June 21, 2018

Institute of International Bankers

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SEC-CFTC Harmonization:
Key Issues under Title VII of the Dodd-Frank Act

The matrix below summarizes key issues raised as a result of differences between the rules adopted or proposed by the Securities and Exchange Commission ("**SEC**") and the Commodity Futures Trading Commission ("**CFTC**") to implement the regulatory framework for security-based swaps ("**SBS**") and swaps under Title VII of the Dodd-Frank Act. Because most of the CFTC's Title VII rules have been in effect for several years, but the SEC's Title VII rules are either awaiting adoption or are not yet in effect, greater harmonization of the SEC's rules to the CFTC's rules would help facilitate prompt implementation of the SEC's Title VII regime with minimal disruption to the SBS market and robust protections and lower costs for investors and other end-users. Accordingly, in several instances, our recommendations call for such harmonization even if the SEC's rules would, standing alone, be less strict or costly than the CFTC's rules. We also note some key areas where changes to the CFTC's rules or guidance would be appropriate. Our recommendations cover the following areas:

- Conflicts with foreign blocking, privacy, secrecy, labor and employment laws raised by certifications and legal opinions required for foreign dealers, background checks for associated persons, and trade reporting rules;
- The treatment of transactions between non-U.S. persons arranged, negotiated or executed by personnel or agents located in the U.S.;
- Trade reporting data fields, mechanics, and cross-border application;
- External business conduct standards; and
- Capital, margin, and segregation rules.[1]

Our recommendations are intended to complement ongoing initiatives by the CFTC to recalibrate its swaps regulatory regime through Project KISS and leadership in international standard setting bodies, such as the Basel Committee on Banking Supervision ("**BCBS**"), the International Organization of Securities Commissions ("**IOSCO**"), and the Committee on Payments and Market Infrastructures ("**CPMI**"). We have referenced these initiatives where appropriate in the matrix below. We envision that the agencies' harmonization efforts would continue in parallel with these initiatives and that implementation of the SEC's Title VII regime should be staggered as a result.

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[1] In addition to addressing the issues described in this matrix, the CFTC and SEC should also address the issues raised in our comment letters regarding the agencies' still-pending rule proposals. *See* Note 4, below.

In addition to the recommendations below, the SEC should, where appropriate, permanently extend its temporary exemptive relief related to the revision of the definition of "security" in the Securities Exchange Act of 1934 to encompass SBSs.[2] *See* SEC Release No. 34-82626. We recommend that the SEC grant this permanent extension well in advance of the expiration of the relief on February 5, 2019 in order to reduce uncertainty and potential duplication in SBS regulation.

We also recommend that, well in advance of SBS dealer registration, the SEC make substituted compliance determinations covering the same range of "entity-level" rules and foreign jurisdictions currently covered by the CFTC's corollary determinations.

If the SEC takes these steps and the others described herein, then an 18-month period before SBS dealer registration, business conduct, and reporting rules take effect should be sufficient to provide for orderly implementation of the SEC's Title VII ruleset. Additional time would then be required to implement SBS dealer margin and capital requirements, which must account for ongoing phased implementation of other regulators' margin rules and implementation of the pending capital proposal from the CFTC.

[2] As discussed in previous comment letters from the Securities Industry and Financial Markets Association ("**SIFMA**"), application of the pre-Dodd Frank securities requirements on SBSs is generally unworkable and/or unnecessary in light of the new SBS regulatory regime. *See,* Draft SIFMA SBS Exemptive Relief Request (Oct. 20, 2011), available at https://www.sec.gov/comments/s7-27-11/s72711-7.pdf, and SIFMA SBS Exemptive Relief Request (Dec. 5, 2011), available at https://www.sec.gov/comments/s7-27-11/s72711-10.pdf. Additionally, including an SBS in the definition of "security" subjects entities that are dual-registered as SBS dealers and broker-dealers to both the SBS and securities regulatory regimes, placing those dual-registered entities at a competitive disadvantage.

