliation and dispute reporting provisions that require that counterparties engage in portfolio reconciliation and resolve discrepancies in connection with uncleared security-based swaps, and to provide prompt notification to the Commission and applicable prudential regulators regarding certain valuation disputes.
- Portfolio compression – Portfolio compression provisions that require that SBS Entities have procedures addressing bilateral offset, bilateral compression and multilateral compression in connection with uncleared security-based swaps.
- Trading relationship documentation – Trading relationship documentation provisions that require SBS Entities to have procedures to execute written security-based swap trading relationship documentation with their counterparties prior to, or contemporaneously with, executing certain security-based swaps.³⁷

Taken as a whole, these risk control requirements help to promote market stability by mandating that registered entities follow practices that are appropriate to manage the market, counterparty, operational, and legal risks associated with their security-based swap businesses.

³⁷ See Exchange Act Release No. 87782 (Dec. 18, 2019) 85 FR 6359, 6361 (Feb. 4, 2020) (“Risk Mitigation Adopting Release”). The Swiss Application discusses Swiss requirements regarding records of agreements with counterparties. See Swiss Application section II.1.c at 17-19, 24-31.

No Proposed Positive Substituted Compliance Determination - Dispute Reporting and

Trading Relationship Documentation: In connection with dispute reporting and trading relationship documentation, the Commission stated a preliminary view that the Swiss requirements were not comparable to Exchange Act requirements.³⁸ The Commission noted in its initial assessment of the comparability of dispute reporting requirements that paragraph (c) of Exchange Act rule 15Fi-3 requires SBSDs to promptly report to the Commission valuation disputes in excess of \$20 million that have been outstanding for three or five business days (depending on counterparty types),³⁹ and that Swiss law lacks a specific requirement for reporting security-based swap valuation disputes in excess of \$20 million.⁴⁰ The Commission noted in its initial assessment of trading relationship documentation requirements that Exchange Act rule 15Fi-5 requires that “security-based swap trading relationship documentation shall be in writing and shall include all terms governing the trading relationship between the security-based swap dealer . . . and its counterparty,”⁴¹ and that under Swiss law there is no explicit requirement to agree in writing to all terms governing the trading relationship.⁴² Considering these and other differences described in the proposed Order,⁴³ the Commission did not propose to make a positive substituted compliance determination with respect to dispute reporting or trading relationship documentation requirements.

³⁸ See Swiss Substituted Compliance Notice and Proposed Order, 86 FR at 45774-75 (excluding Exchange Act rule 15Fi-3(c) covering reporting of security-based swap valuation disputes from the risk control provisions covered by paragraph (b)(3) the proposed Order).

³⁹ See 17 CFR 240.15Fi-3(c).

⁴⁰ See Swiss Substituted Compliance Notice and Proposed Order, 86 FR at 45774-75.

⁴¹ See 17 CFR 240.15Fi-5(b)(1).

⁴² See Swiss Substituted Compliance Notice and Proposed Order, 86 FR at 45775.

⁴³ See id.

Proposed Positive Substituted Compliance Determination - Internal Risk Management,

Trade Acknowledgement and Verification, Portfolio Reconciliation and Portfolio Compression:

With respect to these risk control requirements, the Commission stated a preliminary view based on the Swiss Application and the Commission's review of applicable provisions, that relevant Swiss requirements would produce regulatory outcomes that are comparable to those associated with the internal risk management, trade acknowledgement and verification, portfolio reconciliation, and portfolio compression risk control requirements. Substituted compliance for those risk control requirements accordingly would be conditioned on Covered Entities being subject to and complying with the Swiss provisions that in the aggregate establish a framework that produces outcomes comparable to those associated with the analogous risk control requirements under the Exchange Act.⁴⁴

- Proposed Positive Substituted Compliance Determination Conditions - Portfolio

Reconciliation: In connection with portfolio reconciliation requirements, the Commission stated a preliminary view that Swiss requirements are comparable to Exchange Act requirements, but only when part of one of the applicable Swiss requirements is not applied. The proposed Order therefore included the requirement that a Covered Entity be subject to and comply with FinMIA 108(b) and also the requirement that Covered Entities not apply

⁴⁴ See Swiss Substituted Compliance Notice and Proposed Order, 86 FR at 45788. (listing in paragraph (b)(1) of the proposed Order the requirements a Covered Entity must be subject to and comply with in connection with internal risk management, in paragraph (b)(2) the requirements a Covered Entity must be subject to and comply with in connection with trade acknowledgement and verification, in paragraph (b)(3) the requirements a Covered Entity must be subject to and comply with in connection with portfolio reconciliation, and paragraph (b)(4) the requirements a Covered Entity must be subject to and comply with in connection with portfolio compression).

FinMIA article 108(b)'s exception for "small non-financial counterparties" as defined in FinMIA article 98.⁴⁵

- Proposed Positive Substituted Compliance Determination Conditions - Portfolio

Compression: In connection with portfolio compression requirements, the Commission stated its preliminary view that Swiss requirements were comparable to Exchange Act requirements, but only when one of the applicable Swiss exclusions is not applied. The proposed Order included the requirement that a Covered Entity be subject to and comply with FinMIA article 108(d) and also include a requirement that Covered Entities not apply the portion of FinMIA article 108(d) that excludes application of its requirements when there are fewer than 500 non-centrally cleared OTC derivatives transactions outstanding.⁴⁶

B. Commenter views and final provisions

1. General considerations

Trading Relationship Documentation: The Commission received one comment concerning the risk control requirements that specifically addressed trading relationship documentation.⁴⁷ In its letter, the commenter disagreed with the Commission's preliminary view not to make a positive substituted compliance determination for the trading relationship documentation requirements of Exchange Act rule 15Fi-5.⁴⁸ In support of its position the commenter generally noted the "various documentation-related requirements as listed in the

⁴⁵ See Swiss Substituted Compliance Notice and Proposed Order, 86 FR at 45788.

⁴⁶ See Swiss Substituted Compliance Notice and Proposed Order, 86 FR at 45788.

⁴⁷ See Swiss Firms' Letter at 1-4.

⁴⁸ See Swiss Substituted Compliance Notice and Proposed Order, 86 FR at 45775.

Swiss Application,”⁴⁹ and cited as its primary example that Swiss law “does impose an obligation on a Covered Entity to perform daily internal valuations for risk management purposes.”⁵⁰ While the described obligation may be relevant for requirements related to portfolio reconciliation and internal risk management, it did not address the Exchange Act’s trading relationship documentation requirement that SBSDs have procedures to ensure that trading relationship documentation is executed with counterparties prior to, or contemporaneously with, executing certain security-based swap transactions.⁵¹ Additionally, consistent with the Swiss Application’s statement that under Swiss law “there is no explicit requirement to agree in writing to all terms governing the trading relationship,”⁵² the commenter’s letter notes that “Swiss law does not specifically require Covered Entities to agree with counterparties on the process for valuing each SBS.”⁵³ Although the commenter asserted that “parties will in practice agree on how SBS are valued,”⁵⁴ the Commission has previously stated that voluntary market practices do not establish the requisite supervisory framework or enforcement authority to establish the specific regulatory requirements of Exchange Act section 15Fi-5.⁵⁵ Additionally, the commenter asserted that the “documentation requirement is intended to ensure parties always have legal certainty regarding their contractual obligations to each other,” but proceeded to note that its current practices under Swiss law do not always fulfill this requirement.⁵⁶ Ultimately, the Commission is unconvinced by the

⁴⁹ See Swiss Firms’ Letter at 2.

⁵⁰ See Swiss Firms’ Letter at 2.

⁵¹ 17 CFR 240.15Fi-5(a)(2), Exchange Act rule 15Fi-5(a)(2).

⁵² See Swiss Application section II.1.c at 24.

⁵³ See Swiss Firms’ Letter at 2.

⁵⁴ Id.

⁵⁵ See Swiss Substituted Compliance Notice and Proposed Order, 86 FR at 45775 n.53.

⁵⁶ See Swiss Firms’ Letter at 2 (stating that “in very limited instances, key terms may be documented in a confirmation shortly after an oral agreement”).

commenter's arguments that Swiss law imposes trading relationship documentation requirements that are comparable to those under Exchange Act rule 15Fi-5. Therefore, for the reasons discussed above and in the proposed Order, the Commission is not making a positive substituted compliance determination in relation to trading relationship documentation.

