THE FINANCIAL SERVICES ROUNDTABLE
Financing America's Economy

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July 5, 2013

Via **electronic mail at rule-comments@sec.gov**

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: Regulation Systems Compliance and Integrity, Exchange Act Release No. 69077 [File No. S7-01-13], 78 Federal Register 18084 (Mar. 25, 2013) (the "Proposing Release")

Dear Ms. Murphy:

The Financial Services Roundtable[1] respectfully submits these comments on the proposal by the Securities and Exchange Commission (the "Commission") entitled, Regulation Systems Compliance and Integrity ("Reg SCI").[2] If adopted, Reg SCI would represent the Commission's first foray into the direct regulation of technology and systems. It would impose obligations on "SCI entities"[3] and "Responsible SCI personnel"[4] concerning certain systems utilized in the conduct of their business. Reg SCI would accomplish its goals by requiring a combination of "reasonably designed" policies and procedures; corrective action in response to issues; and review, reporting and notification protocols.

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[1] The Financial Services Roundtable (the "Roundtable") represents 100 integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for $98.4 trillion in managed assets, $1.1 trillion in revenue, and 2.4 million jobs.

[2] SEC. & EXCH. COMM'N, Proposed Regulation Systems Compliance and Integrity, Exchange Act Release No. 69077 [File No. S7-01-13], 78 Federal Register 18084 (Mar. 25, 2013).

[3] As proposed, § 242.1000(a) defines an *SCI entity* as "an SCI self-regulatory organization, SCI alternative trading system, plan processor, or exempt clearing agency subject to [Automated Review Policy]." *Id.* at 18177.

[4] As proposed, § 242.1000(a) defines *Responsible SCI personnel* "for a particular SCI system or SCI security system impacted by an SCI event, [as] any personnel, whether an employee or agent, of the SCI entity having responsibility for such system." *Id.*

Executive Summary

Reg SCI as proposed seeks to regulate the manner in which SCI entities implement their technology systems. Among other things, it would impose on SCI entities requirements to adopt, implement and enforce policies and procedures related to such systems and their functioning, including changes to such systems. With respect to one of the policies and procedures requirements, the proposed rule includes a safe harbor from liability.

The Roundtable's comments relate to the proposed safe harbor, and can be summarized as follows:

- The proposed safe harbor raises many questions about the standard of liability to which SCI entities and SCI personnel would be held under proposed Reg SCI.
- Given the complexity of the relevant technologies and the interconnectivity of the various systems, the Roundtable opposes a strict liability standard because it is unworkable.
- As drafted, the proposed safe harbor also would result in "finger-pointing" rather than productive dialogue when technology failures inevitably occur, and runs the risk of becoming the *de facto* yardstick for measuring Reg SCI compliance.
- In the alternative, the Roundtable proposes a safe harbor for remediation efforts initiated without regulatory prompting, and for situations involving simple deficiencies in policies and procedures.
- The Roundtable believes its alternative Reg SCI safe harbor would be more effective in serving the public interest and protecting investors because it is designed to reinforce the more positive regulatory and business goals of encouraging compliance, innovation, and transparency.

Introduction

The Roundtable takes this opportunity to comment on the proposed safe harbors from liability included in the proposed rule at Sections 1000(b)(2)(ii) and (iii). The proposed safe harbors would apply to both SCI entities and SCI personnel, and, assuming satisfaction of the requirements, would protect them from liability with respect to the policies and procedures requirement set forth in Section 1000(b)(2) of Reg SCI.[5]

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[5] The Roundtable notes that its membership generally does not include securities exchanges, self-regulatory organizations ("SROs"), or registered clearing agencies, but does include many significant broker-dealers, several of which operate alternative trading systems. Questions 192 to 208 posed in the Proposing Release query whether the Commission should propose a companion rule placing similar requirements on broker-dealers and their systems. *See* Proposing Release, *supra* note 2, at 18139-41. The Roundtable does not believe that an extension of the proposed requirements to broker-dealers is necessary or appropriate, given the régime currently governing broker-dealers, particularly the mandated

Safe harbors can be important components of a regulatory régime because they provide an affirmative set of conditions that, if met, constitute conduct that is above reproach. Nevertheless, the proposed safe harbors in Reg SCI raise several important issues that we believe should be addressed in order to ensure that the safe harbor adopted by the Commission would function in a transparent manner that encourages appropriate behavior without negative consequences.

