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May 4, 2015

By Electronic Mail

Re: Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information; Proposed Rule, 80 Fed. Reg. 14,740 (Mar. 19, 2015)

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street NE.
Washington, DC 20549–7010

Dear Mr. Fields,

Markit appreciates the opportunity to comment on the Securities and Exchange Commission ("SEC" or "Commission") Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information proposal ("Proposal").

Markit (NASDAQ: MRKT)[1] is a global financial information services company, offering independent data, valuations, risk analytics, and related services across regions, asset classes and financial instruments. MarkitSERV,[2] a wholly-owned subsidiary of Markit, is a middleware[3] reporting agent[4] that operates as an exempt securities-based swap ("SBS") clearing agency.[5] MarkitSERV's

[1] Please see www.markit.com for further information.

[2] Please see www.markitserv.com for further information.

[3] Middleware services include a variety of post-trade processing functions, including confirmation, matching, submission of trades to clearing, regulatory reporting, and other post-trade processing. See MarkitSERV Overview, https://www.markit.com/Product/File?CMSID=307bef8dbc8b4b979ab81c74feeaac32 (last visited May 1, 2015). Middleware service providers facilitate the ability of a market participant to trade in bilateral (a.k.a. "over-the-counter" or "OTC"), platform, and/or cleared trade contexts.

[4] MarkitSERV serves as a "reporting agent" in markets currently subject to derivatives reporting requirements. Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information; Final Rule, 80 Fed. Reg. 14,564, 14,602 ("Rule 901(a), as adopted, does not limit the types of entities that may serve as reporting agents on behalf of reporting sides of security-based swaps.").

[5] See, e.g., Exchange Act Release No. 34–64796 (July 1, 2011), 76 Fed. Reg. 39,963 (July 7, 2011) (providing an exemption from registration under Section 17A(b) of the Exchange Act, and stating that ''[t]he Commission is using its authority under section 36 of the Exchange Act to provide a conditional temporary exemption [from clearing agency registration], until the compliance date for the final rules relating to registration of clearing agencies that clear security-based swaps pursuant to sections 17A(i) and (j) of the Exchange Act, from the registration requirement in Section 17A(b)(1) of the Exchange Act to any clearing agency that may be required to register with the Commission solely as a result of providing Collateral Management Services, *Trade Matching Services*, Tear Up and Compression Services, and/or substantially similar services for security-based swaps'' (emphasis added)). The Commission has indicated that "it may consider at a later time whether rules tailored to clearing agencies that provide post-trade processing

infrastructure plays an important role in supporting the global derivatives markets in North America, Europe, and the Asia-Pacific region. Globally over 1,500 firms use the various MarkitSERV platforms that process, on average, 80,000 derivatives transaction processing events every day. MarkitSERV has also sent over 60 million trade reports to trade repositories worldwide.

Markit has been actively and constructively engaged in the debate about regulatory reform in financial markets, including topics such as the implementation of the Pittsburgh G20 commitments for OTC derivatives and the design of a new regulatory regime for benchmarks and indices. Over the past years, we have submitted more than 115 comment letters to regulatory authorities around the world and have participated in numerous roundtables.

I. Overview

We support the SEC's efforts to increase its visibility into the SBS markets and its efforts more generally to increase public transparency into the SBS markets. We welcome, in particular, the SEC's allowance to have reporting sides[6] to trades select a reporting agent to report SBS on their behalf in the final Regulation SBSR rulemaking ("Regulation SBSR Final Rules") that accompanied the Proposal.[7] This allowance enables individual market participants that are subject to a reporting obligation to decide on the basis of quality of service and cost whether to build SBS reporting functionality themselves or to retain a reporting agent.

We also welcome the Commission's balanced approach to the use of unique identifier codes ("UICs"). We commend the Commission's attempt to channel market forces to incentivize the development of UICs by SDRs.[8] We believe the development of UICs will facilitate derivatives reporting globally and enhance the ability of regulators to conduct surveillance and better identify sources of systemic risk. UICs will also enhance the utility of post-trade information made freely available to the public, as required by the Dodd–Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").[9]

While we commend the considerable progress the Commission has made toward realizing the goals of the Dodd-Frank Act, we believe that the Commission should reconsider Proposed Rule 901(a)(2)(i). This proposed rule provides that "[f]or a clearing transaction, the reporting side is the registered clearing agency that is a counterparty to the transaction."

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services would be appropriate." Clearing Agency Standards; Final Rule, 76 Fed. Reg. 66,220, at 66,288 (Nov. 2, 2012).

[6] "Reporting side means the side of a security-based swap identified by § 242.901(a)(2)." SEC Rule 900(gg). SEC Rule 901(a), in turn, determines when a counterparty to a trade is obligated to submit SBS data to a repository. SEC Rule 901(a) (entitled "Assigning reporting duties").

[7] Regulation SBSR Final Rule, 80 Fed. Reg. 14,564, 14,602 ("[A]llowing entities other than regulated intermediaries to provide reporting services to reporting persons could enhance competition and foster innovation in the market for post-trade processing services. This could, in turn encourage more efficient reporting processes to develop over time as technology improves and the market gains experience with security-based swap transaction reporting.").

[8] See Rule 903.

[9] The Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub.L. 111–203, section 10B, at (m) (July 21, 2010), available at http://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf.