Issue(s)	**SEC Rule(s)**	**CFTC Rule(s)**	**Recommendation(s)**
***Conflicts with Foreign Blocking, Privacy, Secrecy, Labor, and Employment Laws*.** The novel, extraterritorial application of U.S. law under Title VII has led to several potential conflicts with foreign blocking, privacy, secrecy, labor, and employment laws, including:			
• Requirements for foreign dealers to register in the U.S. and submit to U.S. inspection and examination requirements, even if they conduct U.S.-facing business through a regulated U.S. affiliate or their only U.S. nexus is that a U.S. affiliate guarantees their transactions with foreign counterparties;	Final SEC Rule 15Fb2-4(c) will require a non-resident SBS dealer to certify and provide a legal opinion relating to SEC access to books and records and onsite inspections and examinations. In adopting this requirement, the SEC did not specify which books, records, locations, and laws must be covered by the certification and opinion. Absent clarification or relief, most (if not all) non-resident SBS dealers could not satisfy this requirement because they do business in jurisdictions that have blocking, privacy, or secrecy laws. Withdrawal of non-resident SBS dealers from the U.S. market would materially reduce market liquidity and competition for investors.	The registration form for swap dealers, National Futures Association ("**NFA**") Form 7-R, contains a carve-out from certifications relating to U.S. authorities' access to books and records for foreign blocking, privacy, and secrecy laws about which a swap dealer informs the CFTC in writing. The CFTC does not impose a legal opinion requirement like the one required by SEC Rule 15Fb2-4(c). Instead, the CFTC and NFA have generally worked with swap dealers and foreign regulators to develop more tailored measures to avoid or overcome the obstacles that these laws can pose to U.S. investigations or exams.	When the SEC finalizes its recordkeeping rules for SBS dealers, it should eliminate its opinion requirement and amend its certification requirement to adopt the same carve-out as the CFTC. If the SEC does not take these steps, then it could mitigate (but not eliminate) the disruption caused by its opinion and certification requirements by adopting guidance clarifying that those requirements cover (i) books and records related to the SBS dealer's U.S. SBS business and (ii) laws applicable in the SBS dealer's jurisdiction of incorporation, principal place of business or, if different, the location(s) where the SBS dealer will maintain and make available such required books and records to the SEC. The books and records related to an SBS dealer's U.S. SBS business would be records (including communications) of the SBS transactions that count toward the SBS dealer *de minimis* threshold (*e.g.*, U.S.-facing SBS transactions) and, for an SBS dealer subject to SEC capital and margin oversight (without substituted compliance), financial records.

Issue(s)	SEC Rule(s)	CFTC Rule(s)	Recommendation(s)
• A dealer cannot permit an associated person ("**AP**") to effect or be involved in effecting transactions on its behalf if the dealer knows, or in the exercise of reasonable care should have known, that the AP is subject to statutory disqualification; and	Final SEC Rule 15Fb6-2 will require (i) an SBS dealer to provide a certification relating to this prohibition and (ii) the chief compliance officer of an SBS dealer to review and sign employment questionnaires or applications, which are to serve as the basis for a background check. However, in certain foreign jurisdictions, local labor or employment law prohibits employers from requiring their employees to provide information regarding their criminal or civil history; in these jurisdictions, employers must rely on alternative measures to vet their employees. The adverse impact of these conflicts is exacerbated by the broad geographic reach of the SEC's background check requirements, which cover non-U.S. employees who do not interact with U.S. counterparties, and the application of these requirements to non-front-office personnel, such as personnel solely responsible for drafting and negotiating master agreements and confirmations or managing collateral.	NFA Form 7-R contains a similar certification, but neither the CFTC nor NFA has imposed any affirmative background check requirements. In addition, the CFTC has provided no-action relief from the statutory disqualification prohibition for APs located outside the U.S. whose counterparties are located outside the U.S. Finally, unlike the SEC, the CFTC has not interpreted its AP requirements to extend outside of front-office personnel.	When it finalizes its recordkeeping rules, instead of always requiring a standard U.S. employment questionnaire/application and background check, the SEC should permit an SBS dealer to use alternative measures to confirm that a non-resident AP is not subject to statutory disqualification in situations where (i) using a standard U.S. employment questionnaire/ application and background check would conflict with local law or the AP does not interact with U.S. counterparties and (ii) the AP complies with applicable registration or licensing requirements in the jurisdiction(s) where he or she is located. The SEC should also make related clarifications regarding the AP statutory disqualification certification. Additionally, the SEC should focus Rule 15Fb6-2's requirements and related recordkeeping rules on personnel who are performing "front-office" functions, such as recommending or executing SBS transactions. If the SEC does not do so, it should clarify that other personnel will not be considered to effect or be involved in effecting SBS transactions unless they exercise managerial or other discretionary, supervisory authority over the SBS business of an SBS dealer.