In particular, the Roundtable is concerned about three issues. First, the safe harbor as drafted creates a strict liability standard for Reg SCI compliance. We believe a strict liability standard would have numerous negative impacts, including a chilling effect on innovation in the ways SCI entities and SCI personnel handle their technology responsibilities. Second, the proposed safe harbor would inhibit accountability because SCI entities and SCI personnel are likely to engage in "finger-pointing" as they seek to avoid liability, shift responsibility, and cast blame on other market participants or colleagues. This risk is especially heightened given the high level of interconnectedness within the financial markets and their participants. Third, the Roundtable believes the safe harbor for SCI entities as drafted ultimately would become the sole yardstick by which conduct is judged. With respect to a requirement of "reasonably designed" policies and procedures, the factors set out in the safe harbor will become the *de facto* requirements of the rule, rather than simply one way to demonstrate compliance with the rule. This will discourage SCI entities and Responsible SCI personnel from finding alternative solutions better tailored to their needs, or the needs of the market overall.

It is important for liability to be apportioned appropriately among market participants. In addition, safe harbors are important mechanisms for fostering appropriate behavior from a regulatory as well as a business perspective. To that end, the Roundtable recommends that the Commission provide twin safe harbors from liability under Reg SCI where either: (1) the SCI entity or SCI personnel discovers and remediates a problem without regulatory intervention, so long as no underlying material violation of laws or rules occurred, or (2) no technology error or problem has occurred, but the policies and procedures might benefit from improvements. These twin safe harbors for SCI entities and SCI personnel would further the important goal of encouraging critical internal inquiry designed to improve systems and procedures. Unlike the proposed safe harbors, which rely exclusively on "the stick," the Roundtable's proposal relies on "the carrot," a more appropriate approach where technology is concerned.

Reg SCI Liability and the Safe Harbors Generally

At the outset, the Roundtable notes that Reg SCI is not drafted as a rule that imposes liability for technology errors. Rather, it proposes policies and procedures, remediation, and notification requirements. As such, SCI entities or SCI personnel would not be liable under Reg SCI for the technology failure itself, but rather only if the SCI entity or SCI personnel did not have adequate policies and procedures, did not

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risk management controls for broker-dealers with market access pursuant to rule 15c3-5 under the Securities Exchange Act of 1934 [17 C.F.R. § 240.15c3-5], which imposes various obligations on those broker-dealers whose activities might most significantly impact the national market system. *See* Proposing Release, *supra* note 2, at 18138-39.

appropriately remediate once an error or issue was identified, or failed to make the required notifications and reports. Liability for a technology failure arises only if that technology failure also results in a material violation of some other applicable rule.[6]

Two Areas Regarding the Safe Harbors Lack Clarity

With respect to the proposed safe harbors generally, two significant points lack clarity. First, the proposed safe harbor for SCI personnel appears to apply with respect to a requirement placed exclusively on SCI entities. In particular, the safe harbor set forth in Section 1000(b)(2)(iii) applies with respect to the requirement in Section 1000(b)(2)(i) that SCI entities "[e]stablish, maintain, and enforce written policies and procedures reasonably designed to ensure that its SCI systems operate in the manner intended, including in a manner that complies with the federal securities laws and rules and regulations thereunder and the entity's rules and governing documents, as applicable." The implications of this fact are unclear. Ordinarily, one does not think of providing a safe harbor from a rule, unless that rule applies to the person to whom the safe harbor is given. This point is one reason for Roundtable's concern with the standard of liability that the Commission proposes to impose with respect to Reg SCI. SCI personnel should not have liability without some corresponding duty. However, proposed Section 1000(b)(2)(i) does not establish any duty from which liability could (or should) arise. Creating a safe harbor in these circumstances evinces a desire to impose liability even in the absence of a duty or regulation of conduct, one of the hallmarks for strict liability.

