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via Electronic Mail (rule-comments@sec.gov)

Ms. Elizabeth M. Murphy

Secretary

Securities and Exchange Commission

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Re: File Nos. S7-02-13, S7-34-10 and S7-40-11: Cross-Border Security-Based Swap Activities

Dear Ms. Murphy:

The Institute of International Finance (IIF) welcomes the opportunity to comment on the proposed rules and interpretive guidance to address the application of the provisions of the Securities Exchange Act of 1934, as amended, that were added by Subtitle B of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act to cross-border security-based swap activities.

We are responding because we believe that the substituted compliance elements of the Securities and Exchange Commission (SEC)'s proposal are extremely significant for the emerging international policy debate on the effects of different national modes of implementation of internationally agreed measures and standards.

However, rather than respond to all the questions raised in the rule proposal as a whole, we have focused our comments on the international implications of the proposed rules and guidance and in particular on the key questions related to the use of "substituted compliance" in Section XI. We felt that the most effective way to do this would be to group the questions into topics such as the economic effects of the rule proposal and the process for substituted compliance requests, and to respond on those topics in this letter.

General observations and consideration of the economic impact of the Rule Proposal

As a general observation, the IIF and its members strongly support the underlying concept and broad outlines of Section XI of the proposed rule and commend the SEC for its approach.

In a recent submission to the Financial Stability Board (FSB) and in a recent report, we expressed concern at the impact of national regulatory measures on cross-border business and at the costs of

insufficient coordination and consistency between such measures.¹ The proposed rule takes a considered and balanced approach which, if adopted, subject to the suggested improvements below, would address many of these concerns and in so doing would be beneficial for financial stability in the United States and more widely, beneficial for end-users, good for financial market participants and institutions, and would contribute to sustainable economic growth both in the United States and global economy.

In terms of financial stability, the rule proposal and proposed use of substituted compliance would help overcome legal differences which can make it harder for regulators and supervisors to cooperate and rely on each other and to monitor risks. It would help avoid potential weaknesses and loopholes in regulation and oversight. It would make it easier for the SEC and foreign counterparts to get a complete and understandable picture of the risks and vulnerabilities in financial institutions and market participants both nationally and globally. It would also reduce the potential for regulatory arbitrage and the migration of risk between jurisdictions. By including an assessment of the comparability of a dedicated examination program, the expertise of examiners, the existence of a risk monitoring framework and an examination plan in the foreign regulator for instance, the rule proposal would put the SEC in a better position to cooperate with foreign supervisors and for both sides to develop confidence in each other's supervision. Importantly, by promoting greater coordination and mutual reliance, the rule proposal would make it easier for the SEC to cooperate with foreign counterparts in handling any crises, and allow them to respond promptly, effectively and collectively.

Not only would the rule proposal improve global financial stability if adopted, it would also increase financial stability in the US. A further reason for this is that it would increase regulatory efficiency, enabling the SEC to concentrate staff resources on the implementation and enforcement of rules in the United States rather than having to stretch them to cover entities and transactions in other jurisdictions. Similarly, it would contribute to regulatory efficiency and conservation of supervisory resources by avoiding duplication and allowing agencies to leverage each other's capabilities and knowledge.

In addition to these benefits for financial stability, there would be benefits for end-users and the wider economy because the rule proposal if adopted would make it much easier for foreign market participants to offer services in the US, providing greater choice and competition, and making it easier and cheaper for instance for corporates to hedge their risks. The IIF believes that if the rule proposal were adopted, it would also create a strong push for similar approaches in other jurisdictions, making it easier for US market participants to offer their services cross-border, with consequent benefits to them, to end-users outside the US and to the world economy.

Further, by reducing the uncertainty over how differences in regulation will be handled, and by mitigating or avoiding potential conflicts of regulation, the rule proposal would make it easier for

¹ “*Memorandum to the Financial Stability Board: Containing Extraterritoriality to Promote Financial Stability*”, IIF, October 2012, and “*Promoting Greater International Regulatory Consistency*”, IIF, June 2013.

firms and market participants in the US and beyond to plan ahead and operate, making it more likely that they will choose to offer services in the US and making it easier for them to manage risks. Such reduction in conflicts or overlaps would also make internal compliance by firms more efficient, reinforce the clarity of compliance requirements, and reduce the risk of inadvertent violations of one or another country's rules. This predictability and ability to plan ahead would also contribute to sustainable economic growth.