Issue(s)	**SEC Rule(s)**	**CFTC Rule(s)**	**Recommendation(s)**
• Requirements for dealers to report identifying information regarding counterparties when reporting such information would conflict with foreign laws. The Financial Stability Board has spearheaded an effort to eliminate those conflicts.	Final Regulation SBSR will require SBS dealers to report IDs for counterparties. To address conflicts with foreign laws, the SEC indicated it might grant exemptions from reporting counterparty IDs, but only for historical transactions.	The CFTC staff has addressed some (but not all) of the relevant legal conflicts through no-action relief allowing swap dealers to use substitute, "masked" identifiers for counterparties who reside in enumerated jurisdictions whose local privacy or similar laws prohibit reporting un-masked IDs. This relief applies to both historical and new transactions.	Like the CFTC, the SEC should grant masking relief covering both historical and new transactions. The agencies should also consider enhancements to existing relief.
***ANE Transactions*.** The CFTC and SEC have taken different approaches to how they treat transactions between non-U.S. persons that are arranged, negotiated, or executed by personnel located in the U.S. ("**ANE Transactions**"). Market participants have raised concerns that applying U.S. rules to ANE Transactions already subject to foreign regulation would discourage non-U.S. clients from interacting with U.S. personnel and impede risk management by expert trading personnel located in the U.S. On the other hand, the benefits of applying additional requirements to ANE Transactions are limited. In particular, such transactions do not pose any risks to the U.S. financial system because no U.S. person is party to the transactions either directly or as guarantor. Also, identifying ANE Transactions poses costly implementation challenges for transactions negotiated over longer periods of time and multiple time zones or in situations where the	Under final rules adopted by the SEC, SBSs connected with a non-U.S. person's SBS dealing activity that are arranged, negotiated, or executed by its (or its agent's) personnel located in a U.S. branch or office are: • included in calculations for the *de minimis* exception to cross-border dealing activity requiring registration of a potential SBS dealer (Rule 3a71–3(b)(1)(iii)); • subject to regulatory reporting and public dissemination (Regulation SBSR, Rule 908); and • subject to external business conduct standards (Rule 3a71-3).	The CFTC has never required a non-U.S. person to include ANE Transactions in its swap dealer *de minimis* calculation. Although a November 2013 CFTC staff advisory (Advisory No. 13-69) would have subjected certain ANE Transactions to CFTC "transaction-level" requirements (including real-time public reporting rules and external business conduct standards), no-action letters have generally provided relief from these requirements (*see* No-Action Letter No. 17-36). In addition, an October 2016 proposal would have limited the external business conduct standards that apply to ANE Transactions to anti-fraud, counterparty confidentiality and fair and balanced communication requirements.	The CFTC should codify the treatment of ANE Transactions in a rulemaking confirming that "transaction-level" requirements do not apply to such transactions and such transactions are not covered by the *de minimis* calculation. The SEC should revise its rules to treat ANE Transactions in the same manner. If the SEC does not take this approach, it should: • exclude ANE Transactions from the *de minimis* calculation if the trading activity is already appropriately regulated because the relevant U.S. personnel are (i) employed by an affiliate that is either (a) a bank that is registered as an SBS dealer or (b) a registered broker-dealer and (ii) trading on behalf of an entity subject to BCBS-IOSCO compliant margin and capital rules; • limit the external business conduct requirements for ANE Transactions to anti-fraud,