Second, the proposed rule does not indicate to whom SCI entities or SCI personnel would be liable for a breach. While presumably there would be regulatory liability for a violation of the rule, does the Commission also intend that there would be liability to other parties? Could, for example, an individual investor sue a securities exchange for a violation of Reg SCI if that exchange experienced a malfunction and anticipate a recovery if the exchange were not in compliance with Reg SCI? The Roundtable believes such an approach would represent a significant change to the risk profile of securities exchanges and similar SCI entities who, for the most part, disclaim any potential liability with respect to their operations and technology.

Standard of Liability

The confusion around the safe harbors leads the Roundtable to question the efficacy of the standard of liability that the Commission proposes to apply with respect to Reg SCI. The text of the proposed SCI entity safe harbor also highlights the problem. The entity safe harbor in Section 1000(b)(2)(ii) applies only to one aspect of Reg SCI: the requirement that an SCI entity implement reasonably designed policies and procedures for the operation of its SCI systems. However, the safe harbor then seems to merely

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[6] Proposing Release, *supra* note 2, at 18116 ("In this regard, an SCI entity would not be deemed to violate proposed Rule 1000(b)(2)(i) merely because it experienced a systems compliance issue. . ."); *see also* In the Matter of EDGX Exchange, Inc., *et al.*, Admin. Proc. File No. 3-14586, Exchange Act Release No. 65556, at 2 (October 13, 2011), *available at* http://www.sec.gov/litigation/admin/2011/34-65556.pdf ("Direct Edge Matter") ("While some system outages inevitably will occur and not every outage is a violation of the federal securities laws. . . .").

further define what elements the policies and procedures must have in order to meet this requirement by itemizing a list of points that reasonably designed policies and procedures must cover. In our view, the inherent circularity of requiring reasonably designed policies and procedures and providing a safe harbor when those policies and procedures are reasonably designed presents the problem.[7]

The Roundtable believes that rather than creating a true safe harbor, the proposed rule would implement a strict liability régime. Under strict liability principles, SCI entities would be liable without regard to the standard of care they exercise. Moreover, we are concerned that liability under Reg SCI would attach whenever there was a system or technology malfunction or error, because that would be viewed as *ipso facto* proof that the policies and procedures were not reasonably designed, without a showing of causation (or contributory fault).

The Roundtable does not believe this type of "strict liability" standard is appropriate or in the public interest for three main reasons. First, technology has grown increasingly complex, a fact that the Commission acknowledges in the Proposing Release.[8] The participants at the Commission's Technology and Trading Roundtable on October 2, 2012 also stressed the ever-growing complexity of the markets. A strict liability régime requires perfection, which all participants at the Technology and Trading Roundtable agreed was impractical and unfair. That conclusion makes sense.

We note that technology companies generally disclaim liability with respect to technology malfunctions or the inability for technology to perform certain tasks, including those tasks for which the technology was designed and on which basis the technology was licensed to the end-user. While such a broad disclaimer may not be appropriate for SCI entities, neither is it appropriate for them to have liability for everything that happens, irrespective of what it is, the impact it has, or the otherwise *de minimis* nature of the event. The Roundtable believes that a strict liability régime will make people scared to assume any level of risk, scared to deviate from their assigned

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[7] The Commission already believes that securities exchanges are required to have policies and procedures of the type that would be required under Reg SCI and that failure to do so could result in liability. Direct Edge Matter at 2-3 ("A national securities exchange must invest appropriate resources necessary to ensure the strength and integrity of its systems, processes, and controls, to comply with its own Commission-approved rules, to provide for adequate backup and failover systems, to prevent or react appropriately to significant system outages and failures, and, ultimately, to ensure an adequate governance and oversight structure necessary for quality assurance, continuous improvement, and process measurement, monitoring, and control."); In the Matter of Chicago Board Options Exchange, Inc., *et al.*, Admin. Proc. File No. 3-15353, Exchange Act Release No. 69726, at 11, 13 (June 11, 2013), *available at* http://www.sec.gov/litigation/admin/2013/34-69726.pdf ("CBOE Matter") (describing the CBOE's failures to have adequate, reasonably designed policies and procedures in connection with certain regulatory functions); In the Matter of The NASDAQ Stock Market, LLC, *et al.*, Admin. Proc. File No. 3-15339, Exchange Act Release No. 69655, at 2 (May 29, 2013), *available at* http://www.sec.gov/litigation/admin/2013/34-69655.pdf ("NASDAQ Matter").