The commenter also requested that, as an alternative to a positive substituted compliance determination for trading relationship documentation generally, the Commission provide relief from the requirements of Exchange Act rule 15Fi-5(b)(5)⁵⁷ relating to disclosures for insured depository institutions and financial companies under the Dodd Frank Act.⁵⁸ In support of its request the commenter noted that such relief would be consistent with the rule's goal of "enhancing transparency and legal certainty regarding each party's rights and obligations under the transaction."⁵⁹ However, the commenter did not identify Swiss requirements that would require comparable disclosure of those rights and obligations or governing law under the transaction and, in fact, noted that because Swiss law subjects banks to a depositor protection scheme, no documentation is required.⁶⁰ The commenter also posits that the Commission should grant relief to be consistent with its approach taken in other jurisdictions.⁶¹ However, in each of the jurisdictions cited by the commenter, comparable requirements were identified by the applicants to

⁵⁷ 17 CFR 240.15Fi-5(b)(5), Exchange Act rule 15Fi-5(b)(5).

⁵⁸ The trading relationship documentation provisions of rule 15Fi-5(b)(5), 17 CFR 240.15Fi-5(b)(5), require certain disclosures regarding the status of the SBS Entity or its counterparty as an insured depository institution or financial counterparty, and regarding the possible application of the insolvency regime set forth under Title II of the Dodd-Frank Act or the Federal Deposit Insurance Act.

⁵⁹ See Swiss Firms' Letter at 3 (quoting the Risk Mitigation Adopting Release, 85 FR at 6361).

⁶⁰ See Swiss Firms' Letter at 3.

⁶¹ See Swiss Firms' Letter at 3-4 (citing to the French Substituted Compliance Order, 86 FR at 41623 n.136, German Substituted Compliance Order, 85 FR at 85690 n.36, and Spanish Substituted Compliance Notice and Proposed Order, 86 FR at 47674 n.66).

warrant a positive substituted compliance determination.⁶² A comparable disclosure requirement under Swiss law has not been identified in either the Swiss Application⁶³ or the commenter's letter.⁶⁴

As previously stated, in lieu of requiring requirement-by-requirement similarity, the Commission takes a holistic approach to assessing comparability analysis, encompassing all Swiss requirements that establish comparability with the applicable regulatory outcome.⁶⁵ However, as neither the Swiss Application, nor the commenter, has identified an applicable regulation under Swiss law, the Commission is unable to determine comparability. Therefore, the Commission is not granting the commenter's requested relief and is not making a positive substituted compliance determination specific to the requirements of Exchange Act rule 15Fi-5(b)(5).

Dispute Reporting: The Commission did not receive comments on its preliminary view with respect to dispute resolution. For the reasons described in the proposed Order,⁶⁶ the Commission continues to believe that Swiss dispute reporting requirements are not comparable to Exchange Act requirements and is not making a positive substituted compliance determination for them.

Other Risk Control Requirements: Having not received any comments addressing them, the Commission continues to conclude that, taken as a whole, the internal risk management, trade acknowledgment and verification, portfolio reconciliation, and portfolio compression

⁶² See French Substituted Compliance Order, 86 FR at 41623 n.136 (citing EMIR Margin RTS article 2); German Substituted Compliance Order, 85 FR at 85690 n.36 (citing EMIR Margin article 2 and EMIR Margin RTS article 2); Spanish Substituted Compliance Notice and Proposed Order, 86 FR at 47674 n.66 (citing EMIT Margin RTS).

⁶³ See Swiss Application section II.1.c at 28-29 (stating that "because Swiss law subjects banks to a depositor protection scheme, documentation of the bank's status as such is not required").

⁶⁴ See Swiss Firms' Letter at 3 (stating that "Swiss laws do not require the same disclosure [as Exchange Act rule 15Fi-5(b)(5)]").

⁶⁵ See Swiss Substituted Compliance Notice and Proposed Order, 86 FR at 45775.

⁶⁶ See *id.* at 45774-75.

requirements under Swiss law subject Covered Entities to risk mitigation and documentation practices that are appropriate to the risks associated with their security-based swap businesses, and thus help to produce regulatory outcomes that are comparable to the outcomes associated with the relevant risk control requirements under the Exchange Act. Although the Commission recognizes that there are differences between the approaches taken by the relevant risk control requirements under the Exchange Act and relevant Swiss requirements, the Commission continues to believe that those differences on balance should not preclude substituted compliance for these requirements, as the relevant Swiss requirements taken as a whole help to produce comparable regulatory outcomes.

To help ensure the comparability of outcomes, substituted compliance for the relevant risk control requirements is subject to certain conditions. Substituted compliance for internal risk management, trade acknowledgment and verification, portfolio reconciliation, and portfolio compression requirements is conditioned on the Covered Entity being subject to, and complying with, relevant Swiss requirements.⁶⁷ In connection with portfolio reconciliation requirements, the Order requires that Covered Entities not apply FinMIA article 108(b)'s exception for "small non-financial counterparties" as defined in FinMIA article 98. Requiring that Covered Entities not apply this exception helps ensure that the Swiss requirements for portfolio reconciliation are applied to Covered Entities in a manner comparable to the applicable Exchange Act requirements. In connection with portfolio compression requirements, the Order also requires that Covered Entities not apply the portion of FinMIA article 108(d) that excludes application of its requirements when there are fewer than 500 non-centrally cleared OTC derivatives

⁶⁷ See paras. (b)(1) through (4) of the Order.

transactions outstanding.⁶⁸ Requiring that Covered Entities not apply this exclusion helps ensure that the Swiss requirements for portfolio compression are applied to Covered Entities in a manner comparable to the applicable Exchange Act requirements. A Covered Entity that is unable to comply with an applicable condition—and thus is not eligible to use substituted compliance for the particular set of Exchange Act risk control requirements related to that condition—nevertheless may use substituted compliance for another set of Exchange Act requirements addressed in the Order if it complies with the conditions to the relevant parts of the Order.

Under the Order, substituted compliance for the relevant risk control requirements (relating to internal risk management, trade acknowledgment and verification, portfolio reconciliation, and portfolio compression) is not subject to a condition that the Covered Entity apply substituted compliance for related recordkeeping requirements in Exchange Act rules 18a-5 and 18a-6. A Covered Entity that applies substituted compliance for one or more risk control requirements, but does not apply substituted compliance for the related recordkeeping requirements in Exchange Act rules 18a-5 and 18a-6, will remain subject to the relevant provisions of Exchange Act rules 18a-5 and 18a-6. Those rules require the Covered Entity to make and preserve records of its compliance with Exchange Act risk control requirements and of its security-based swap activities required or governed by those requirements. A Covered Entity that applies substituted compliance for a risk control requirement, but complies directly with related recordkeeping requirements in rules 18a-5 and 18a-6, therefore must make and preserve records of its compliance with the relevant conditions of the Order and of its security-based swap

⁶⁸ See para. (b)(4)(ii) of the Order.

activities required or governed by those conditions and/or referenced in the relevant parts of rules 18a-5 and 18a-6.

V. Substituted Compliance for Internal Supervision, Chief Compliance Officer and Additional Exchange Act Section 15F(j) Requirements

A. Proposed approach

The Swiss Application requested substituted compliance in connection with requirements relating to:

- Internal supervision – Diligent supervision is required pursuant to Exchange Act rule 15Fh-3(h),⁶⁹ and Exchange Act section 15F(j)(5) requires conflict of interest systems and procedures. These provisions generally require that SBSEs establish, maintain and enforce supervisory policies and procedures that reasonably are designed to prevent violations of applicable law, and implement certain systems and procedures related to conflicts of interest.⁷⁰
- Chief compliance officers – Chief compliance officer requirements are set out in Exchange Act section 15F(k) and Exchange Act rule 15Fk-1.⁷¹ These provisions in general require that SBSEs designate individuals with the responsibility and authority to establish, administer and review compliance policies and procedures, to resolve conflicts of interest, and to prepare and certify an annual compliance report to the Commission.⁷²

⁶⁹ 17 CFR 240.15Fh-3(h).

⁷⁰ The Swiss Application addresses Swiss provisions that address firms' supervisory systems, responsible individuals and qualification requirements for supervisors, supervisory system policies and procedures; the chief compliance officer and the chief compliance officer's reporting authority and job security, chief compliance officer policies and procedures, and chief compliance officer reports. See Swiss Application section II.3 at 67-109.

⁷¹ 17 CFR 240.15Fk-1.

⁷² The Swiss Application discusses Swiss requirements that address compliance officers and their responsibilities, compliance officer appointment, removal and compensation, related conflict of

- Additional Exchange Act section 15F(j) requirements – Additional requirements related to information-gathering pursuant to Exchange Act section 15F(j)(4)(A), and certain antitrust prohibitions specified by Exchange Act section 15F(j)(6).⁷³

Taken as a whole, these internal supervision, chief compliance officer and additional Exchange Act section 15F(j) requirements help to promote SBSEs' use of structures, processes and responsible personnel reasonably designed to promote compliance with applicable law, identify and cure instances of non-compliance and manage conflicts of interest.