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locations of both parties' personnel are relevant (*e.g.*, in the inter-dealer reporting context). Overcoming these challenges will require firms either to modify their systems and practices to detect involvement of U.S. personnel on a systematic basis or systematically to limit the involvement of such personnel.			disclosure, and fair and balanced communication requirements, since these requirements will not pose onboarding issues for non-U.S. counterparties that could discourage them from interacting with U.S. personnel; and • apply reporting requirements solely based on the status of the each party to the transaction as, for example, a U.S. person or U.S.-registered SBS dealer, instead of triggering additional reporting requirements for ANE Transactions solely because of the involvement of U.S. personnel.
***Trade Reporting Data Fields, Mechanics, and Cross-Border Application*.** Differences among the data fields, reporting mechanics, and cross-border application required under trade reporting rules adopted by the SEC, CFTC, and foreign regulators limit the ability for reporting parties to use common systems across rulesets, prevent the creation of a common data set that is aggregable across jurisdictions, and impose differential costs or market impact on end-users, which can skew markets. These differences also inhibit reliance on substituted compliance. The main areas that raise these issues are set out below:			

Issue(s)	SEC Rule(s)	CFTC Rule(s)	Recommendation(s)
• Inconsistent requirements for when data repositories must publicly disseminate data and how reporting parties should embargo that data;	Rule 901 of final Regulation SBSR imposes an interim reporting deadline of 24 hours after execution, but Rule 902 requires an SBS data repository to disseminate trade information publicly immediately upon receipt. Rule 902 also prohibits disclosure of trade information to others before it has been sent to an SBS data repository (the "**Embargo Rule**").	Part 43 of the CFTC's rules requires the reporting party to report trade information to a swap data repository as soon as technologically practicable after execution, but for trades at or above the "minimum block size" (set by the CFTC) the swap data repository has to apply a delay before it disseminates that information publicly. The length of this delay depends on the size and asset class of a transaction. Foreign jurisdictions' reporting rules typically operate in a similar manner. Part 43 also imposes an Embargo Rule, which creates challenges with respect to compliance with foreign reporting requirements as well.	Firms would generally prefer to report SBS transactions earlier than the SEC's rules require so they can use existing, CFTC-compliant reporting systems to submit the reports. However, if they did so, SBS data repositories would immediately publicly disseminate these transactions, without the benefits of the 24-hour public dissemination delay intended by the SEC.[3] But if reporting parties delay these reports until the 24-hour deadline, they could face issues with the SEC's Embargo Rule due to reporting requirements in foreign jurisdictions. In addition, a lack of uniform technology to apply reporting delays amongst SBS dealers may create the opportunity for reverse engineering parties' identities and trading strategies. To address these issues, the SEC should amend Rule 902, or grant relief, so that SBS data repositories disseminate trade information publicly not upon receipt of reported data but when the relevant time period (*i.e.*, 24 hours after execution) has expired.

[3] While the interim, 24-hour public dissemination delay will give the SEC additional time to consider how to set block sizes, further analysis is needed whether the 24-hour delay gives sufficient protection (and time to hedge) for less liquid SBS products. We note in this regard proposals for the CFTC to recalibrate its own public dissemination rules. The agencies should work together going-forward to make appropriate amendments to public dissemination rules.