[8] Proposing Release, *supra* note 2, at 18087-88.

roles, and scared to continue to improve systems and functionality, all because of a well-founded fear of strict liability.[9]

In considering the liability issues associated with technology in general and Reg SCI in particular, we respectfully request the Commission to more clearly distinguish between liability under Reg SCI and liability for underlying events. In our view, compliance with Reg SCI and compliance with other federal securities laws and rules must remain distinct. If a court of competent jurisdiction were to issue a final judgment that an SCI entity's procedures are not "reasonably designed" to meet Reg SCI's requirements, then the SCI entity would not necessarily have violated some other law or rule. Similarly, the occurrence of a technology problem at a SCI entity does not necessarily mean that the SCI entity also is in violation of Reg SCI. This goal of distinguishing violations is hampered by the safe harbor as drafted, because of the circular manner in which it functions with the rule itself.

Second, these complex technology systems must interact with each other in the national market system.[10] Regulation NMS[11] mandates this interaction, but more than that, the interaction helps all investors by giving them access to liquidity and best prices. With all this cross-communication between systems, it often will be difficult to determine with specificity all of the systems or elements that Reg SCI procedures need to cover. Additionally, the interactions between so many different systems will be difficult to predict, increasing the chance that policies and procedures will miss issues, some of which—with the benefit of hindsight—may be determined to have been critical issues. A strict liability standard in this situation will lead to fear of new systems and technologies, either internal or external, because of the potential liability. Moreover, this interaction of complex systems could result in liability for all SCI entities with respect to an event or series of events. Perhaps worse, only one participant may be liable for all of the unforeseen and unforeseeable consequences of its technology, because it will be deemed to have caused other SCI entities to fall out of Reg SCI compliance.

The so-called "Flash Crash" demonstrates this difficulty. Months of investigation by capable teams from the Commission and the Commodity Futures Trading Commission led to a report ascribing the events of May 6, 2010 to many contributing factors, some technology-related and others not.[12] How would the Commission apportion liability in connection with the Flash Crash under Reg SCI?

Consider the question further in the context of the systems of a single SCI entity: the New York Stock Exchange's (the "Exchange") liquidity replenishment points. Under Reg SCI, would the Exchange be liable for this functionality during the flash crash? Or

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[9] *See e.g.*, Ben Casselman, "Risk-Adverse Culture Infects U.S. Workers, Entrepreneurs," WALL ST. J. at A1 (June 3, 2013), *available at* http://online.wsj.com/article/SB10001424127887324031404578481162903760052.html.

[10] Section 11A of the Securities Exchange Act defines the national market system. 15 U.S.C. §78k-1.

[11] Regulation NMS, 17 C.F.R. §242.600 *et seq.*

[12] Findings Regarding the Market Events of May 6, 2010, Report of the Staffs of the CFTC and SEC to the Joint Advisory Committee on Emerging Regulatory Issues (Sept. 30, 2010), *available at* http://www.sec.gov/news/studies/2010/marketevents-report.pdf.

would all other SCI entities that did not accommodate the liquidity replenishment points in their procedures be liable? Under a strict liability régime, presumably all SCI entities could be liable, the Exchange for the unintended consequences on the rest of the market, and other SCI entities for failing to have policies and procedures governing the interaction of their systems with the Exchange. We urge the Commission to provide interpretative guidance to market participants on how complex systems interactions should be handled. Absent this guidance, Reg SCI and the safe harbor would leave too many liability questions unanswered.[13]

Third, strict liability régimes inevitably lead to regulation through constant enforcement actions for low-level, immaterial violations that desensitize people (both Responsible SCI personnel and regulators) to actual, material violations. It shifts the focus from broad problems to minutiae and all parties (market participants and regulators) lose the forest for the trees. This problem is exacerbated with respect to the meaning of the phrase "*reasonably designed* policies and procedures," because different people have different views on what constitutes *reasonable design* under particular facts and circumstances. A strict liability régime also would encourage findings that a technology malfunction or error must mean that policies or procedures were not reasonably designed.