In proposing to provide conditional substituted compliance in connection with this part of the Swiss Application, the Commission preliminarily concluded that the relevant Swiss requirements in general would produce comparable regulatory outcomes by providing that Swiss SBSs have structures and processes that reasonably are designed to promote compliance with applicable law and to identify and cure instances of non-compliance and manage conflicts of interest. Substituted compliance under the proposed Order was to be conditioned in part on SBSs being subject to and complying with specified Swiss provisions that in the aggregate produce regulatory outcomes that are comparable to those associated with those internal supervision, compliance and related requirements under the Exchange Act.⁷⁴

interest provisions and compliance-related reports. See Swiss Application section II.3.c at 90-109.

⁷³ Section 15F(j)(4)(A) particularly requires firms to have systems and procedures to obtain necessary information to perform functions required under section 15F. The Swiss Application in turn discusses Swiss provisions generally addressing information gathering and disclosure. See Swiss Application Section II.2 at 33. Section 15F(j)(6) prohibits firms from adopting any process or taking any action that results in any unreasonable restraint of trade, or to impose any material anticompetitive burden on trading or clearing. The Swiss Application addresses Swiss antitrust requirements. See Swiss Application section II.3.b at 78.

⁷⁴ See Swiss Substituted Compliance Notice and Proposed Order, 86 FR at 45775-76.

Under the proposed Order, substituted compliance was to be subject to certain additional conditions to help ensure the comparability of regulatory outcomes. First, substituted compliance in connection with the internal supervision requirements would be conditioned on the Covered Entities complying with applicable Swiss supervisory and compliance provisions as if those provisions also require the Covered Entities to comply with applicable requirements under the Exchange Act and the other conditions of the Order.⁷⁵ This condition was intended to reflect that, even with substituted compliance, Covered Entities would still directly be subject to a number of requirements under the Exchange Act and conditions of the Order that fall outside the ambit of Swiss internal supervision and compliance requirements.⁷⁶

For similar reasons, the proposed Order conditioned substituted compliance in connection with the compliance report requirements under Exchange Act section 15F(k)(3) and Exchange Act rule 15Fk-1(c) on the Covered Entity annually providing the Commission with certain compliance reports required pursuant to FINMA Circular 2017/1 margins 78–81. Those reports must: (1) Be provided to the Commission at least annually and in the English language; (2) include a certification signed by the chief compliance officer or senior officer⁷⁷ of the Covered

⁷⁵ In other words, the proposed Order would require that the Covered Entity’s supervisory and compliance program cover the applicable requirements under the Exchange Act and other conditions of the Order.

⁷⁶ See id. at 45776. These residual Exchange Act requirements could, for example, relate to requirements for which substituted compliance is not available, requirements for which the Order does not make a positive substituted compliance determination, security-based swap business for which the Covered Entity is unable to satisfy the conditions of the Order, and/or requirements or security-based swap business for which the Covered Entity decides not to use substituted compliance. The condition was designed to allow a Covered Entity to use their existing internal supervision and compliance frameworks to comply with the relevant Exchange Act requirements and Order conditions, rather than having to establish separate special-purpose supervision and compliance frameworks.

⁷⁷ See Exchange Act rule 15Fk-1(e)(2) (defining “senior officer” as “the chief executive officer or other equivalent officer”).

Entity that, to the best of the certifier's knowledge and reasonable belief and under penalty of law, the report is accurate and complete in all material respects; (3) address the Covered Entity's compliance with applicable requirements under the Exchange Act and other applicable conditions of the proposed Order in connection with requirements for which the Covered Entity is relying on the proposed Order; (4) be provided to the Commission no later than 15 days following the earlier of the submission of the report to the Covered Entity's management body or the time the report is required to be submitted to the management body; and (5) together cover the entire period that the Covered Entity's annual compliance report referenced in Exchange Act section 15F(k)(3) and Exchange Act rule 15Fk-1(c) would be required to cover.⁷⁸

The Commission preliminarily did not provide substituted compliance for Exchange Act antitrust provisions, based on the preliminary conclusion that allowing an alternative means of compliance would not lead to comparable regulatory outcomes.⁷⁹

B. Commenter views and final provisions

The Commission received one comment addressing the internal supervision, chief compliance officer and additional Exchange Act section 15F(j) requirements section of the proposed Order⁸⁰ and other than modifying the order in response to the comment, is adopting it as proposed.⁸¹

⁷⁸ See Swiss Substituted Compliance Notice and Proposed Order, 86 FR at 45776-77. The condition was designed to allow a Covered Entity to leverage the compliance reports that it must produce pursuant to Swiss requirements, by extending those reports to address compliance with the conditions to the proposed Order. In practice, a Covered Entity may satisfy this condition by identifying relevant Order conditions and reporting on the implementation and effectiveness of its controls with regard to compliance with those Order conditions.

⁷⁹ See *id.* at 45777.

⁸⁰ See Swiss Substituted Compliance Notice and Proposed Order, 86 FR at 45775-77.

⁸¹ See para. (c) of the Order.

The commenter stated that two Swiss provisions included in paragraph (c)(3) of the proposed Order, BO articles 14e and 14g, would not apply to Covered Entities.⁸² The commenter also stated that the other provisions cited in paragraph (c)(3), in particular BO article 12 and FINMA Circular 2017/1, were sufficient for a finding of comparability.⁸³ With respect to BO article 14e, the Commission believes that the remaining provisions are duplicative and has therefore deleted the reference to BO article 14e.⁸⁴ With respect to BO article 14g, however, the provisions cited do not clearly address conflicts of interest of associated persons, although the Swiss Application argues that those provisions do, in practice, lead to comparable outcomes.⁸⁵ The Swiss Application, however, identified FinSA article 25,⁸⁶ which addresses conflicts of interest to the same extent as article 14g, and is applicable to the Covered Entities, but only within Switzerland. The Commission believes it is therefore necessary to make two changes to address the deletion of BO article 14g. First, the Commission has replaced BO article 14g with FinSA article 25 in paragraph (c)(3), but compliance with FinSA article 25 is only required when it is by its terms applicable (within Switzerland).⁸⁷ In addition, consistent with the Swiss Application,⁸⁸ the Commission has included a condition to BO article 12 requiring that article 12(2) be applied in a manner to address the relevant conflicts of interest.⁸⁹

⁸² See Letter from Colin Lloyd of Cleary Gottlieb Steen & Hamilton LLP on behalf of UBS AG and Credit Suisse AG to Vanessa Countryman, Secretary, Commission, dated October 6, 2021 (“Swiss Firms’ Letter II”).

⁸³ Id.

⁸⁴ See para. (c)(3) of the Order.

⁸⁵ See Swiss Application section II.3.d at 96 and Swiss Firms’ Letter II.

⁸⁶ See Swiss Application section II.3.d at 96.

⁸⁷ See para. (c)(3) of the Order.

⁸⁸ See Swiss Application section II.3.d at 97-98.

⁸⁹ See para. (c)(3) of the Order.

Consistent with the proposed Order, substituted compliance in connection with internal supervision further is conditioned on the Covered Entity being subject to and complying with the applicable Swiss supervisory and compliance provisions listed in paragraph (c)(3) of the Order, as if those provisions also require SBSBs to comply with applicable requirements under the Exchange Act and the other applicable conditions to the Order.⁹⁰ Substituted compliance in connection with the chief compliance officer requirements further is conditioned on the compliance reports provided to the Commission addressing the SBSB's compliance with other applicable conditions of the Order.⁹¹ A Covered Entity that is unable to comply with an applicable condition—and thus is not eligible to use substituted compliance for the Exchange Act internal supervision and/or chief compliance officer requirements related to that condition—nevertheless may use substituted compliance for another set of Exchange Act requirements addressed in the Order if it complies with the conditions to the relevant parts of the Order.

Under the Order, substituted compliance for internal supervision and chief compliance officer requirements is not subject to a condition that the Covered Entity apply substituted compliance for related recordkeeping requirements in Exchange Act rules 18a-5 and 18a-6. A Covered Entity that applies substituted compliance for internal supervision and/or chief compliance officer requirements, but does not apply substituted compliance for the related recordkeeping requirements in Exchange Act rules 18a-5 and 18a-6, will remain subject to the relevant provisions of Exchange Act rules 18a-5 and 18a-6. Those rules require the Covered Entity to make and preserve records of its compliance with Exchange Act internal supervision

⁹⁰ See para. (c)(4) of the Order. In other words, a Covered Entity's reliance on substituted compliance under para. (c)(4) requires that the Covered Entity's supervisory and compliance programs cover the applicable provisions under the Exchange Act and other conditions of the Order.

⁹¹ See para. (c)(2)(ii) of the Order.

and chief compliance officer requirements and of its security-based swap activities required or governed by those requirements. A Covered Entity that applies substituted compliance for internal supervision and/or chief compliance officer requirements, but complies directly with related recordkeeping requirements in rules 18a-5 and 18a-6, therefore must make and preserve records of its compliance with the relevant conditions of the Order and of its security-based swap activities required or governed by those conditions and/or referenced in the relevant parts of rules 18a-5 and 18a-6.