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• Inconsistent requirements for what trade data must be reported;	Rule 901 of final Regulation SBSR requires reporting of Primary and Secondary Trade Information as set forth in the rule. While there is no requirement to report certain data (such as valuation data), other data elements are new and more challenging (such as trader ID or additional data elements that are necessary for a person to determine the market value of the transaction).	The CFTC's reporting rules (Parts 43, 45, and 46) require a different set of data to be reported per trade, such as the "Minimum Primary Economic Terms," which, for example, do not include trader IDs. However, other data elements are problematic under the CFTC rules (as previously raised with the CFTC by market participants) such as the "any other terms" field.	The CFTC and SEC are participating in a CPMI-IOSCO data harmonization working group covering transaction IDs, product IDs, and other critical data elements, and the CFTC intends to make changes to its rules taking into consideration final guidance provided by CPMI-IOSCO. The agencies should work together to identify a harmonized set of data for the reporting of swaps and SBSs and then revise their rules accordingly. Pending the outcome of this workstream, the SEC should not require data fields or reports for SBSs that the CFTC or foreign regulators do not require for swaps. SBS dealers would still be required to maintain the underlying information as part of their records. This phased implementation would make it possible to implement Regulation SBSR sooner and set the stage for firms to make a single set of changes to their reporting systems in the future when the SEC and CFTC have agreed on an enhanced set of harmonized data fields. If the SEC and CFTC data fields were harmonized, it would enhance the agencies' oversight of related swaps and SBSs and allow a single report for "mixed swaps" submitted to one data repository (for swaps or SBSs) to be made available to both the SEC and CFTC, eliminating duplicative reporting and reducing risk of errors.

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• Inconsistent requirements for the non-reporting party to a transaction to provide data;	Rule 906 of final Regulation SBSR requires an SBS data repository to collect certain information directly from the non-reporting side, such as counterparty ID and (if applicable) the broker ID, branch ID, execution agent ID, trading desk ID, and trader ID.	The CFTC's reporting rules (Parts 43, 45, and 46) and its data repository rules (Part 49) do not impose similar obligations on swap data repositories to obtain data from non-reporting parties.	Many end-users are not equipped to report data to a data repository. The CFTC and SEC should work together to adopt a consistent approach to requirements for non-reporting sides/parties, which minimizes burdens on end-users in line with the CFTC rules. In the meantime, the SEC should not require additional data beyond counterparty IDs from non-reporting sides, either directly or indirectly through reporting sides.
• Inconsistent requirements for the public dissemination of the actual notional or principal amount for transactions;	Rules 901 and 902 of final Regulation SBSR require the reporting side to report, and the SBS data repository to disseminate publicly, the actual notional or principal amount for an SBS.	CFTC Rule 43.4 requires the reporting party to report the actual notional or principal amount for a swap, but the swap data repository publicly disseminates a rounded or capped notional or principal amount.	Even with a 24-hour delay, disseminating the actual notional or principal amount for a transaction can still cause an adverse market impact for less liquid or larger sized transaction types. In addition, publicly disseminating this information can facilitate reverse engineering of parties' identities and trading strategies. To address these issues, the SEC should adopt notional rounding and capping rules.
• Absence of determinations permitting substituted compliance with foreign reporting rules; and	Rule 908 of final Regulation SBSR does not permit the SEC to make a substituted compliance determination unless it finds that a foreign jurisdiction's reporting rules require comparable data fields and the SEC has direct electronic access to data reported pursuant to those rules, among other conditions.	CFTC guidance imposes similar conditions on substituted compliance with foreign reporting rules. However, pending substituted compliance, the CFTC has granted no-action relief until 2020 for certain foreign-headquartered swap dealers in relation to reporting their swaps with non-U.S. counterparties (No-Action Letter No. 17-64).	If the SEC does not make substituted compliance determinations prior to when its SBS reporting rules take effect, it should provide temporary relief.

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• Inconsistent extraterritorial reach of reporting rules.	Rule 908 requires trade reports for SBSs where both parties are non-U.S. persons but at least one is guaranteed by a U.S. person. The SEC has also treated foreign branches of U.S. SBS dealers in emerging markets in the same manner as branches located in jurisdictions with more active SBS markets.	CFTC guidance does not apply public reporting rules to a non-U.S. person guaranteed by a U.S. person unless its counterparty is a U.S. person, another guaranteed affiliate of a U.S. person, a conduit affiliate of a U.S. person or a registered swap dealer. In addition, certain emerging market branches benefit from a *de minimis* exception from public reporting and other "transaction-level" rules.	To avoid unduly disadvantaging U.S. firms when doing business outside of the U.S., the SEC should align the extraterritorial scope of its reporting rules with the CFTC. Alternatively, it should grant relief for branches and guaranteed affiliates located in emerging market jurisdictions (subject to a 5 percent volume limit) and temporary relief (pending substituted compliance) for other jurisdictions. (The same approach/relief should apply to other transaction level requirements — such as mandatory clearing and trading requirements — once SEC rules for these requirements come into effect.)