In Section II below, we opine that the Commission and the public would better served if the Commission adopts an approach to SBS reporting that ensures that the alpha, beta, and gamma SBS trade records[10] will be received by the same SDR (i.e. "Alternative 3") and promotes competition in the market for SDR and SDR-related reporting services by not sanctioning registered clearing agency[11] rules that tie clearing to SDR imposes burdens on competition in the markets for SDR and post-trade processing services. In Section III below, we comment on some specific questions posed by the Commission.

II. The Reporting Side to the Alpha SBS Trade Should Remain the Reporting Side

Our comments focus on Proposed Rule 901(a)(2)(i) which, as noted above, provides that "[f]or a clearing transaction, the reporting side is the registered clearing agency that is a counterparty to the transaction." The Proposal states further that "[i]n its capacity as the reporting side, the registered clearing agency would be permitted to select the registered security-based swap data repository ("SDR") to which it reports a clearing transaction."[12] We caution against this approach because, among other things, we believe it is not supported by an adequate consideration of the factors contained in Section 3(f) of the Securities and Exchange Act of 1934 ("Exchange Act").[13]

The Commission is directed by Congress to consider, under Section 3(f) of the Exchange Act, the effects of any rulemaking on the protection of investors, efficiency, competition, and capital formation.[14] Our comments below focus on the Proposal's considerations of efficiency and competition. With respect to the Proposal's rationale for Proposed Rule 901(a)(2)(i), we believe that it is flawed because, among other things, (Subsection 1) it ignores the efficiency benefits and reduced costs introduced by middleware reporting agencies and (Subsection 2) needlessly and unjustifiably proposes an approach to cleared SBS reporting that imposes a burden on competition. Therefore, in Subsection 3 below, we recommend the Commission adopt Alternative 3, whereby

[10] "In the agency model [of clearing], which predominates in the U.S. swap market, a swap that is accepted for clearing—often referred to in the industry as an ''alpha''—is terminated and replaced with two new swaps, known as ''beta'' and ''gamma.''" Proposal at 14,742.

[11] "Clearing agency" for the purpose of this letter means "registered clearing agency" unless otherwise specified. Under proposed Rule 901(a)(2)(i), the Commission would impose the duty to report clearing transactions on registered clearing agencies. 15 U.S.C. § 78c(a)(23) defines the term "clearing agency" as meaning "any person who acts as an intermediary in making payments or deliveries or both in connection with transactions in securities or who provides facilities for comparison of data respecting the terms of settlement of securities transactions, to reduce the number of settlements of securities transactions, or for the allocation of securities settlement responsibilities. Such term also means any person, such as a securities depository, who (i) acts as a custodian of securities in connection with a system for the central handling of securities whereby all securities of a particular class or series of any issuer deposited within the system are treated as fungible and may be transferred, loaned, or pledged by bookkeeping entry without physical delivery of securities certificates, or (ii) otherwise permits or facilitates the settlement of securities transactions or the hypothecation or lending of securities without physical delivery of securities certificates."

[12] Proposal at 14,743.

[13] "Whenever pursuant to this title the Commission is engaged in rulemaking, or in the review of a rule of a self-regulatory organization, and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation." Exchange Act, Section 3(f), available at https://www.sec.gov/about/laws/sea34.pdf.

[14] Id.

the reporting side of the alpha trade would be required to report also the resulting beta and gamma cleared transactions, reporting either itself or, where it so choses, by using a reporting agent.

1. Consideration of Efficiency-Related Costs and Benefits

The Proposal appears to have based its proposed approach to Proposed Rule 901(a)(2)(i) chiefly on operational efficiency considerations. The Proposal states the proposed rule is warranted because "a clearing agency is the only party that has complete information about clearing transactions immediately upon their creation"[15] Alternative approaches would require a non-clearing agency party to acquire data regarding a cleared SBS from the relevant clearing agency or the clearing agency's counterparty and "[t]his extra and unnecessary step could introduce more opportunities for data discrepancies, errors, or delays in reporting."[16] The Proposal also suggests that whether or not it mandated that clearing agencies be the reporting side on beta and gamma trades "registered clearing agencies would report clearing transactions to their affiliated SDR" because these clearing agencies are likely to offer the "lowest price."[17]

Based on our experience in reporting derivatives transactions to trade repositories in eight jurisdictions we believe that the rationale supporting Proposed 901(a)(2)(i) is unsound for at least six reasons:

- First, when a clearing agency submits a message to the parties that a swap has been accepted to clearing an essential, not an "extra" or "unnecessary" step in the clearing process has occurred and, as a result of this, the parties to the beta and gamma trade and the platform[18] have "complete information about [their] clearing transactions" almost "immediately upon their creation."
- Second, "data discrepancies, errors, or delays" are more likely when the market for SDR and post-trade processing services is unresponsive to market forces, as would be the case if the reporting of cleared transactions was undertaken by a clearing agency.
- Third, as informed by the experience in Commodity Futures Trading Commission ("CFTC")-regulated markets, it is very likely that Proposed Rule 901(a)(2)(i) would lead to fragmented data across SDRs that service the cleared and uncleared markets respectively, reducing the utility of SDR data and frustrating the Commission's use of SDR data.
- Fourth, the Proposal ignores the efficiency gains resulting from the presence of middleware reporting agents in the market for SDR and post-trade processing services despite noting such benefits in the Regulation SBSR Final Rule.
- Fifth, the Proposal errs when it suggests that whether or not it mandated that clearing agencies be the reporting side on beta and gamma trades "registered clearing agencies would report clearing transactions to their affiliated SDR" because these clearing agencies are likely to offer the "lowest price" when, in fact, reporting to other SDRs via middleware reporting agents is more likely to offer the "lowest price."
- Finally, the Proposal's failure to acknowledge the efficiency benefits and reduced costs that result from the presence of middleware reporting agents is a serious defect.