Finally, the substituted compliance Order does not extend to antitrust provisions under the Exchange Act, as the Commission continues to believe that allowing an alternative means of compliance would not lead to outcomes comparable to the Exchange Act.⁹²

VI. Substituted Compliance for Recordkeeping, Reporting, and Notification Requirements

A. Proposed approach

The Swiss Application in part requested substituted compliance for requirements applicable to SBS Entities under the Exchange Act relating to:

- Record Making — Exchange Act rule 18a-5 requires prescribed records to be made and kept current.⁹³
- Record Preservation — Exchange Act rule 18a-6 requires preservation of records.⁹⁴

⁹² See Swiss Substituted Compliance Notice and Proposed Order, 86 FR at 45777.

⁹³ See 17 CFR 240.18a-5. The Swiss Application discusses Swiss requirements that address firms' record creation obligations related to matters such as financial condition, operations, transactions, counterparties, and their property, personnel, and business conduct. See Swiss Application section II.2.a at 33-47.

⁹⁴ See 17 CFR 240.18a-6. The Swiss Application discusses Swiss requirements that address firms' record preservation obligations related to records that firms are required to create, as well as additional records such as records of communications. See Swiss Application section II.2.b at 48-61.

- Reporting — Exchange Act rule 18a-7 requires certain reports.⁹⁵
- Notification — Exchange Act rule 18a-8 requires notification to the Commission when certain financial or operational problems occur.⁹⁶
- Daily Trading Records. Exchange Act section 15F(g) requires SBS Entities to maintain daily trading records.⁹⁷

Taken as a whole, the recordkeeping, reporting, and notification requirements that apply to SBS Entities are designed to promote the prudent operation of the firm’s security-based swap activities, assist the Commission in conducting compliance examinations of those activities, and alert the Commission to potential financial or operational problems that could impact the firm and its customers.⁹⁸

⁹⁵ See 17 CFR 240.18a-7. The Swiss Application discusses Swiss requirements that address firms’ obligations to make certain reports. See Swiss Application section II.2.c at 62-64.

⁹⁶ See 17 CFR 240.18a-8. The Swiss Application discusses Swiss requirements that address firms’ obligations to make certain notifications. See Swiss Application section II.2.c at 64-66.

⁹⁷ See 15 U.S.C. 78o-10(g). The Swiss Application discusses Swiss requirements that address firms’ record preservation obligations related to records that firms are required to create, as well as additional records such as records of communications. See Swiss Application section II.2.b at 50-52.

⁹⁸ Rule 3a71-6 sets forth additional analytic considerations in connection with substituted compliance for the Commission’s recordkeeping, reporting, and notification requirements. In particular, Exchange Act rule 3a71-6(d)(6) provides that the Commission intends to consider (in addition to any conditions imposed) “whether the foreign financial regulatory system’s required records and reports, the timeframes for recording or reporting information, the accounting standards governing the records and reports, and the required format of the records and reports” are comparable to applicable provisions under the Exchange Act, and whether the foreign provisions “would permit the Commission to examine and inspect regulated firms’ compliance with the applicable securities laws.”

B. Commenter views and final provisions

1. General considerations

In proposing to provide conditional substituted compliance in connection with this part of the Swiss Application, the Commission preliminarily concluded that the relevant Swiss requirements, subject to conditions and limitations, would produce regulatory outcomes that are comparable to the outcomes associated with the vast majority of the recordkeeping, reporting, and notification requirements under the Exchange Act applicable to prudentially regulated SBS Entities pursuant to Exchange Act rules 18a-5, 18a-6, 18a-7, and 18a-8 and Exchange Act section 15F(g) (collectively, the “recordkeeping, reporting, and notification requirements”).⁹⁹ Substituted compliance for the recordkeeping, reporting, and notification requirements accordingly is conditioned on Covered Entities being subject to and complying with the Swiss provisions that in the aggregate establish a framework that produces outcomes comparable to those associated with the analogous recordkeeping, reporting, and notification requirements under the Exchange Act.¹⁰⁰

The proposed structure of the substituted compliance determinations with respect to the recordkeeping, reporting, and notification requirements would have provided Covered Entities with greater flexibility to select distinct requirements within the broader rules for which they want to apply substituted compliance.¹⁰¹ This would not preclude a Covered Entity from

⁹⁹ See Swiss Substituted Compliance Notice and Proposed Order, 86 FR at 45777.

¹⁰⁰ See paras. (d)(1)(i)(A), (d)(1)(i)(B), (d)(1)(i)(C), (d)(1)(i)(D), (d)(1)(i)(E), (d)(1)(i)(F)(I), (d)(1)(i)(G), (d)(1)(i)(H), (d)(1)(i)(I)(I), (d)(1)(i)(J)(I), (d)(1)(i)(K)(I), (d)(2)(i)(A), (d)(2)(i)(B), (d)(2)(i)(C), (d)(2)(i)(D), (d)(2)(i)(E), (d)(2)(i)(F)(I), (d)(2)(i)(G)(I), (d)(2)(i)(H), (d)(2)(i)(I), (d)(2)(i)(J), (d)(2)(i)(K)(I), (d)(2)(i)(L), (d)(2)(i)(M), (d)(3)(i), (d)(3)(i)(B), (d)(4)(i)(A), (d)(4)(i)(B), and (d)(5) of the Order.

¹⁰¹ See Swiss Substituted Compliance Notice and Proposed Order, 86 FR at 45777-78.

applying substituted compliance for the entire rule (subject to conditions and limitations). However, it would permit the Covered Entity to apply substituted compliance with respect to certain requirements of a given rule and to comply directly with the remaining requirements. This more granular approach to the recordkeeping, reporting, and notification rules was intended to permit Covered Entities to leverage existing recordkeeping and reporting systems that are designed to comply with the broker-dealer recordkeeping and reporting requirements on which the recordkeeping, reporting, and notification requirements applicable to SBS Entities are based. For example, it may be more efficient for a Covered Entity to comply with certain Exchange Act requirements within a given recordkeeping, reporting, or notification rule (rather than apply substituted compliance) because it can utilize systems that its affiliated broker-dealer has implemented to comply with them. This proposed approach was consistent with the approach taken by the Commission in the French and UK Orders.¹⁰²

As applied to Exchange Act rules 18a-5 and 18a-6, this approach of providing greater flexibility resulted in preliminary substituted compliance determinations with respect to the different categories of records these rules require SBS Entities to make, keep current, and/or preserve.¹⁰³ The objective of these rules – taken as a whole – is to assist the Commission in monitoring and examining for compliance with substantive Exchange Act requirements applicable to SBS Entities (e.g., business conduct requirements) as well as to promote the prudent operation of these firms.¹⁰⁴ The Commission stated a preliminary belief that the

¹⁰² See French Substituted Compliance Order, 86 FR at 41649; UK Substituted Compliance Order, 86 FR at 43360.

¹⁰³ See Swiss Substituted Compliance Notice and Proposed Order, 86 FR at 45778.

¹⁰⁴ See, e.g., Exchange Act Release No. 71958 (Apr. 17, 2014), 79 FR 25194, 25199-200 (May 2, 2014).

comparable Swiss recordkeeping rules achieve these outcomes with respect to compliance with substantive Swiss requirements for which preliminary positive substituted compliance determinations were being made (e.g., the preliminary positive substituted compliance determinations with respect to the Exchange Act business conduct requirements).¹⁰⁵ At the same time, the recordkeeping rules address different categories of records through distinct requirements within the rules. Each requirement with respect to a specific category of records (e.g., paragraph (b)(2) of Exchange Act rule 18a-5 addressing ledger accounts) can be viewed in isolation as a distinct recordkeeping rule. Therefore, the Commission made preliminary substituted compliance determinations at this level of Exchange Act rules 18a-5 and 18a-6.¹⁰⁶ The Commission did not receive comment on this granular approach and is adopting it as proposed.¹⁰⁷

Second, the Commission did not make a preliminary positive substituted compliance determination with respect to a discrete provision of the recordkeeping, reporting, and notification requirements if it was fully or partially linked to a substantive Exchange Act requirement for which substituted compliance was not available or for which a preliminary positive substituted compliance determination was not being made.¹⁰⁸ In particular, a preliminary positive substituted compliance determination was not made, in full or in part, for recordkeeping, reporting, or notification requirements linked to the following Exchange Act rules for which substituted compliance is not available or a preliminary positive substituted

¹⁰⁵ See Swiss Substituted Compliance Notice and Proposed Order, 86 FR at 45778.

¹⁰⁶ See Swiss Substituted Compliance Notice and Proposed Order, 86 FR at 45778.

¹⁰⁷ See paras. (d)(1)(i) and (d)(2)(ii) of the Order.

