

**A·F·G·I**  
**ASSOCIATION OF FINANCIAL GUARANTY INSURERS**  
**Unconditional, Irrevocable Guaranty**

August 20, 2013

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

Re: Cross-Border Security-Based Swap Activities; Re-Proposal of Regulation SBSR and Certain Rules and Forms Relating to the Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants

The Association of Financial Guaranty Insurers (“AFGI”) appreciates the opportunity to provide the Securities and Exchange Commission (“SEC” or “Commission”) with its comments on cross-border security-based swap (“SBS”) activities and certain rules and forms relating to the registration of security-based swap dealers (“SBSDs”) and major security-based swap participants (“MSBSPs”), pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act.<sup>1</sup>

AFGI is a trade association that represents the unique perspective of financial guaranty insurers and reinsurers. AFGI recently provided comments to the SEC regarding the application of various SBS and MSBSP regulations to financial guaranty insurers, pursuant to the SEC’s reopening of comment periods for certain SBS-related proposed rules.<sup>2</sup> Through this letter, AFGI incorporates its previous comments to the SEC with respect to the application of SBS and MSBSP requirements to legacy SBS transactions, as summarized below. Further, as related to the SEC’s MSBSP registration requirements, AFGI seeks clarification that a guarantor will not be required to attribute to itself the guaranteed swaps of a registered MSBSP while such MSBSP’s registration is pending.

Importantly, as it did in its July 22, 2013 letter to the SEC and taking into account the proposed treatment of U.S. and non-U.S. guarantors in the context of cross-border transactions, AFGI encourages the SEC to coordinate its regulatory efforts with the Commodity Futures Trading Commission (“CFTC”) and foreign regulators in order to ensure the consistent regulation of financial guaranty insurers. Indeed, AFGI believes

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<sup>1</sup> Cross-Border Security-Based Swap Activities; Re-Proposal of Regulation SBSR and Certain Rules and Forms Relating to the Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants, 78 Fed. Reg. 30,968 (May 23, 2013).

<sup>2</sup> Reopening of Comment Periods for Certain Rulemaking Releases and Policy Statement Applicable to Security-Based Swaps Proposed Pursuant to the Securities Exchange Act of 1934 and the Dodd-Frank Wall Street Reform and Consumer Protection Act, 78 Fed. Reg. 30,800 (May 23, 2013).

that international harmonization is essential to enhance financial stability and market efficiency.

**I. Registration of Entities Solely Because of their Loss Mitigation Activities or their Legacy Portfolios Running-Off Shortly After the Effective Registration Due Date**

As noted in previous comment letters, no AFGI member has insured new credit default swaps (“CDS”) since 2009 except in connection with loss mitigation or risk reduction activities. Further, AFGI members are constrained from insuring CDS under applicable legal requirements, and do not expect to insure new CDS in the future, except perhaps in connection with loss mitigation and risk reduction activities.<sup>3</sup>

In this context, AFGI understands that the Commission will regulate as SBS some of the CDS entered into by affiliates of AFGI members and, as a result, some financial guaranty insurers may potentially be subject to regulation as MSBSPs. AFGI members are currently conducting calculations to determine whether they meet the threshold for registration as MSBSPs. AFGI members are using valuations employed in accordance with GAAP (FASB 157) to calculate an entity’s current and potential exposure to determine whether they exceed MSBSP thresholds.

AFGI has commented in the past that, for transactions executed after the compliance date, SBSs, MSBSPs, and their counterparties will all be on notice of the new regulatory regime and will be able to structure transactions accordingly. In contrast, with regard to legacy transactions with a projected run-off in the near future, financial guaranty insurers and their counterparties would not be afforded the same opportunity. Applying new rules to these transactions would be highly disruptive and could have financial consequences that neither party foresaw or desired. Additionally, there is no added benefit to applying the new rules to legacy transactions as such application would not further the SEC’s stated objectives of protecting investors and promoting efficiency, competition, and capital formation.

For these reasons, in conducting calculations, AFGI members believe that the SEC should allow some flexibility regarding the application of MSBSP requirements for entities that will be required to register solely because of their legacy portfolios. Indeed, the SEC should evaluate the merits of providing an exemption from MSBSP registration if legacy positions are expected to decline below MSBSP thresholds within 12 to 24 months of the effective date due to projected run-off or terminations. At a minimum, we submit that the SEC should consider a flexible approach to the application of MSBSP requirements for these entities.

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<sup>3</sup> As outlined in its letter to the SEC on February 15, 2013, AFGI understands the definition of an SBS legacy account to include loss mitigation transactions (i.e., transactions amending or otherwise reducing risk in a legacy portfolio).

Moreover, when a financial guaranty insurer amends an existing insured swap or enters into another swap with the same or a substitute counterparty in connection with loss mitigation or risk reduction efforts and does not increase its notional exposure, its activities should not be viewed as creating new derivatives. Rather, these loss mitigation or risk reduction transactions should be afforded the same regulatory treatment as legacy swaps, particularly with regard to the insurance grandfather provisions and the posting of margin. Indeed, insurance regulators have taken the position that loss mitigation and risk reduction activities do not constitute writing of new business where a financial guaranty insurer is prohibited from writing new business. The regulatory treatment of these efforts should be consistent among regulators to encourage efforts to reduce the ultimate exposure from these legacy transactions.

## **II. Clarification Regarding Attribution of Swaps to a Guarantor**

In its proposed rule regarding cross-border transactions, the SEC states that “*once* the [...] person becomes a major security-based swap participant and registers with the Commission, the U.S. guarantor would no longer be required to attribute to itself the security-based swap positions entered into by the [...] person” [emphasis added]. In addition, in its joint definitional rules, the SEC and CFTC noted, “we do not believe that it is necessary to attribute a person’s [...] security-based swap positions to a [...] guarantor if the person *already* is subject to capital regulation by the CFTC or SEC” [emphasis added].

While the SEC and CFTC have made clear that a guarantor will not be required to attribute to itself the guaranteed swaps of a registered MSBSP, AFGI also seeks clarification that a guarantor will not be required to attribute to itself the guaranteed swaps of a registered MSBSP when such MSBSP’s registration is pending. We believe that this clarification follows the spirit and language of the Commissions’ rules.

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We thank the SEC for the opportunity to comment on its proposed rules regarding cross-border SBS activities, and appreciate its attention to the concerns highlighted by AFGI in this letter. If you have any questions, please do not hesitate to contact the undersigned at bstern@assuredguaranty.com or (212) 339-3482.

Very truly yours,



Bruce E. Stern,  
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