[15] Proposal at 14,745.

[16] Proposal at 14,745.

[17] Proposal at 14,782.

[18] I.e. a national securities exchange or security-based swap execution facility ("SB-SEF"). See Rule 900(v).

These reasons are elaborated below.

a. *When a clearing agency submits a message to the parties that a swap has been accepted to clearing an essential, not an "extra" or "unnecessary" step in the clearing process has occurred and as a result of this the parties to the beta and gamma and the platform have "complete information about [their] clearing transactions" almost "immediately upon their creation"*

We note that the clearing agency must, as a matter of course, send the cleared SBS trade record straight through to the sides to the trade or, if relevant, any non-affiliated reporting side (e.g., the platform or reporting agent). In other words, for the clearing agency to transmit a message indicating that a trade has or has not been accepted for clearing (a necessary last step to conclude cleared transactions between the clearinghouse and the parties to the beta and gamma trades), there is no "extra step." Moreover, the processing of cleared trades by a clearinghouse is nearly instantaneous, resulting in no operationally significant delay.[19]

b. *Contrary to the Proposal's assertion, "data discrepancies, errors, or delays" are more likely when the market for SDR and post-trade processing services is unresponsive to market forces*

The Proposal's concern about "data discrepancies, errors, or delays" resulting from SBS reporting that would follow based on messages sent by clearing agencies to a platform or market participant reporting side is unfounded. Insofar as the concern exists, it could be addressed without the anticompetitive means set out by Proposed Rule 901(a)(2)(i). In the case of the clearing agency, this concern could be addressed through rulemaking or enforcement (if such concerns are not merely theoretical). The Commission has more than adequate statutory authority "to facilitate the establishment of a national system for the prompt and accurate clearance and settlement of transactions in securities (other than exempt securities).[20] A clearing agency's transmission of messages specifying the details of a transaction that has been accepted to clearing is a necessary part of the "accurate clearance and settlement of transactions."[21] Indeed, under Proposed Rule 901(e), a clearing agency is required to report whether or not it has accepted a security-based swap for clearing and to communicate this to the SDR containing the alpha trade.

The Proposal could also be concerned with a non-clearing agency reporting side's ability to submit accurate SBS reports. This concern is similarly unfounded. It should be stressed that a reporting side has the incentive, provided under penalty of law,[22] to ensure accurate SBS reports. The reporting side can either develop internal systems to ensure accurate SBS reports, retain the services of the clearing agency as reporting agent, or retain the services of a non-clearing agency-affiliated reporting agent, such as MarkitSERV. Reporting agents, clearing agency-affiliated or not, that do not provide accurate and timely reports, in turn, are unlikely to remain competitive as such if they cause their customers to become subject to regulatory penalties.

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[19] See e.g., CFTC Staff Guidance on Swaps Straight-Through Processing, Sept. 26, 2013, available at http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/stpguidance.pdf ("Recent data received by [the CFTC's Division of Clearing and Risk] shows that DCOs now accept at least 93% of trades within three (3) seconds or less, and 99% of trades within ten (10) seconds or less.").

[20] See 15 U.S.C. § 78q–1(a)(1)(A).

[21] Id.

[22] See e.g., Rule 905.

Moreover, the likelihood of "data discrepancies" and "errors" would be reduced if the Commission empowered market participants and platforms to select the SDR and for SDRs to compete with one another based on quality of service[23] and cost. In a competitive market for SDR services, SDRs would be incentivized to compete with one another to provide value-added services, such as reporting agent services, recordkeeping tools and portfolio- and transaction-level analytics, or, in the case of platforms, capabilities that would facilitate surveillance activities. SDRs are unlikely to make investments to develop these capabilities if the SDR and post-trade processing market is not competitive and not responsive to market forces, as would be the case under the proposed approach.

c. As informed by the experience in CFTC-regulated markets, it is very likely that Proposed Rule 901(a)(2)(i) would lead to fragmented data across SDRs that service the cleared and uncleared markets respectively, reducing the utility of SDR data and frustrating the Commission's use of SDR data

While we appreciate Proposed Rule 901(a)(3) (which would require clearing agencies to submit a termination message to the alpha SDR), we note this rule will not eliminate the risk of data fragmentation. In CFTC-regulated swaps markets, MarkitSERV notes that while DCOs generally send beta and gamma swap records to an affiliated SDR market participants and platforms generally prefer using a repository not affiliated with a DCO. This trend demonstrates that (1) clearinghouses, despite their regulator-given advantages, still cannot provide service or fees that make them competitive as SDRs for all swap trade records and (2) the approach the Proposal takes, like the approach taken by the CFTC, will likely lead to fragmentation of data between SDRs that house alpha trades and those that receive the beta and gamma trades.