¹⁰⁸ See Swiss Substituted Compliance Notice and Proposed Order, 86 FR at 45778 (discussing this limitation).

compliance determination was not made: (1) Exchange Act rule 15Fh-4; (2) Exchange Act rule 15Fh-5; (3) Exchange Act rule 15Fh-6; (4) Exchange Act rule 18a-4; (5) Regulation SBSR; (6) Form SBSE and its variations; (7) Exchange Act rule 15Fh-1; (8) Exchange Act rule 15Fh-2; and (9) Exchange Act rule 15Fi-5. This proposed approach was consistent with the approach taken by the Commission in the French and UK Orders.¹⁰⁹ The Commission did not receive comment on these limitations and the Order includes them.¹¹⁰

Third, the Commission conditioned substituted compliance with discrete provisions of the recordkeeping, reporting, and notification requirements that were fully or partially linked to a substantive Exchange Act requirement for which substituted compliance was available on the Covered Entity applying substituted compliance with respect to the linked Exchange Act requirement.¹¹¹ In particular, substituted compliance for a provision of the recordkeeping, reporting, and notification requirements that is linked to the following Exchange Act rules was conditioned on the SBS Entity applying substituted compliance to the linked substantive Exchange Act rule: (1) Exchange Act rule 15Fh-3(h); (2) Exchange Act rule 15Fi-2; (3) Exchange Act rule 15Fi-3; (4) Exchange Act rule 15Fi-4; and (5) Exchange Act rule 15Fk-1. The Commission did not receive comment on these conditions and the Order includes them.¹¹²

Fourth, the Commission conditioned substituted compliance with Exchange Act rule 18a-7 on Covered Entities filing periodic unaudited financial and operational information with

¹⁰⁹ See French Substituted Compliance Order, 86 FR at 41650; UK Substituted Compliance Order, 86 FR at 45778.

¹¹⁰ See para. (d) of the Order.

¹¹¹ See Swiss Substituted Compliance Notice and Proposed Order, 86 FR at 18395 (discussing this condition).

¹¹² See para. (d)(3) of the Order.

the Commission or its designee in the manner and format required by Commission rule or order.¹¹³ The Commission did not receive comment on this condition and the Order includes it.¹¹⁴

Fifth, the proposed Order conditioned substituted compliance with Exchange Act rule 18a-8 on Covered entities simultaneously sending a copy of any notice required to be sent by Swiss law to the Commission in the manner specified on the Commission's website and including with the transmission the contact information of an individual who can provide further information about the matter that is the subject of the notice.¹¹⁵ The Commission did not receive comment on these conditions and the Order includes them.¹¹⁶

Sixth, the proposed Order included a condition that Covered Entities must promptly furnish to a representative of the Commission upon request an English translation of any record, report, or notification of the Covered Entity that is required to be made, preserved, filed, or subject to examination pursuant to Exchange Act section 15F of this Order.¹¹⁷ The Commission did not receive a comment on this condition and the Order includes it.¹¹⁸

¹¹³ See Swiss Substituted Compliance Notice and Proposed Order, 86 FR at 45782 (discussing this condition).

¹¹⁴ See para. (d)(3) of the Order.

¹¹⁵ See Swiss Substituted Compliance Notice and Proposed Order, 86 FR at 45782 (discussing this condition).

¹¹⁶ See para. (d)(4)(ii)(A) of the Order.

¹¹⁷ See Swiss Substituted Compliance Notice and Proposed Order, 86 FR at 45784 (discussing this condition).

¹¹⁸ See para. (d)(7) of the Order.

2. Citations to Swiss Law

The Commission received comment recommending changes to the proposed Order to refine the scope of Swiss law provisions that would operate as conditions to substituted compliance.¹¹⁹ The Commission staff reviewed each of the Swiss law citations that the commenter recommended adding or removing from the Order for relevance to the comparable Exchange Act requirement while also keeping in mind that each Swiss law citation was included in the Swiss Application intentionally. The Commission's conclusion and reasoning with respect to the commenter's recommendations are discussed in further detail below.

First, the commenter recommended replacing references to FMIO article 38 with FinMIA article 38 in paragraphs (d)(1)(i)(E) and (d)(1)(i)(G) of the Order, because FinMIA article 38 covers recordkeeping duties of Covered Entities while FMIO article 38 is a provision that applies to organized trading facilities. The Commission agrees with the commenter's reasoning and is therefore replacing references to FMIO article 38 with FinMIA article 38 in paragraphs (d)(1)(i)(E) and (d)(1)(i)(G) of the Order.¹²⁰

Second, the commenter recommended deleting from paragraphs (d)(1)(i)(H) and (d)(2)(i)(H) of the Order references to CO article 330a, which provides for an employee's right to obtain a letter of recommendation, reasoning that this Swiss law provision does not directly apply to records, and that this provision only concerns rights arising out of employment relationships under Swiss law and is not applicable outside of Switzerland. Even though CO article 330a is not a direct recordkeeping requirement, in practice it requires Swiss firms to

¹¹⁹ See Swiss Firms' Letter at Annex.

¹²⁰ Compare paras. (d)(1)(i)(E) and (d)(1)(i)(G) of the Swiss Substituted Compliance Notice and Proposed Order, with paras. (d)(1)(i)(E) and (d)(1)(i)(G) of the Order.

maintain employment records that are relevant to Exchange Act rules 18a-5(b)(8) and 18a-6(d)(1), so the Commission is not removing references to this requirement from the Order's list of Swiss requirements comparable to Exchange Act rules 18a-5(b)(8) and 18a-6(d)(1).¹²¹

Third, the commenter recommended deleting from paragraph (d)(2)(i)(G)(I) of the Order references to CO article 686, which requires firms to preserve a register of registered shares for ten years, reasoning that this Swiss law provision only applies to shares of companies incorporated in Switzerland. The Commission expects the firms relying on the Order to be incorporated in Switzerland, so the Commission is not removing references to this requirement from the Order's list of Swiss requirements comparable to Exchange Act rules 18a-6(c).¹²²

Fourth, the commenter recommended replacing references to FINMA Circular 2008/21 margin 131 with FINMA Circular 2008/21 margin 132 in paragraph (d)(2)(i)(I) of the Order, because the Swiss Application inadvertently cited to a repealed provision of Swiss law. The Commission agrees with the commenter's reasoning and is therefore replacing FINMA Circular 2008/21 margin 131 with FINMA Circular 2008/21 margin 132 in paragraph (d)(2)(i)(I) of the Order.¹²³

VII. Supervisory and Enforcement Considerations

A. Proposed approach

Exchange Act rule 3a71-6(a)(2)(i) provides that the Commission's assessments regarding the comparability of foreign requirements in part should take into account "the effectiveness of

¹²¹ Compare paras. (d)(1)(i)(H) and (d)(2)(i)(H) of the Swiss Substituted Compliance Notice and Proposed Order, with paras. (d)(1)(i)(H) and (d)(2)(i)(H) of the Order.

¹²² Compare para. (d)(2)(i)(G)(I) of the Swiss Substituted Compliance Notice and Proposed Order, with para. (d)(2)(i)(G)(I) of the Order.

¹²³ Compare para. (d)(2)(i)(I) of the Swiss Substituted Compliance Notice and Proposed Order, with para. (d)(2)(i)(I) of the Order.

the supervisory program administered, and the enforcement authority exercised” by the foreign financial regulatory authority. This provision is intended to help ensure that substituted compliance is not predicated on rules that appear high-quality on paper if market participants in practice are allowed to fall short of their obligations, while also recognizing that differences among supervisory and enforcement regimes should not be assumed to reflect flaws in one regime or another. The Swiss Application accordingly included information regarding the supervisory and enforcement framework applicable to derivatives markets and market participants in Switzerland.

In proposing to grant substituted compliance in connection with the Swiss Application, the Commission preliminarily concluded that the relevant supervisory and enforcement considerations were consistent with substituted compliance. That preliminary conclusion took into account information regarding FINMA’s practices supervising Covered Firms located in Switzerland, as well as their enforcement-related authority and practices.¹²⁴

B. Commenter views and final provisions

Commenters did not address the Commission’s preliminary conclusions regarding supervisory and enforcement considerations, and the Commission continues to conclude that the relevant supervisory and enforcement considerations in Switzerland are consistent with substituted compliance. In particular, based on the available information regarding FINMA’s authority and practices to oversee market participants’ compliance with applicable requirements and to take action in the event of violations, the Commission remains of the view that, consistent with rule 3a71-6, comparability determinations reflect Swiss requirements as they apply in practice.

¹²⁴ See Swiss Substituted Compliance Notice and Proposed Order, 86 FR at 45784-85.