By removing an unnecessary duplication of regulatory and supervisory oversight, the rule proposal would also reduce burdens on businesses both in the US and elsewhere without any weakening of oversight, thus allowing firms to use funds more efficiently.

Nevertheless, the proposed approach (and any similar approaches used in other jurisdictions) will be even more effective and beneficial if they are consistent with, and coordinated with, the work and approaches of other authorities in the same jurisdiction (particularly in the case where multiple supervisors have responsibility for swaps regulation), national authorities in other jurisdictions and international standard setters such as the International Organization of Securities Commissions (IOSCO).

While any domestic coordination and consistency would clearly be for the domestic regulators to ensure (with the assistance of the ministry of finance or Treasury where necessary), in our recent paper on international consistency referred to above, we set out some ideas for how international consistency could be delivered without impeding the ability of national regulators to act promptly and in a way that addresses national concerns. Coordination and consistency is important both at the regulatory policy initiation and implementation stages. The more that the SEC and others can identify, discuss and address together any differences in national implementation that could create conflicts, uncertainty or other problems, the more effective regulation will be and the easier to reach positive assessments of comparability. International standard setters could play a useful role here in helping to identify and reconcile differences. We therefore hope that the SEC will work with these bodies and other national regulators to promote a consistent, global approach.

A further general observation is that while the rule proposal provides for substituted compliance covering significant aspects of entity-level and transaction-level requirements, it does not seem to address the issue of whose rules govern when the transaction is between two or more parties in different markets. It is important that the SEC provide guidance as to how one determines the applicable requirements in such cases. We suggest that the final rule should clarify that if the SEC has concluded on the basis of its outcomes-based assessment that the rules of the host country where the counterparties are located produce comparable outcomes to those in the United States, then either the parties should be free to choose which rules apply or the rules where the transactions occurs should be the default position.

A final general observation is that the rule proposal provides for substituted compliance once registration has taken place and does not provide for substituted compliance on registration and related requirements where appropriate for foreign market participants. While such requirements

raise additional issues, we urge the SEC to consider conditions upon which it could allow appropriate foreign market participants to satisfy the registration requirements through compliance with the relevant requirements in their home jurisdictions, with appropriate notice of such compliance to the SEC.. Consideration of extending substituted compliance to the full suite of entity-level requirements should not hold up implementation of the very positive proposals that have been made, but should be kept open in order to achieve the full benefits of substituted compliance over the full range of regulatory issues in due course.

The role of foreign regulators

In our comments below, we have made suggestions about specific areas and particular ways in which foreign regulators have a role to play. However, we feel that in finalizing the rule, the SEC should have, and should articulate, a clear understanding of the role that it expects foreign regulators to play throughout the process of substituted compliance.

At the core of this should be the idea that while the substituted compliance determination is for the SEC alone to make, the approach can only be fully successful if the SEC and foreign regulator concerned work together throughout the process.

We agree with the rule proposal that the premise of such collaboration must be the existence of supervisory and enforcement Memoranda of Understanding or other arrangements with the appropriate financial regulatory authority or authorities, including sufficient information-sharing agreements and arrangements.

We go into this in more detail in individual sections below, but in summary, this would mean:

- At the stage of request for substituted compliance, allowing (and ordinarily expecting) foreign regulators to apply on behalf of participants in their jurisdictions;
- When reaching a substituted compliance assessment, the SEC's engaging in dialogue with the foreign jurisdiction concerned and providing some opportunity to explain differences in rules and if necessary, resolve to amend rules rather than reaching a determination without any consultation;
- After a jurisdiction has been determined to be comparable and a substituted compliance approach applied, the SEC's reviewing the information received on the comparability of the rules of a foreign jurisdiction on a regular basis and periodically verifying with the foreign regulator.