In order to reduce the risk of data fragmentation and ensure the maximum utility from SBS data, the Commission should instead seek to ensure alpha, beta, and gamma trades all are housed in the same SDR. The trends described above, which would be likely to extend into the SBS markets under the proposed approach to the reporting of cleared transactions, will lead to alpha trades being warehoused in one or a few SDRs while each CCP has its own separate warehouse. By virtue of the fact that these linked alpha trades, on one hand, and the beta and gamma trades, on the other, are kept at different SDRs increases the difficulties the Commission would have in linking the two data sets. We note that the integrity and reliability of the interconnections between both data sets is important in reconstructing market phenomenon for market surveillance purposes, e.g., when investigating the manipulation of an equity or credit underlier, knowing when a party transacted to establish their leveraged position to benefit in cleared SBS can be critical.

d. The Proposal ignores the efficiency gains resulting from the presence of middleware reporting agents in the market for SDR and post-trade processing services despite noting such benefits in the Regulation SBSR Final Rule

We note that the Proposal appears to have left out of its considerations of efficiency the participation of reporting agents in cleared SBS reporting workflows, despite finding in the accompanying

[23] "Quality of service" might include reliability, as well ease of use and integration into a firm's existing input and output systems, and ancillary services an SDR could provide. See Security-Based Swap Data Repository Registration, Duties, and Core Principles; Final Rule, 80 Fed. Reg.14,438, at 14,451 (Mar. 19, 2015).

Regulation SBSR Final Rule that "allowing entities other than regulated intermediaries to provide reporting services to reporting persons could […] foster innovation in the market for post-trade processing services. This could, in turn encourage more efficient reporting processes to develop over time as technology improves and the market gains experience with security-based swap transaction reporting."[24]

Specialized reporting agents, like MarkitSERV play an important role in data standardization as reporting agents to many market participants and infrastructures and improve data quality as a function of their expertise. Middleware reporting agents,[25] in particular, reduce the cost to trade through, among other things, economies of scale they achieve as a function of their role as intermediaries across a large number of market participants, trading platforms, clearinghouses, and trade repositories.

The Commission should consider that reporting agents do reduce the costs of connectivity between market participants, clearing agencies, SDRs, and platforms. These reduced costs of connectivity were not considered in the Proposal. For example, a reporting agent to a market participant on a bilateral (off platform) trade can:

- Simultaneously submit the alpha trade record to the reporting side's preferred SDR in the appropriate format and submit the same trade to a clearing agency to be accepted into clearing in the format the clearing agency accepts;

- Receive the clearing agency's clearing acceptance message and automatically enrich the clearing acceptance message to send a new message to the same SDR in the format it prefers to terminate the alpha trade;

- Create new beta and gamma trade records based on a feed from the clearinghouse while simultaneously sending messages keeping both sides to the trade updated on the beta and gamma swaps as they incur lifecycle events in a format they can readily intake.

A middleware reporting agent can perform all of these steps in a matter of seconds. We understand that a clearing agency could, at best, perform only the last two steps, while a middleware reporting agency is equipped to service the cleared trade at all stages, better ensuring the accuracy of the trade records and the linkage between alpha, beta, and gamma trade records.

e. The Proposal errs when it suggests that whether or not it mandated that clearing agencies be the reporting side on beta and gamma trades "registered clearing agencies would report clearing transactions to their affiliated SDR" because these clearing agencies are likely to offer the "lowest price" when, in fact, middleware reporting agents are more likely to offer the "lowest price"

The Proposal's assertion that whether or not it mandated that clearing agencies be the reporting side on beta and gamma trades "registered clearing agencies would report clearing transactions to their affiliated SDR" because these clearing agencies are likely to offer the "lowest price"[26] ignores the fact that middleware reporting agents can offer an even lower price. Middleware reporting agents, like MarkitSERV, are expert at converting clearing acceptance messages into derivatives

[24] Regulation SBSR Final Rule at 14,602.

[25] See supra at note 3.

[26] Proposal at 14,782.

trade records for trade repository intake at a price that is competitive with the price offered by clearing agencies. These workflows could be easily leveraged to provide SDR reporting services at a price lower than a clearing agency.

In contrast to currently registered SBS clearing agencies (that are connected only to affiliated trade repositories[27]), middleware reporting agents, such as MarkitSERV, are connected to numerous trade repositories globally and have achieved economies of scale with respect to the straight-through processing of cleared swaps across numerous clearinghouses and regulatory reporting regimes. MarkitSERV, for example, supports reporting under eight regulatory regimes currently and, as described above, over 1,500 firms use the various MarkitSERV platforms that process, on average, 80,000 OTC derivatives transaction processing events every day, many in SBS. MarkitSERV also processes cleared derivatives trades at 16 clearinghouses globally. MarkitSERV has sent over 45 million trades to trade repositories worldwide since the launch of the first trade repositories in 2010.

f. The Proposal's failure to acknowledge the efficiency benefits and reduced costs that result from the presence of middleware reporting agents is a serious defect

The efficiency benefits introduced by the presence of middleware reporting agents, if they were properly accounted for by the Commission in the Proposal (and not just in the Regulation SBSR Final Rule), would have provided additional and, in our opinion, decisive support to the three alternative approaches described by the Commission, without imposing a burden on competition in the market for SDR and post-trade processing services (see Subsection 2 immediately below). On this basis, we believe the Commission's consideration of the costs and benefits of its proposed approach as it relates to its consideration of efficiency is fundamentally flawed.

2. Consideration of Competition-Related Costs and Benefits

Consideration of the effects on competition of its rules is required not only by Section 3(f) of the Exchange Act, but also Section 17A of the Exchange Act.[28] We believe the Commission's consideration of the costs and benefits of Proposed Rule 901(a)(2)(i) is inadequate for reasons described in more detail below. While, as the Proposal opines, there may be economies of scale that justify the formation of natural monopolies in clearing,[29] there is no regulatory or commercial reason why there should be a natural monopoly in the market for SDR services. That is, no regulatory or commercial reason that would exist absent a rule like that Proposed Rule 901(a)(2)(i).