To be clear, the supervisory and enforcement considerations addressed by rule 3a71-6 do not mandate that the Commission make judgments regarding the comparative merits of U.S. and foreign supervisory and enforcement frameworks, or to require specific findings regarding the supervisory and enforcement effectiveness of a foreign regime. The rule 3a71-6 considerations regarding supervisory and enforcement effectiveness instead address whether comparability analyses related to substituted compliance reflect requirements that market participants must follow, and for which market participants are subject to enforcement consequences in the event of violations. Those considerations are satisfied here.

VIII. Conclusion

IT IS HEREBY DETERMINED AND ORDERED, pursuant to rule 3a71-6 under the Exchange Act, that a Covered Entity (as defined in paragraph (e)(1) of this Order) may satisfy the requirements under the Exchange Act that are addressed in paragraphs (b) through (d) of this Order so long as the Covered Entity is subject to and complies with relevant requirements of the Swiss Confederation and with the conditions to this Order, as amended or superseded from time to time.

(a) General conditions.

This Order is subject to the following general conditions, in addition to the conditions specified in paragraphs (b) through (d):

(1) Security-based swaps and transactions as “derivatives” or “derivative transactions.”

For each condition in paragraphs (b) through (d) of this Order that requires the application of, and the Covered Entity’s compliance with, provisions of FinMIA and FMIO, the relevant security-based swaps and security-based swap transactions are “derivatives” and/or “derivative transactions” for purposes of FinMIA article 2(c), or otherwise are described by the relevant language of that provision.

(2) “Counterparty” status. For each condition in paragraph (b) through (d) of this Order that requires the application of, and the Covered Entity’s compliance with, the provisions of FinMIA and FMIO, the Covered Entity complies with the applicable conditions of the Order regardless of whether the Covered Entity’s counterparty is a “counterparty” for purposes of FinMIA article 93, or otherwise is described by the relevant language of that provision.

(3) Counterparty’s status as “company.” For each condition in paragraph (b) through (d) of this Order that requires the application of, and the Covered Entity’s compliance with, the

provisions of FMIO, the Covered Entity complies with the applicable conditions of the Order regardless of whether a Covered Entity's counterparty is a "company" for purposes of FMIO article 77, or otherwise is described by the relevant language of that provision.

(4) Covered Entity as "bank." For each condition in paragraph (b) through (d) of this Order that requires the application of, and the Covered Entity's compliance with, the provisions of the BA and BO and/or other Swiss requirements adopted pursuant to those provisions, the Covered Entity is a "bank" for purposes of BA article 1a, or otherwise is described by the relevant language of that provision.

(5) Covered Entity as "systemically important." For each condition in paragraph (b) through (d) of this Order that requires the application of, and the Covered Entity's compliance with, the provisions of the FINMA Circular 2017/1, the Covered Entity is "systemically important" for purposes of BA article 8(3) and article 9, or otherwise are described by the relevant language of that provision.

(6) Covered Entity as "category 1." For each condition in paragraph (b) through (d) of this Order that requires the application of, and the Covered Entity's compliance with, the provisions of FINMA Circular 2017/1, the Covered Entity is supervised as "category 1," as defined in BO articles 2(2) and 2(3) and BO Annex 3, or otherwise is described by the relevant language of those provisions.

(7) "Institution-specific approach" to operational risk quantification. For each condition in paragraphs (b) through (d) of this Order that requires the application of, and the Covered Entity's compliance with, the provisions of FINMA Circular 2008/21 margins 45-107, the Covered Entity applies the institution-specific approach, as defined in CAO article 94, to quantifying capital requirements for operational risk, as approved by FINMA.

(8) Memorandum of Understanding with FINMA. The Commission and FINMA have a supervisory and enforcement memorandum of understanding and/or other arrangement addressing cooperation with respect to this Order at the time the Covered Entity complies with the relevant requirements under the Exchange Act via compliance with one or more provisions of this Order.

(9) Notice to Commission. A Covered Entity relying on this Order must provide notice of its intent to rely on this Order by notifying the Commission in writing. Such notice must be sent to an email address provided on the Commission's website. The notice must include the contact information of an individual who can provide further information about the matter that is the subject of the notice. The notice must identify each specific substituted compliance determination within paragraphs (b) through (d) of the Order for which the Covered Entity intends to apply substituted compliance. A Covered Entity must promptly provide an amended notice if it modifies its reliance on the substituted compliance determinations in this Order.

(10) Notification Requirements Related to Changes in Capital. A Covered Entity that is prudentially regulated relying on this Order must apply substituted compliance with respect to the requirements of Exchange Act rule 18a-8(c) and the requirements of Exchange Act rule 18a-8(h) as applied to Exchange Act rule 18a-8(c).

(b) Substituted compliance in connection with risk control requirements.

This Order extends to the following provisions related to risk control:

(1) Internal risk management. The requirements of Exchange Act section 15F(j)(2) and relevant aspects of Exchange Act rule 15Fh-3(h)(2)(iii)(I), provided that the Covered Entity is subject to and complies with the requirements of: BO article 12; FINMA Circular 2017/1

margins 9-14, 31-49, 52-76, 82-97; and FINMA Circular 2008/21 margins 45, 54-63, 65-68, 117-138.

(2) Trade acknowledgement and verification. The requirements of Exchange Act rule 15Fi-2, provided that the Covered Entity is subject to and complies with the requirements of FinMIA articles 108(a) and (c); and FMIO articles 95, 97, and 113(1).

(3) Portfolio reconciliation. The requirements of Exchange Act rule 15Fi-3, other than paragraph (c) to that rule, provided that:

(i) The Covered Entity is subject to and complies with the requirements of FINMASA article 29; FinMIA article 108(b) and (c); and FMIO articles 96, 97 and 113(1)(d);

(ii) The Covered Entity does not apply FinMIA article 108(b)'s exception for "small non-financial counterparties" as defined in FinMIA article 98.

(4) Portfolio compression. The requirements of Exchange Act rule 15Fi-4, provided that:

(i) The Covered Entity is subject to and complies with the requirements of FinMIA article 108(d); and FMIO articles 98 and 113(1)(d); and

(ii) The Covered Entity does not apply the portion of FinMIA article 108(d) that excludes application of the requirement when there are fewer than 500 non-centrally cleared OTC derivatives transactions outstanding.

(c) **Substituted compliance in connection with internal supervision and compliance requirements and certain Exchange Act section 15F(j) requirements.**

This Order extends to the following provisions related to internal supervision and compliance and Exchange Act section 15F(j) requirements:

(1) Internal supervision. The requirements of Exchange Act rule 15Fh-3(h) and Exchange Act sections 15F(j)(4)(A) and (j)(5), provided that:

(i) The Covered Entity is subject to and complies with the requirements identified in paragraph (c)(3) of this Order; and

(ii) This paragraph (c) does not extend to the requirements of paragraph (h)(2)(iii)(I) to rule 15Fh-3 to the extent those requirements pertain to compliance with Exchange Act sections 15F(j)(2), (j)(3), (j)(4)(B) and (j)(6), or to the general and supporting provisions of paragraph (h) to rule 15Fh-3 in connection with those Exchange Act sections.

(2) Chief compliance officers. The requirements of Exchange Act section 15F(k) and Exchange Act rule 15Fk-1, provided that:

(i) The Covered Entity complies with the requirements identified in paragraph (c)(3) of this Order;

(ii) All reports required pursuant to FINMA Circular 2017/1 margins 78-81 must also:

(A) Be provided to the Commission at least annually, and in the English language;

(B) Include a certification signed by the chief compliance officer or senior officer (as defined in Exchange Act rule 15Fk-1(e)(2)) of the Covered Entity that, to the best of the certifier's knowledge and reasonable belief and under penalty of law, the report is accurate and complete in all material respects;

(C) Address the firm's compliance with:

(i) Applicable requirements under the Exchange Act; and

(ii) The other applicable conditions to this Order in connection with requirements for which the Covered Entity is relying on this Order;

(D) Be provided to the Commission no later than 15 days following the earlier of:

(i) The submission of the report to the Covered Entity's management body; or

(ii) The time the report is required to be submitted to the management body; and

(E) Together cover the entire period that the Covered Entity's annual compliance report referenced in Exchange Act section 15F(k)(3) and Exchange Act rule 15Fk-1(c) would be required to cover.

(3) Applicable supervisory and compliance requirements. Paragraphs (c)(1) and (c)(2) are conditioned on the Covered Entity being subject to and complying with the following requirements: BA articles 3(2)(c) and 3f; BO article 12 (provided that the application of BO article 12(2) includes procedures reasonably designed to address conflicts of interest that may be present with respect to associated persons being supervised); FINMA Circular 2017/1 articles 9-97; FINMA Circular 2008/21 margins 54-62, 65-68, 121-122, and 128-136.5; FINMA Circular 2013/8 margins 45-61, 64; FINMA Circular 2010/1 margins 16-74; FINMA Circular 2018/3 margins 14-35; and (where applicable) FinSA article 25.