Throughout this process, IOSCO and other international standard setters have a valuable and increasing role to play to facilitate cooperation, collection and verification of information and if necessary, the resolution of any differences or disagreements.

Such a collaborative approach will be in the interest not only of the successful application of the substituted compliance approach, but also in the interest of U.S. entities or market participants seeking to benefit from similar treatment in other jurisdictions.

The process for making substituted compliance requests and the issue of to whom the determination should apply

Our reading of the Rule Proposal is that consideration of substituted compliance for a jurisdiction would be initiated by an application from an individual market participant. While, as stated in the next paragraph, we understand the rationale for allowing market participants to initiate the process, we believe that in practice it would be simpler to allow foreign regulators to apply for participants (or a specific class of participants) from their jurisdictions to benefit from substituted compliance. This would avoid the need for a multitude of requests from individual market participants and the collection and submission of the same information and data. It would also reduce the length and complexity of the process.

That said, we suggest that the final rule should allow a fallback option for individual market participants to apply even if there is no application by the regulator in their jurisdictions. Moreover, where an application is received from a particular market participant, any substituted compliance determination should cover or be open to the entire class of participants with respect to the given category of regulation in such jurisdiction and not just the participant who has applied, subject of course to meeting whatever conditions or requirements may exist.

The scope of the determination and how the assessment should be carried out

We agree with the proposed balance between making a ‘regime-wide’ determination and looking requirement by requirement and generally believe that this “middle way” approach could be a good model for other areas of regulation and jurisdictions.

Furthermore, we welcome the fact that determinations would not need to be reciprocal and would not require the other jurisdiction to recognize the SEC’s rules in a given category as equivalent. While reciprocity is desirable, the necessary determinations and negotiations may be counterproductive, as the SEC recognizes; furthermore, it can be expected that if substituted-compliance proves effective (especially in the context of a broader framework to be provided by IOSCO over time), then convergence across regime can be expected, without the delays and difficulties explicit reciprocity might require.

We also appreciate the fact that public hearings would be optional. Of course, the SEC’s reasoning in any case should be public and available for public scrutiny, but hearings should generally not be necessary for gathering facts and could put the SEC in an uncomfortable position vis-à-vis other countries. Therefore, hearings should be reserved only for exceptional cases, which are difficult to foresee at this stage.

We agree that consistency of outcomes is the right basis on which to establish substituted compliance. Assessment of consistency of outcomes rather than any attempt to make determinations on a textual or granular analysis of specific requirements balances efficiency and local discretion with clarity for investors and market participants, and further permits the greatest respect for the autonomy and legal systems of each regulatory regime.

We understand that the IOSCO Task Force referred to above is looking at a definition of what “outcomes-focused” should mean and encourage the SEC to work with the Task Force on this issue and foster an international understanding of what constitutes consistency of outcomes over time. Such an understanding will take time to evolve and implementation of substituted compliance should not be delayed while IOSCO examines the issue; however, as a medium term goal, convergence of understanding of equivalent outcomes as a goal of substituted compliance would be most helpful.

Furthermore, in carrying out the assessment of whether a particular jurisdiction has comparable rules, standards and oversight (and in any subsequent reviews), we encourage the SEC to make as much use as possible of the information collected and assessments made of compliance by jurisdictions with IOSCO, FSB, and other standard setters including the assessments carried out by the IMF and World Bank, and to encourage this information gathering and assessments, including on supervision.

Not only would use of such information and assessments enable the SEC to concentrate staff resources as noted above: it would also promote confidence in the assessment and avoid any risk of the assessments being seen as biased or politically motivated. Further, we suggest that the SEC should continue to play an active role in developing these international standards and ensuring their implementation.

We acknowledge that in some areas, international standards and reviews have not yet been fully developed or applied in sufficient detail and that reliance on such international sources of information therefore will not be possible for the entirety of substituted compliance assessments. In some areas however, it should already be possible to make use of such information. As more detailed international standards are developed and enforced, the SEC should be in a position to make increasing use of them, further enhancing the efficiency gains promised by the substituted compliance concept.