Below we point out three key concerns with the Proposal's consideration of the effects on competition Proposed Rule 901(a)(2)(i) would have. First, Proposed Rule 901(a)(2)(i) would sanction what should otherwise be the unlawful tying of clearing and SDR services. Second, the

[27] See e.g., ICE Clear Credit Rule 211, submitted for self-certification on Apr. 10, 2013, available at http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/rul041013icc002.pdf and ICE Link Regulatory Reporting for EMIR, Jan. 2014, https://www.theice.com/publicdocs/creditex/ICELink_Regulatory_Reporting_EMIR.pdf, at 5.

[28] Id. at (a)(2)(A) ("**The Commission is directed, therefore, having due regard for the public interest, the protection of investors, the safeguarding of securities and funds, and maintenance of fair competition** among brokers and dealers, **clearing agencies**, and transfer agents, to use its authority under this chapter— (i) to facilitate the establishment of a national system for the prompt and accurate clearance and settlement of transactions in securities (other than exempt securities)." (emphasis added)).

[29] Id. at note 216.

Proposal would frustrate the enhancement of "competition" and deter innovation in the market for post-trade processing services" and "more efficient reporting processes."[30] Third, Proposed Rule 901(a)(2)(i) would enhance the ability of SDRs affiliated with a clearing agency to impose exit barriers[31] that will deter competition in the market for SDR services and increase data fragmentation.

a. Proposed Rule 901(a)(2)(i) would sanction otherwise unlawful tying of clearing and SDR services

We note that the consequence of Proposed Rule 901(a)(2)(i) is all but certain the vertical integration of clearing and SDR services for single-name CDS.[32] The Proposal appears to acknowledge the effects that the otherwise[33] unlawful tying Rule 901(a)(2)(i) would lead to[34] but sanctions it nonetheless.

The CFTC's recent consideration of the effects on competition of rules tying clearing and SDR services in its review and ultimate approval of CME Rule 1001 is instructive.[35] CME Rule 1001 provides that, regardless of the desires of a swap counterparty, all CME-cleared swap trades must be reported to CME's Repository Service – an outcome consistent with and, indeed, sanctioned by Proposed Rule 901(a)(2)(i).

In reviewing CME Rule 1001, the CFTC considered whether the rule constituted unlawful "tying."[36] Citing antitrust case law, the CFTC found that in order to constitute unlawful tying, the activity at

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[30] See supra at note 7.

[31] An "exit barrier" is a restriction, de jure or de facto, to the sharing and utility of data housed at an SDR. For example, an SDR is incentivized to make data it houses unusable by other SDRs so as to prevent other SDRs from competing based on quality of services and comprehensiveness of data.

[32] ICE Clear Credit Rule 211, submitted for self-certification on Apr. 10, 2013, available at http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/rul041013icc002.pdf.

[33] Exchange Act at 17A(b)(3) ("A clearing agency shall not be registered unless the Commission determines that […] (I) The rules of the clearing agency do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of this title.")

[34] Proposal at 14,772 ("Because all clearing transactions, like all other security-based swaps, must be reported to a registered SDR, there would be a set of potentially captive transactions that clearing agencies could initially use to vertically integrate into SDR services.").

[35] See e.g., Statement of the CFTC, Mar. 6, 2013, http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/statementofthecommission.pdf and Chicago Mercantile Exchange Inc. ("CME") Rule 1001 ("CME Rule 1001"), voluntarily submitted to CFTC staff review on Dec. 6, 2012, available at http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/rul120612cme001.pdf, and ICE Clear Credit Rule 211, submitted for self-certification on Apr. 10, 2013, available at http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/rul041013icc002.pdf.

[36] Statement of the CFTC at 11 ("Determining whether Rule 1001 is anticompetitive in light of those standards depends, in part, on whether CME has either market power or monopoly power. Assessing either market power or monopoly power first requires defining the relevant market for the tying product (in this case, the market for CME's swap clearing services. Once the appropriate relevant antitrust market is defined, market power or monopoly power within that market can be assessed. While there is no established numerical cutoff, a market share below 30 percent is generally recognized as insufficient to support a finding of market/monopoly power.") (citations omitted).

issue must be undertaken by a person that has market power.[37] The CFTC determined that a market share below 30 percent is generally recognized as insufficient to support a finding of market/monopoly power.[38] The CFTC's decision to approve CME Rule 1001 was predicated on the fact that did not reach this threshold, i.e. "CME's share of cleared swaps appear[ed] small at th[e] time" and therefore "the [CFTC] [was] unable to conclude […] that CME Rule 1001 will unreasonably restrain trade or impose a material anticompetitive burden[.]"[39]

At the time of the CFTC's decision (March 2013), CME had a less than 30% market share in the market for cleared swaps.[40] In contrast, the market for single-name CDS clearing is considerably more concentrated.[41] As noted in the Proposal, "only a single firm serves the market for North American single-name CDS."[42] The same firm has over 88% market share in the market for CDS indexes, as measured by open interest.[43] This latter fact demonstrates that market/monopoly power exists in the market for the clearing of SBS today, and it is unlikely that any strong competition will emerge in the foreseeable future.

b. *The Proposal would frustrate the enhancement of "competition" and deter innovation in the market for post-trade processing services" and "more efficient reporting processes*

We note that to the extent that the Commission decides to reduce the ability of reporting agents not affiliated with clearing agencies to compete in the provision of SDR reporting or post-trade processing services for cleared SBS, the Commission would frustrate the very policy goals it

[37] Id.

[38] Id. at 11-12.

[39] Id.