(4) Additional condition to paragraph (c)(1). Paragraph (c)(1) further is conditioned on the requirement that the Covered Entity complies with the provisions specified in paragraph (c)(3) as if those provisions also require compliance with:

(i) Applicable requirements under the Exchange Act; and

(ii) The other applicable conditions to this Order in connection with requirements for which the Covered Entity is relying on this Order.

(d) Substituted compliance in connection with recordkeeping, reporting, and notification requirements.

This Order extends to the following provisions that apply to a Covered Entity related to recordkeeping, reporting, and notification:

(1)(i) Make and keep current certain records. The requirements of the following provisions of Exchange Act rule 18a-5, provided that the Covered Entity complies with the relevant conditions in this paragraph (d)(1)(i) and with the applicable conditions in paragraph (d)(1)(ii):

(A) The requirements of Exchange Act rule 18a-5(b)(1), provided that the Covered Entity is subject to and complies with the requirements of FMIO-FINMA article 1; FinMIA articles 104 and 106; FMIO annex 2; CO article 958f;

(B) The requirements of Exchange Act rule 18a-5(b)(2), provided that the Covered Entity is subject to and complies with the requirements of CO article 958f; AccO article 1; FinMIA article 106;

(C) The requirements of Exchange Act rule 18a-5(b)(3), provided that the Covered Entity is subject to and complies with the requirements of CO article 958f; FinMIA articles 104 and 106; FMIO annex 2;

(D) The requirements of Exchange Act rule 18a-5(b)(4), provided that the Covered Entity is subject to and complies with the requirements of FinMIA article 38; FMIO article 36; FinIA article 50; FMIO-FINMA article 1; CO article 958f;

(E) The requirements of Exchange Act rule 18a-5(b)(5), provided that the Covered Entity is subject to and complies with the requirements of FinMIA article 38; FinIA article 50; FMIO-FINMA article 1; CO article 958f;

(F) The requirements of Exchange Act rules 18a-5(b)(6) and (b)(11), provided that:

(I) The Covered Entity is subject to and complies with the requirements of FinMIA articles 106 and 108(a); FMIO article 95; CO article 958f; and

(2) The Covered Entity applies substituted compliance for the requirements of Exchange Act rule 15Fi-2 pursuant to this Order;

(G) The requirements of Exchange Act rule 18a-5(b)(7), provided that the Covered Entity is subject to and complies with the requirements of FinMIA article 38; FinIA article 50; FMIO-FINMA article 1; FMIO annex 2; FinMIA articles 104 and 106; AMLA article 3; CO article 958f;

(H) The requirements of Exchange Act rule 18a-5(b)(8), provided that the Covered Entity is subject to and complies with the requirements of CO article 958f; BA article 3; BO article 12; CO article 330a; FINMA Circular 2008/21, Annex 3, margins 30-33;

(I) The requirements of Exchange Act rule 18a-5(b)(13), regarding one or more provisions of Exchange Act rules 15Fh-3 or 15Fk-1 for which substituted compliance is available under this Order, provided that:

(1) The Covered Entity is subject to and complies with the requirements of FINMA Circular 2017/1; BA article 3; CO article 958f, in each case with respect to the relevant security-based swap or activity;

(2) With respect to the portion of Exchange Act rule 18a-5(b)(13) that relates to one or more provisions of Exchange Act rule 15Fh-3 for which substituted compliance is available under this Order, the Covered Entity applies substituted compliance for such business conduct standard(s) of Exchange Act rule 15Fh-3 pursuant to this Order, as applicable, with respect to the relevant security-based swap or activity; and

(3) With respect to the portion of Exchange Act rule 18a-5(b)(13) that relates to Exchange Act rule 15Fk-1, the Covered Entity applies substituted compliance for Exchange Act section 15F(k) and Exchange Act rule 15Fk-1 pursuant to this Order;

(J) The requirements of Exchange Act rule 18a-5(b)(14)(i) and (ii), provided that:

(1) The Covered Entity is subject to and complies with the requirements of FinMIA articles 104 and 106; CO article 958f; and

(2) The Covered Entity applies substituted compliance for Exchange Act rule 15Fi-3 pursuant to this Order; and

(K) The requirements of Exchange Act rule 18a-5(b)(14)(iii), provided that:

(1) The Covered Entity is subject to and complies with the requirements of FinMIA articles 104 and 106; CO article 958f; and

(2) The Covered Entity applies substituted compliance for Exchange Act rule 15Fi-4 pursuant to this Order.

(ii) Paragraph (d)(1)(i) is subject to the following further conditions:

(A) Paragraphs (d)(1)(i)(A) through (C) and (G) are subject to the condition that the Covered Entity preserves all of the data elements necessary to create the records required by the applicable Exchange Act rules cited in such paragraphs and upon request furnishes promptly to representatives of the Commission the records required by those rules;

(B) A Covered Entity may apply the substituted compliance determination in paragraph (d)(1)(i)(I) to records of compliance with Exchange Act rule 15Fh-3(h) in respect of one or more security-based swaps or activities related to security-based swaps; and

(C) This Order does not extend to the requirements of Exchange Act rule 18a-5(b)(9), (b)(10), or (b)(12).

(2)(i) *Preserve certain records.* The requirements of the following provisions of Exchange Act rule 18a-6, provided that the Covered Entity complies with the relevant conditions in this paragraph (d)(2)(i) and with the applicable conditions in paragraph (d)(2)(ii):

(A) The requirements of Exchange Act rule 18a-6(a)(2), provided that the Covered Entity is subject to and complies with the requirements of FinMIA article 106; CO article 958f; FMIO-FINMA article 1(4); AccO article 3; FINMA Circular 2008/4 Marg. 16;

(B) The requirements of Exchange Act rule 18a-6(b)(2)(i), provided that the Covered Entity is subject to and complies with the requirements of FinMIA article 106; CO article 958f; FMIO-FINMA article 1(4); AccO article 3; FINMA Circular 2008/4 Marg. 16;

(C) The requirements of Exchange Act rule 18a-6(b)(2)(ii), provided that the Covered Entity is subject to and complies with the requirements of CO article 958f; FINMA Circular 2013/8 Marg. 60 and Marg. 61;

(D) The requirements of Exchange Act rule 18a-6(b)(2)(iii), provided that the Covered Entity is subject to and complies with the requirements of CO article 958f; AMLA article 7(3); AMLO-FINMA article 5(1);

(E) The requirements of Exchange Act rule 18a-6(b)(2)(iv), provided that the Covered Entity is subject to and complies with the requirements of CO article 958f; FINMA Circular 2013/8 Marg. 60 and Marg. 61;

(F) The requirements of Exchange Act rule 18a-6(b)(2)(vii), regarding one or more provisions of Exchange Act rules 15Fh-3 or 15Fk-1 for which substituted compliance is available under this Order, provided that:

(1) The Covered Entity is subject to and complies with the requirements of FINMA Circular 2017/1; BA article 3; CO article 958f, in each case with respect to the relevant security-based swap or activity;

(2) With respect to the portion of Exchange Act rule 18a-6(b)(2)(vii) that relates to one or more provisions of Exchange Act rule 15Fh-3 for which substituted compliance is available

under this Order, the Covered Entity applies substituted compliance for such business conduct standard(s) of Exchange Act rule 15Fh-3 pursuant to this Order, as applicable, with respect to the relevant security-based swap or activity; and

(3) With respect to the portion of Exchange Act rule 18a-6(b)(2)(vii) that relates to Exchange Act rule 15Fk-1, the Covered Entity applies substituted compliance for Exchange Act section 15F(k) and Exchange Act rule 15Fk-1 pursuant to this Order;

(G) The requirements of Exchange Act rule 18a-6(c), provided that:

(1) The Covered Entity is subject to and complies with the requirements of BA article 3; BO article 12; CO articles 686 and 958f; and

(2) This Order does not extend to the requirements of Exchange act rule 18a-6(c) relating to Forms SBSE, SBSE-A, SBSE-C, SBSE-W, all amendments to these forms, and all other licenses or other documentation showing the registration of the Covered Entity with any securities regulatory authority or the U.S. Commodity Futures Trading Commission;

(H) The requirements of Exchange Act rule 18a-6(d)(1), provided that the Covered Entity is subject to and complies with the requirements of CO article 958f; BA article 3; BO article 12; CO article 330a; FINMA Circular 2008/21, Annex 3, margins 30-33;

(I) The requirements of Exchange Act rule 18a-6(d)(2)(ii), provided that the Covered Entity is subject to and complies with the requirements of BA article 3; BO article 12; CO article 958f; FINMA Circular 2008/21 margins 122, 128, 132, and Appendix 2;

(J) The requirements of Exchange Act rule 18a-6(d)(3)(ii), provided that the Covered Entity is subject to and complies with the requirements of CO article 958f; BA article 3; BO article 12;

(K) The requirements of Exchange Act rule 18a-6(d)(4) and (d)(5), regarding one or more provisions of Exchange Act rules 15Fi-3 or 15Fi-4 for which substituted compliance is available under this Order, provided that:

(1) The Covered Entity is subject to and complies with the requirements of CO article 958f; FinMIA article 106;

(2) With respect to the portion of Exchange Act rule 18a-6(d)(4) and (d)(5) that relates to Exchange Act rules 15Fi-3 or 15Fi-4, the Covered Entity applies substituted compliance for Exchange Act rules 15Fi-3 and 15Fi-4 pursuant to this Order; and

(3) This Order does not extend to the requirements of Exchange Act rule 18a-6(d)(4) and (d)(5) relating to Exchange Act rule 15Fi-5;

(L) The requirements of Exchange Act rule 18a-6(e), provided that the Covered Entity is subject to and complies with the requirements of AccO; and

(M) The requirements of Exchange Act rule 18a-6(f), provided that the Covered Entity is subject to and complies with the requirements of FINMA Circular 2018/3.