The Roundtable believes the result would create a regulatory environment that runs counter to the "culture of compliance" that U.S. financial services firms work diligently to inculcate and that the Commission has sought to encourage.[14] When the company is regularly hit with penalties even when its employees and management try hard to make things work in accord with applicable law and regulations, its people become immune to the real issues around them. They are likely to adopt a "cost of doing business" mentality that views regulatory inquiries, fines and disciplinary actions as simply another impact to the bottom line. The distinction between a fine for a *de minimis* rule infraction and a fine for a material violation blurs to the point that both are seen as manageable costs of doing business.[15]

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[13] The Commission might also consider evaluating whether there would have been liability under Reg SCI in connection with the Direct Edge Matter, the CBOE Matter and the NASDAQ Matter, both for the defendants in each of those matters as well as other market participants. How much of an obligation would proposed Reg SCI impose on SCI entities to learn the systems of other market participants and the possible effects of malfunctions elsewhere?

[14] *E.g.*, Luis Aguilar, Commissioner, SEC, "Doing the Right Thing: Compliance That Works for Investors" (Apr. 18, 2013); Lori A. Richards, Director, SEC Office of Compliance Inspections and Examinations, "The Culture of Compliance" (Apr. 23, 2003).

[15] Relatedly, a strict liability world—with lots of fines and disciplinary actions for *de minimis* or immaterial events—would further erode confidence in U.S. capital markets. Thus, when strict liability is wielded as a hammer, every event—including those that are *de minimis* or immaterial—looks like a nail. Accordingly, the Roundtable believes a strict liability régime would encourage investors and regulators to view everyone as a law-breaker, because strict liability imposes such a view.

The Blame Game

The Roundtable believes that the Commission should design Reg SCI to promote problem-solving and encourage market participants to work together to understand what happened in a particular situation and to build a better marketplace. Given human nature, we believe the effect of the proposed safe harbor would result in "finger-pointing", rather than striving to attain these more laudable goals.

For example, each time there is a technology error or malfunction materially impacting the markets, the regulators will begin a fact-gathering process to determine what happened. Inquiries will be made to SCI entities and Responsible SCI personnel. In response, each SCI entity and SCI personnel will be in a rush to demonstrate that its activities met the safe harbor. Blame mysteriously will always lie elsewhere. This situation has the potential to obscure the reconstruction of events, as participants focus more on themselves than on what happened. Rather than encouraging participants to submit helpful information designed to assess what happened, the Commission will run the risk of receiving self-serving accusations that bring it no closer to the truth and provide no guidance about how to handle similar events in the future.

The risk of finger-pointing is heightened if a strict liability standard applies. There is no incentive to accept responsibility for an event that is likely to result in disciplinary action. Rather, a strict liability régime further encourages the shifting of blame onto others.

Creating the Sole Yardstick

The Roundtable also is concerned that the safe harbor standards will become the sole yardstick by which conduct is measured. Even if the safe harbor were non-exclusive, we see it becoming the *de facto* standard, to the exclusion of other, legitimate approaches. This risk is heightened because of technological complexity and interconnectivity and the variety of entities that would be subject to Reg SCI.

Rather than inquiring deeply to determine the best approach under the particular facts and circumstances, violations will be found to have occurred in every instance where SCI personnel or SCI entities cannot meet the requirements of the safe harbor. Participants ordinarily will opt for the easy route by simply complying with the safe harbor, rather than applying the type of rigor and analysis the Commission should encourage. Coping with technological complexity and continuing change requires participants to bring many different solutions to bear, in part because each SCI entity utilizes technology in different ways and in part because each SCI entity connects with the rest of the market in different ways. Here, the proposed safe harbor seems merely a substitute for the Commission's idea of how SCI entities should implement their technologies. In a national market system that thrives on diversity, we believe homogenization is not the answer.