[40] Cf. id. citing inter alia *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S 2, 26-29 (1984) (a 30 percent market share in the tying product market insufficient to support a finding of market power to sustain a tying violation). "[C]ourts virtually never find monopoly power when market share is less than about 50 percent," id. at 231-32, or a dangerous probability of monopolization when shares are less than 30 percent. Id. at 320.

[41] ICE Clear Credit and ICE Clear Europe (collectively "ICE"), "The Global Leader in Cleared CDS Volume" accounts for 100% of the approximately $771.9 billion of global single-name credit default swap ("CDS") open interest. See ICE Clear Credit, https://www.theice.com/clear-credit (last visited Apr. 23, 2015).

[42] Proposal at 14,774.

[43] Global CDS Index Open Interest

	ICE Clear Credit	ICE Clear Europe	ICE Total	CME	LCH	Total
Open Interest in Billions USD (1 EUR = 1.1 USD)	$514	$201	$715	$53	$49	$817
Market Share	63%	25%	88%	6%	6%	

Chart based on data from ICE Clear Credit, https://www.theice.com/clear-credit (last visited Apr. 29, 2015); CME Credit Products, http://www.cmegroup.com/trading/cds/ (last visited Apr. 29, 2015); and LCH.Clearnet, CDSClear Volumes, http://www.lchclearnet.com/en/asset-classes/otc-credit-default-swaps/volumes (last visited Apr. 29, 2015).

expressed in its Regulation SBSR Final Rule, as described above – namely, to "enhance competition and foster innovation in the market for post-trade processing services" and "more efficient reporting processes."[44] These very real effects on competition were not considered in the Proposal.

We urge the Commission to consider the impact of its final rules on the market for middleware services and the resulting costs and benefits its rulemaking would have on the markets for execution and clearing generally, and with respect to competition in particular. We also submit that a robust middleware services market would also facilitate competition for execution and, to the extent possible, clearing. For example, middleware service providers reduce the barrier to entry for execution venues by providing them a single source of connectivity to numerous global clearinghouses and trade repositories, enabling them to provide better, faster, and cheaper services to their end users. Middleware services providers also reduce the barriers to entry for market participants seeking to trade on multiple execution venues and to clear at numerous clearinghouses by, among other things, providing them a single point of connectivity and by processing their trades into formats readily input into their risk systems.

c. *Proposed Rule 901(a)(2)(i) would enhance the ability of SDRs affiliated with a clearing agency to impose exit barriers[45] that will deter competition in the market for SDR services and increase data fragmentation*

The quality of an SDR's ancillary services are a function of, among other things, the data it has. In a market where a single clearing agency dominates the market for clearing, under Proposed Rule 901(a)(2)(i), its SDR affiliate would almost certainly inherit a great degree of market power. In order to curb the rise of a competing SDR on the basis of quality of service, a clearing agency-affiliated SDR could impose exit barriers to prevent other SDRs from receiving or being able to process (e.g., through difficult to process reporting formats) its trade record messages. The likelihood of these exit barriers becoming effective is also enhanced to the extent that reporting agents' participation in SDR reporting is reduced – an outcome the Commission should expect, as described above in Section II.1.2.b above.

This kind of behavior by a clearing agency-affiliated SDR also increases the likelihood of data fragmentation as market participants would find it more difficult to warehouse all of their SBS (and swap) records in one SDR because of these exit barriers, reducing their ability to ensure the accuracy of their SDR SBS records. The fragmentation problem would be further exacerbated to the extent that middleware is either not present or is itself unable to surmount these exit barriers.

3. The Commission Should Adopt Alternative 3 to Proposed Rule 901(a)(2)(i)

We recommend the Commission adopt Alternative 3, whereby the reporting side of the alpha trade or its reporting agent would be required to report also the resulting beta and gamma cleared transactions.[46] We note that the Commission could provide a clarification to Alternative 3 that address the Proposal's concern that the reporting side to the alpha trade may not have information

[44] Regulation SBSR Final Rule at 14,602.

[45] See supra at note 31.

[46] Proposal at 14,745.

about both the beta and gamma trades.[47] In the case of non-platform executed trades, the Commission could clarify that the reporting side to the alpha trade can contract with (i) the clearing agency or (ii) a non-clearing agency reporting agent that has the necessary data or (iii) the other counterparty to receive the necessary data. The Proposal appears to only consider (i) and (iii), even though in many cases (ii) may be the most efficient and cost-effective choice (given a non-clearing agency reporting agent's potential access to alpha, beta, and gamma trade records and their ability to make use of existing connectivity and messaging workflows).

In the case of platform-executed trades, the Commission could clarify that for Alternative 3, as is the case for alpha trades executed on a platform under Proposed Rule 901(a)(1), that for all such platform trades, the alpha, beta, and gamma be reported by the platform, whether or not the alpha trade was executed anonymously. We note that platforms have surveillance responsibilities that necessarily require that platforms have the ability to monitor beta and gamma cleared swaps over time.[48] Therefore there would be little incremental cost to having platforms be the reporting side to cleared transactions. Similar to non-platform reporting sides to an alpha trade, a platform would then have a choice to determine, based on quality of service and cost, whether to report alpha, beta, and gamma trades (i) itself, (ii) through a non-clearing agency affiliated reporting agent, like MarkitSERV, or (iii) through a clearing agency reporting agent.