(ii) Paragraph (d)(2)(i) is subject to the following further conditions:

(A) A Covered Entity may apply the substituted compliance determination in paragraph (d)(2)(i)(F) to records related to Exchange Act rule 15Fh-3(h) in respect of one or more security-based swaps or activities related to security-based swaps; and

(B) This Order does not extend to the requirements of Exchange Act rule 18a-6(b)(2)(v), (b)(2)(vi), or (b)(2)(viii).

(3) *File Reports*. The requirements of Exchange Act rule 18a-7(a)(2) and the requirements of Exchange Act rule 18a-7(j) as applied to the requirements of Exchange Act rule 18a-7(a)(2), provided that:

(i) The Covered Entity is subject to and complies with the requirements of BA article 6a; BO article 32; CAO article 16; FINMA Circular 2020/1; and FINMA Circular 2016/1; and

(ii) The Covered Entity files periodic unaudited financial and operational information with the Commission or its designee in the manner and format required by Commission rule or order and presents the financial information in the filing in accordance with generally accepted accounting principles that the Covered Entity uses to prepare general purpose publicly available or available to be issued financial statements in Switzerland.

(4)(i) *Provide Notification.* The requirements of the following provisions of Exchange Act rule 18a-8, provided that the Covered Entity complies with the relevant conditions in this paragraph (d)(4)(i) and with the applicable conditions in paragraph (d)(4)(ii):

(A) The requirements of Exchange Act rule 18a-8(c) and the requirements of Exchange Act rule 18a-8(h) as applied to the requirements of Exchange Act rule 18a-8(c), provided that the Covered Entity is subject to and complies with the requirements of FINMASA article 29(2); CAO articles 14, 42(3), 101, and 130(4); and Liquidity Ordinance articles 17b, and 26(2).

(B) The requirements of Exchange Act rule 18a-8(d) and the requirements of Exchange Act rule 18a-8(h) as applied to the requirements of Exchange Act rule 18a-8(d), provided that:

(1) The Covered Entity is subject to and complies with the requirements of FINMASA article 29(2); CAO articles 14, 42(3), 101, and 130(4); and Liquidity Ordinance articles 17b, and 26(2); and

(2) This Order does not extend to the requirements of Exchange Act rule 18a-8(d) to give notice with respect to books and records required by Exchange Act rule 18a-5 for which the Covered Entity does not apply substituted compliance pursuant to this Order;

(ii) Paragraph (d)(4)(i) is subject to the following further conditions:

(A) The Covered Entity:

(1) Simultaneously sends a copy of any notice required to be sent by Swiss law cited in this paragraph of the Order to the Commission in the manner specified on the Commission's website; and

(2) Includes with the transmission the contact information of an individual who can provide further information about the matter that is the subject of the notice; and

(B) This Order does not extend to the requirements of paragraph (g) of rule 18a-8 or to the requirements of Exchange Act rule 18a-8(h) as applied to such requirements.

(5) *Daily Trading Records.* The requirements of Exchange Act section 15F(g), provided that the Covered Entity is subject to and complies with the requirements of CO article 958f; FMIO article 36; FMIO-FINMA article 1; FinMIA articles 38, 104, and 106; FINMA Circular 2013/8 marg. 60 and marg. 61.

(6) *Examination and Production of Records.* Notwithstanding the forgoing provisions of paragraph (d) of this Order, this Order does not extend to, and Covered Entities remain subject to, the requirement of Exchange Act section 15F(f) to keep books and records open to inspection by any representative of the Commission and the requirement of Exchange Act rule 18a-6(g) to furnish promptly to a representative of the Commission legible, true, complete, and current copies of those records of the Covered Entity that are required to be preserved under Exchange Act rule 18a-6, or any other records of the Covered Entity that are subject to examination or required to be made or maintained pursuant to Exchange Act section 15F that are requested by a representative of the Commission.

(7) *English Translations.* Notwithstanding the forgoing provisions of paragraph (d) of this Order, to the extent documents are not prepared in the English language, Covered Entities

must promptly furnish to a representative of the Commission upon request an English translation of any record, report, or notification of the Covered Entity that is required to be made, preserved, filed, or subject to examination pursuant to Exchange Act section 15F of this Order.

(e) Definitions.

(1) “Covered Entity” means an entity that:

(i) Is a security-based swap dealer registered with the Commission;

(ii) Is not a “U.S. person,” as that term is defined in rule 3a71-3(a)(4) under the Exchange Act;

(iii) Is a systemically important bank authorized by FINMA to conduct banking activities in the Swiss Confederation; and

(iv) Is supervised by FINMA under the intensive and continual supervision model as a Category 1 firm as that term is defined in BO Annex 3.

(2) “AccO” means the Ordinance on the Maintenance and Retention of Accounts (Accounts Ordinance), CC 221.431, as amended from time to time.

(3) “AMLA” means the Federal Act on Combating Money Laundering and Terrorist Financing (Anti-Money Laundering Act), CC 955, as amended from time to time.

(4) “AMLO-FINMA” means the Ordinance of the Swiss Financial Market Supervisory Authority on the Prevention of Money Laundering and the Financing of Terrorist Activities (FINMA Anti-Money Laundering Ordinance), CC 955.033.0, as amended from time to time.

(5) “BA” means the Federal Act on Banks and Savings Banks (Banking Act), CC 952, as amended from time to time.

(6) “BO” means the Ordinance on Banks and Savings Banks (Banking Ordinance), CC 952.02, as amended from time to time.

(7) “CAO” means the Ordinance concerning Capital Adequacy and Risk Diversification for Banks and Securities Dealers (Capital Adequacy Ordinance), CC 952.03, as amended from time to time.

(8) “CO” means the Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations), CC 220, as amended from time to time.

(9) “FinIA” means Federal Act on Financial Institutions (Financial Institutions Act), CC 954.1, as amended from time to time.

(10) “FINMA” means the Swiss Financial Market Supervisory Authority.

(11) “FINMA Circular 2008/4” means the FINMA Circular 2008/4, Securities Journals.

(12) “FINMA Circular 2008/21” means the FINMA Circular 2008/21, Operational Risk – Banks.

(13) “FINMA Circular 2010/1” means the FINMA Circular 2010/1, Remuneration schemes.

(14) “FINMA Circular 2013/8” means the FINMA Circular 2013/8, Market conduct rules, Supervisory rules on market conduct in securities trading.

(15) “FINMA Circular 2016/1” means the FINMA Circular 2016/1, Disclosure – Banks.

(16) “FINMA Circular 2017/1” means the FINMA Circular 2017/1, Corporate Governance – Banks.

(17) “FINMA Circular 2018/3” means the FINMA Circular 2018/3, Outsourcing – Banks and Insurers.

(18) “FINMA Circular 2020/1” means the FINMA Circular 2020/1, Accounting – Banks.

(19) “FINMASA” means the Federal Act on the Swiss Financial Market Supervisory Authority (Financial Market Supervision Act), CC 956.1, as amended from time to time.

(20) “FinMIA” means the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (Financial Market Infrastructure Act), CC 958.1, as amended from time to time.

(21) “FMIO” means the Ordinance on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (Financial Market Infrastructure Ordinance), CC 958.11, as amended from time to time.

(22) “FMIO-FINMA” means the Ordinance of the Swiss Financial Market Supervisory Authority on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (FINMA Financial Market Infrastructure Ordinance), CC 958.111, as amended from time to time.

(23) “FinSA” means the Federal Act on Financial Services (Financial Services Act), CC 950.1, as amended from time to time.

(24) “Liquidity Ordinance” means the Ordinance on the Liquidity of Banks.

By the Commission.

J. Matthew DeLesDernier,

Assistant Secretary.