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***External Business Conduct Standards*.** • To facilitate industry-wide compliance with business conduct rules, the International Swaps and Derivatives Association ("**ISDA**") developed the August 2012 Dodd-Frank Protocol. The Protocol was developed over a roughly six-month period, and it took over nine months after publication of the Protocol to ensure broad, market-wide adherence. The Protocol now has over 20,000 adherents. • Drafting and obtaining broad adherence to a new Protocol would require considerable resources and time, but there would be little to no benefits due to the extensive similarities between the agencies' rules.	The SEC's external business conduct rules only impose additional or different obligations on dealers relative to the parallel CFTC rules in a small number of respects: • The SEC's disclosure rules require more information about a counterparty's clearing rights and a dealer's valuation methods; • The SEC's institutional suitability safe harbor is limited to entities with more than $50 million in total assets and specified regulated entities, such as banks and broker-dealers; • The SEC's rules provide that an employee benefit plan that is not a governmental plan or subject to the Employee Retirement Income Security Act ("**ERISA**") is considered to be a Special Entity unless it opts out of that status, whereas such a plan is not a Special Entity under the CFTC's rules unless it opts into that status; • The SEC's safe harbor from an SBS dealer being deemed an advisor to a Special Entity includes a prong for the Special Entity or its fiduciary to acknowledge that the SBS dealer is not acting as an advisor, whereas the parallel CFTC safe harbor provides for the Special Entity or its fiduciary to represent that it is not relying on a swap dealer's recommendations; • The SEC's safe harbor from an SBS dealer being deemed an advisor to an ERISA Special Entity requires that ERISA Special Entity to represent that its fiduciary will review all recommendations "involving" an SBS, whereas the parallel CFTC safe harbor provides for the ERISA Special Entity to represent that its fiduciary will review recommendations "materially affecting" a swap;		SBS dealers will likely be able to satisfy the SEC's expanded disclosure rules and stricter suitability safe harbor without needing a new Protocol. However, a new Protocol might be needed due to small differences in the terms of the representations that the SEC requires in connection with other rules. To address this issue, the SEC should: • Permit an SBS dealer to consider an employee benefit plan not to be a Special Entity if the plan previously represented it is not a Special Entity for swap purposes (*i.e.*, it did not opt in), the SBS dealer notifies the plan that it can opt into Special Entity status for SBS purposes, and the plan does not do so; • As an alternative to receiving an acknowledgment that the SBS dealer is not acting as an advisor, permit an SBS dealer to rely on a representation that a Special Entity or its representative is not relying on the dealer's recommendations; • Clarify that, for a communication to be considered a "recommendation . . involving" an SBS, the communication must materially affect an SBS;

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	• The SEC's safe harbor for non-ERISA Special Entities requires the Special Entity's representative to make representations regarding its satisfaction of the SEC's qualification requirements in addition to a representation that it has policies and procedures reasonably designed to ensure that it satisfies those requirements; and • The agencies' qualification and independence requirements for a non-ERISA Special Entity's representative use slightly different "statutory disqualification" and "associated person" definitions.		• Consistent with the SEC's decision to provide a safe harbor permitting an SBS dealer to treat an ERISA fiduciary as a qualified independent representative of an ERISA Special Entity, provide a safe harbor permitting an SBS dealer to treat a representative of a non-ERISA Special Entity that meets CFTC-compliant qualification and independence standards and provides CFTC-compliant representations regarding how it meets those standards to be a qualified independent representative of that Special Entity for SEC rule purposes; and • Provide relief from requirements that an SBS dealer obtain representations in relation to SBSs from a counterparty or representative that previously provided parallel representations in relation to swaps if the SBS dealer is not aware of information that would cause a reasonable person to question the assumption that the facts underlying those parallel representations are the same for SBSs as they are for swaps.