The Alternative 3 approach would increase the benefit of SBS reporting for the Commission and for market participants or platforms since they would have the power to determine which SDR would receive their regulatory SBS trade reports based on quality of services and cost (and would not be forced to rely on a clearing agency's selection of SDR). In either case, the reporting side to the alpha trade could also delegate reporting to a reporting agent like MarkitSERV or a clearing agency, depending on which can provide the highest quality service at a cost-effective rate. This would ensure that the competition for SDR services achieves the best outcome for market participants.

In contrast to Alternative 3, Proposed Rule 901(a)(2)(i) would deter competition for SDR and post-trade processing services and lower the utility of SDR services, since SDRs that are affiliated to clearing agencies and receive their reports for cleared SBS would no longer need to compete based on quality of service and cost, with no commensurate marginal benefit for market participants. The Commission's proposed approach only provides a marginal benefit (relative to Alternative 3) for the clearing agency, which can more easily leverage a dominant clearing agency position to gain a dominant SDR position by selecting an affiliated SDR as its SDR of choice for beta and gamma trades. We stress again that under Alternative 3, there is no restriction on the reporting side's ability

[47] "Alternative 3 would require the reporting side for the alpha also to report information about a security-based swap—the clearing transaction between the registered clearing agency and the non-reporting side of the alpha—to which it is not a counterparty. The Commission could require the non-reporting side of the alpha to transmit information about its clearing transaction to the reporting side of the alpha. In theory, this would allow the reporting side of the alpha to report both the beta and the gamma. The Commission believes, however, that this result could be difficult to achieve operationally and, in any event, could create confidentiality concerns, as an alpha counterparty may not wish to reveal information about its clearing transactions except to the registered clearing agency (and, if applicable, its clearing member)." Id. at 14,746.

[48] For example, proposed SB-SEF Rule 811(j) would require the SB SEF to have the capacity to capture information that may be used in establishing whether rule violations have occurred, including through the use of automated surveillance systems as set forth in proposed Rule 813(b). See Registration and Regulation of Security-Based Swap Execution Facilities; Proposed Rule, 76 Fed. Reg. 10,948, 10,976 (Feb. 28, 2011).

to assign the task of reporting agent to a clearing agency if the clearing agency provides better or more cost-effective reporting services.

While we consider Alternative 3 to be the best among the proposed approaches to Rule 901(a)(2)(i) and the two other alternatives, we believe that the other two alternatives are still preferable to the proposed approach.[49] This is because these other alternatives, relative to the Proposal, encourage competition based on quality of service and cost and the role of reporting agents and are more likely to result in outcomes whereby the same SDR will receive alpha, beta, and gamma trades.

We note that some market participants reporting sides (in bilateral or off platform workflows) may object to having to develop the means to report the gamma trade with the clearing agency when they are party to the beta trade (or vice versa). To address these concerns, we suggest a fourth alternative. Under this alternative, the platform would remain the reporting side for all platform-executed trades while for bilateral or off platform cleared transactions, the reporting side would be the clearing agency. However, the clearing agency would be required to submit beta and gamma trade records to the alpha SDR (which would be determined by the alpha trade reporting side and not the clearing agency).

III. Request for Comment Questions

We would also like to specifically respond to the Commission's request for comment questions ("RFCQ") 3, 8, 9, 13, 15, and 35.

- RFCQ 3 asks whether "[a]t the time that a security-based swap is accepted for clearing, will any person other than the registered clearing agency have complete information about the beta and the gamma that result from clearing?"

The answer to RFCQ 3 is that the reporting side to the alpha trade and, if relevant, the reporting agent, would have complete information about the beta and gamma trades once their SBS is accepted for clearing and this message is sent. This message is sent nearly instantaneously after a trade is accepted for clearing and any delay is operationally insignificant, as discussed above in Section II.1.a of this letter. Middleware reporting agents, in particular, are well-equipped to perform the service of linking the alpha, beta, and gamma trades and has been in the business of doing for years. MarkitSERV has reconciled alpha, beta, and gamma trades for post-trade processing purposes for its customers for a number of years, for example. Such comparison is of crucial importance for ensuring the quality of data reported to SDRs and the utility of SDR data for market participants, platforms, and the Commission.

- RFCQ 8 asks "[w]hat costs might platforms incur to report security-based swap transactions pursuant to Proposed Rule 901(a)(1)? Could other market participants report these transactions more efficiently or cost effectively?"

The costs of reporting SBS transactions to SDRs largely consists of establishing the necessary connectivity and gathering and translating between different static data sets across different

[49] Alternative 1 is described as "Utilize the reporting hierarchy in Regulation SBSR, as re-proposed. Under this approach, a registered clearing agency would occupy the lowest spot in the hierarchy, along with other persons who are neither registered security-based swap dealers nor registered major security-based swap participants." Proposal at 14,735. Alternative 2 is described as "[m]odify the re-proposed hierarchy to place registered clearing agencies above other non-registered persons but below registered security-based swap dealers and registered major security-based swap participants." Proposal at 14,735.

sources. Since the source of platform trades is generally the platform, one side of its reporting cost calculus, the "input" side, is largely static and fixed. The "output" side, however, is variable and depends on whether the platform would like to report all of its SBS to one SDR or potentially to multiple SDRs – ultimately, the choice would depend on market forces and whether platform customers care where their data goes to, itself a reflection of the quality of services offered by SDRs.