We note that other rules requiring policies and procedures recognize the need for those policies and procedures to be reasonably designed in light of the manner in which

business is conducted.[16] They do not create strictures that impose protocols that may not be suitable for certain market participants. If the Commission intends that all SCI entities conform to the six standards articulated in the safe harbor, then we recommend that the Commission set them forth as express provisions of the rule. The Roundtable believes, however, that such an approach would be misguided for the reasons noted above. Rather, the Roundtable would suggest an altogether different approach to Reg SCI safe harbors.

The Roundtable Recommends an Alternative Approach to the Proposed Safe Harbor

The Roundtable does not oppose liability for SCI entities, and it does not oppose a safe harbor under Reg SCI. Rather, the Roundtable believes that the approach to liability needs to accomplish the following goals:

1. Encourage parties to discover and remediate technology errors and malfunctions, and/or deficiencies in their policies and procedures;

2. Avoid *ipso facto* liability under Reg SCI for failures by technology or systems; and

3. Require some form of causation in order for liability to attach.

Accordingly, the Roundtable recommends that the Commission revise its proposed safe harbor to incorporate these features.

As an alternative to the safe harbor as currently drafted, the Roundtable would propose two safe harbors designed to reward good practices in remediating policies and procedures where no underlying material violation has occurred. These safe harbors would apply with respect to both policies and procedures requirements of proposed Reg SCI, as set forth in Section 1000(b)(1) and (b)(2), unlike the existing proposal, which applies the safe harbor solely to Section 1000(b)(2).

Proposed Safe Harbor for Remediation of Immaterial Violations

Under the proposed "remediation safe harbor," no liability would accrue where the SCI entity or SCI personnel discovered an inadequacy (either in its technology or in its policies and procedures) and remedied it without regulatory involvement and assuming no underlying material violation. This aspect of the safe harbor would only apply if the discovery and remediation process were fully documented in the entity's books and records, which would allow regulators to review the circumstances. Finally, the remediation safe harbor also would extend to underlying technology problems if the SCI entity had complied with Reg SCI. In other words, there would be no finding of

[16] *E.g.*, FINRA Rule 3010 (requiring that broker-dealers have reasonably designed supervisory system based on types of business); rule 206(4)-7 under the Investment Advisers Act, 17 CFR § 275.206(4)-7 (requiring that investment advisors have reasonably designed policies and procedures based on types of business).

violation for a technology malfunction or error if the SCI entity were in compliance with Reg SCI at the time of the malfunction or error.

Proposed Safe Harbor for Mere Deficiencies in Written Policies and Procedures

The second proposed safe harbor would hold that liability would not attach under Reg SCI unless a technology malfunction or error has occurred. The mere fact that policies or procedures could be improved would not result in liability, unless some event occurred due to, in whole or in part, the lack of reasonably designed policies and procedures. Of course, there would still be liability for ignoring Reg SCI's policies and procedures requirements in a material way. But the mere fact that existing policies and procedures could be improved would not by itself be enough for liability.

The Roundtable strongly believes that this approach to creating safe harbors for the policies and procedures requirements will bring out the best in SCI entities, by motivating them to (1) turn a critical eye on themselves, (2) remediate promptly and comprehensively any deficiencies found, and (3) share information with other SCI entities in order to improve the overall technology on which the national market system relies. This proposed safe harbor would reward hard work and diligence without stifling creativity or innovation. Finally, it would foster behaviors by all market participants that we believe will result in better technologies, better interconnectedness, and better markets.

Conclusion

The Roundtable respectfully requests that the Commission reconsider its approach to the safe harbors in proposed Regulation SCI, and revise the proposed safe harbors to incorporate the features we recommend.

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The Roundtable appreciates the opportunity to submit comments on the Commission's proposed Regulation Systems Compliance and Integrity. If it would be helpful to discuss the Roundtable's specific comments or general views on this issue, please contact me at Rich@fsround.org or Rich Foster at Richard.Foster@fsround.org.

Sincerely yours,

Richard M. Whiting

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Executive Director and General Counsel
The Financial Services Roundtable

With a copy to:

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The Honorable Luis A. Aguilar, Commissioner
The Honorable Troy A. Paredes, Commissioner
The Honorable Daniel M. Gallagher, Commissioner

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