Nonetheless, we expect that in many areas, the SEC would require additional information about requirements in a given jurisdiction until international information is fully available. Such information could come from the jurisdiction itself (and existing information-exchange channels might be expanded to facilitate the provision of such information) and it should be permissible to include the provision of information in the form of memoranda from law firms.

Finalizing the determination and allowing for transitional provisions

Although the rule proposal does not touch on this, one element that we recommend adding is that when reaching a substituted compliance assessment, the SEC should engage in dialogue with the foreign jurisdiction concerned and provide some opportunity to explain differences in rules and if necessary, resolve to amend rules rather than reaching a determination without any consultation. Such dialogue would be in the interests of the SEC and United States because it would provide an incentive to the foreign jurisdiction to change or improve its regulation in a particular area. It would also be in line with the SEC’s stated motivation in taking a category by category approach rather

than judging the regime as a whole: to avoid being compelled to either accept or reject another regime as being comparable simply because one element of it was not of the same standard. Further there will be cases where such a dialogue would allow the foreign regulator to dispel any potential misunderstandings about how its regime works.

We believe that during the assessment period, it is vital that there be certainty over the rules that will apply. To deliver this, we hope that the final rule will contain provisions allowing the SEC to grandfather any existing agreements to provide services until a determination has been finalized.

A further element that would be useful to add is to allow for a reasonable transition period in cases where substituted compliance is not granted (and market participants would therefore have to comply fully with SEC rules) or where a jurisdiction committed to carrying out reforms in order to be deemed comparable.

Similarly, transition and grandfathering provisions should be provided for those cases where a substituted compliance determination might have to be withdrawn. Such provisions are necessary to minimize market disruption without any detriment to financial stability.

Modification or withdrawal of a determination

We agree that the SEC should, on its own initiative be able to modify or withdraw a substituted compliance determination for a given area of regulation by a particular foreign jurisdiction, after appropriate notice and opportunity for comment. We do not favor an automatic “sunset provision”, which could cause needless inefficiency and uncertainty if foreign rules remain consistent with substituted compliance principles: rather we suggest that the SEC should review the information received on the comparability of the rules of a foreign jurisdiction on a regular basis and should periodically verify with the foreign regulator. The foreign regulator should have a duty to notify the SEC of any material changes.

If the SEC becomes aware of material changes or of concerns by market participants or others about the continued comparability of the regulation of a particular issue in a given country, or of that country’s oversight and enforcement capabilities or practices, it should be able to investigate further and if necessary review its original determination. Here again, it is to be hoped that the increasing activity of IOSCO and others in developing international standards of interpretation, oversight, and enforcement, would lead to significant convergence over time, minimizing the likelihood of problems on such issues, given that the major jurisdictions now overall share the same broad outlines of goals of securities and conduct regulation.

Direct Electronic Access to information

The rule proposal raises the issue of the SEC’s permitting substituted compliance with respect to regulatory reporting and public dissemination even if it does not have direct electronic access to the security-based swaps transactions reported to the foreign trade repository or foreign regulatory authority. We agree that the SEC should allow substituted compliance in such cases.

Conclusion

In conclusion, we strongly support the broad shape of the substituted compliance elements of the rule proposal as it currently stands, though we would encourage the SEC to ensure that the final rule is consistent with the approach taken by the IOSCO Task Force on Cross-Border Regulation and to make as much use as possible of any information and assessments carried out by IOSCO, the FSB, or other international standard setters.

Should you have any questions, please do not hesitate to contact me at knixon@iif.com or Crispin Waymouth at cwaymouth@iif.com.

Yours Faithfully,

A handwritten signature in black ink, appearing to read "Kevin Nixon". The signature is fluid and cursive, with the first name "Kevin" written more prominently than the last name "Nixon".

Kevin Nixon
Managing Director, IIF

cc: Mary Jo White, Chair
Elisse Walter, Commissioner
Luis Aguilar, Commissioner
Daniel Gallagher, Commissioner

John Ramsay, Director, Division of Trading and Markets
Robert Fisher, Acting Director, Office of International Affairs