Reporting agents, such as MarkitSERV, that are used by a large number of market participants would be in a position to achieve significant economies of scale with respect to derivatives trade reporting and drastically reduce the costs of reporting SBS pursuant to Proposed Rule 901(a)(1) for platforms. As noted by the Commission in the Regulation SBSR Final Rule, "allowing entities other than regulated intermediaries to provide reporting services to reporting persons could enhance competition and foster innovation in the market for post-trade processing services. This could, in turn, encourage more efficient reporting processes to develop over time as technology improves and the market gains experience with security-based swap transaction reporting."[50]

With respect to the second part of RFCQ 8 which asks "[c]ould other market participants report these transactions more efficiently or cost effectively?" The answer is yes, reporting agents and particularly middleware reporting agents. This is because, as explained above, middleware reporting agents, in particular, encourage competition by reducing the ability of market infrastructures to impose exit barriers that deter competition and reduce the cost to trade through, among other things, economies of scale they can easily achieve as a function of their role as intermediaries across market participants, trading platforms, clearinghouses, and trade repositories.

- RFCQ 9 asks "[w]ould a registered clearing agency have the information necessary to report a platform-executed alpha that will be submitted to clearing? If so, should the registered clearing agency, rather than the platform, be required to report the transaction? Why or why not? How long does it typically take between the execution of a security-based swap on a platform and submission to clearing? How long does it typically take between submission to clearing and when the registered clearing agency determines whether to accept or reject the transaction?"

We note here that if access to instantaneous trade data is the determinant to who should be a reporting side (this is the basic rationale behind the approach taken in Proposed Rule 901(a)(2)(i)),[51] then that reasoning would not support a rule whereby the registered clearing agency is the reporting side to the alpha trade. Moreover, if any lag in time between when a message is created (i.e. when a trade is accepted for clearing) and is received (i.e. when a message indicating a trade has been accepted for clearing, creating the beta or gamma swap) is unacceptable to make a message recipient the reporting side (which is the implied rationale for Proposed Rule 901(a)(2)(i)), then for the same reason the clearing agency should not be the reporting side for alpha trades.

- RFCQ 13 asks "[w]ould other market participants be able to report clearing transactions or terminations of transactions submitted to clearing more efficiently or cost effectively than the registered clearing agency? What costs might counterparties incur if one of the sides of the alpha were assigned the duty to report a clearing transaction rather than the registered clearing agency?"

[50] 80 Fed. Reg. 14,564, at 14,602

[51] See Proposal at 14,745.

As discussed in Section II.1.e of the comment letter above, there is no reason to believe that the reporting side to an alpha trade cannot determine on their own whether they themselves, a clearing agency, or another reporting agent can most efficiently or cost effectively report trades to an SDR of their choosing rather than the clearing agency that clears the transaction (quite the contrary is more likely true).

- RFCQ 15 asks "[u]nder Proposed Rule 901(e)(1)(ii), a registered clearing agency would be required to report whether or not it has accepted a security-based swap for clearing. Should this information be required to be reported to the same registered SDR that receives the transaction report of the alpha? If not, how would the Commission and other relevant authorities be able to ascertain whether or not the alpha had been cleared? If so, what costs would be imposed on registered clearing agencies for having to report this transaction information to a registered SDR not of their choosing?"

As discussed in Section II of this comment letter above, we believe that the reporting side to the alpha trade should generally select the SDR to receive beta and gamma trades as well. That approach would obviate the need for the clearing agency to have to report that the SBS has been accepted for clearing to the alpha SBS SDR.

- RFCQ 35 asks "[d]o you believe that registered SDRs should be prohibited from charging users fees for or imposing usage restrictions on the security-based swap transaction information that registered SDRs are required to publicly disseminate under Rule 902(a)? Why or why not?"

We agree with Proposed Rule 900(tt), which would define the term "widely accessible" as used in the definition of "publicly disseminate" in Rule 900(cc), as adopted, to mean "widely available to users of the information on a non-fee basis." This rule would mean that SDRs would be prohibited from charging user fees for or imposing usage restrictions on post-trade SBS transaction information that registered SDRs are required to publicly disseminate.

We ask the Commission to clarify that the restrictions on user fees and usage in Proposed Rule 900(tt) extends only to data that is disseminated by SDRs in a post-trade context. We note and ask the Commission to confirm that certain information contained in publicly-disseminated SBS transaction records may be proprietary and therefore subject to usage restrictions in pre-trade contexts, most likely by non-SDRs or perhaps by affiliates of an SDR, e.g., the use of proprietary reference rates, underlier codes, prices, or indexes used before executing an SBS transaction. This proprietary information may also be embedded in UICs that might be used by an SDR.

We believe this clarification is needed because in its absence, we have reason to expect some market participants to infer that because SDRs may not impose usage restrictions on information contained in a publicly-disseminated SBS record, that all such limitations on user fees and usage restrictions, i.e. in pre-trade contexts, are similarly prohibited.[52] However, we do not believe that it is the Commission's intention, as reflected by the plain text of Proposed Rule 900(tt) and Rule 902(a), their rationale, and cost-benefit analysis, to eliminate all user fees and usage restrictions on information contained in publically disseminated SBS data. Moreover, we do not believe that there would be any significant benefit to post-trade transparency derived from restrictions on user fees and usage in pre-trade contexts.

[52] Such a reading would erase much of the value of virtually all proprietary reference rates, underlier codes, prices, or indexes used in SBS transactions.

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Markit appreciates the opportunity to comment on the Commission's request for comment. We would be happy to elaborate or further discuss any of the points addressed above. In the event you may have any questions, please do not hesitate to contact the undersigned or Salman Banaei at [redacted].

Yours sincerely,

Marcus Schüler
Head of Regulatory Affairs
Markit
[redacted]