Issue(s)	**SEC Rule(s)**	**CFTC Rule(s)**	**Recommendation(s)**
• Disclosure requirements that go beyond what the Dodd-Frank Act's statutory text requires have proven to provide little benefit to counterparties.	Unlike the CFTC's rules, the SEC's rules (and the statute) do not require dealers to provide counterparties with pre-trade mid-market marks and scenario analysis.		The CFTC should amend its rules to eliminate its pre-trade mid-market marks and scenario analysis requirements, consistent with the SEC's rules and the statute.
***Capital, Margin and Segregation Rules*.** The SEC originally proposed its capital, margin and segregation rules for SBS dealers in 2012, drawing from existing broker-dealer rules. Since 2012, the Basel Committee and IOSCO have published international standards for margin rules, which were then reflected in final rules adopted by the U.S. Prudential Regulators (for bank swap dealers and SBS dealers), the CFTC (for nonbank swap dealers) and numerous foreign jurisdictions. Those rules have been in effect since 2016, and market participants have adopted an industry standard initial margin model (the "**SIMM**") and documentation designed to satisfy	Under the SEC's proposed capital, margin and segregation rules, an SBS dealer would be required to: • Calculate initial margin for uncleared SBSs using either standardized haircuts or, for non-equity SBSs only, an approved internal model; • Collect variation margin from all counterparties other than commercial end-users and legacy accounts, subject to a $100,000 minimum transfer amount (shared with initial margin);	Under the CFTC's final margin and segregation rules and its proposed capital rules, a swap dealer would be required to: • Calculate initial margin for all types of uncleared swaps using either standardized haircuts or an approved initial margin model, such as the SIMM; • Collect and post variation margin with all counterparties except non-financial end-users, subject to a $500,000 minimum transfer amount (shared with initial margin);	In addition to addressing the broad range of issues raised during the comment process, the agencies should take the following steps to address the issues raised by differences between their rules:[4] • Consistent with the SEC's approach to cleared credit default swaps held by a dually registered broker-dealer/futures commission merchant, the SEC should permit a dually registered SBS/swap dealer to portfolio margin SBSs and swaps together in accordance with either agency's margin and segregation rules, subject to credit risk capital charges as discussed

[4] These recommendations focus on issues raised by differences between the agencies' requirements. Other issues, such as the approval process for capital models and the calibration of minimum capital requirements, are common across the capital rules proposed by the SEC and CFTC. Our comments also addressed certain unique issues raised by the SEC's margin and segregation proposal. *See* Letter from Kenneth E. Bentsen, Jr., Executive Vice President, Public Policy and Advocacy, SIFMA, to the SEC, dated February 22, 2013; Letter from Sarah A. Miller, Chief Executive Officer, Institute of International Banks, to the CFTC, dated May 15, 2017; and Letter from Mary Kay Scucci, Managing Director, SIFMA, to the CFTC, dated May 15, 2017.

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them. In addition, in 2016 the CFTC proposed capital rules for nonbank swap dealers that would, for dual registrants, overlap with the SEC's capital rules. Inconsistencies between SEC and CFTC capital, margin, and segregation rules will make nonbank SBS dealers uncompetitive with bank SBS dealers, especially if they prevent nonbank SBS dealers from using the SIMM—instead requiring them to use less risk-sensitive calculation methods than bank SBS dealers who can use the SIMM to calculate initial margin under the Prudential Regulators' margin rules—or penalize them for trading with counterparties who elect to segregate initial margin at a third-party custodian.	• Collect initial margin from all counterparties other than commercial end-users and legacy accounts, subject to a $100,000 minimum transfer amount (shared with variation margin). The SEC also proposed an alternative under which initial margin requirements would not apply to uncleared SBSs between SBS dealers;	• Collect and post initial margin with all swap dealers, all major swap participants, and all financial end-users with a material swaps exposure, subject to a $500,000 minimum transfer amount (shared with variation margin) and a $50 million initial margin threshold;	below, concentration risk capital charges, risk management procedures, and waiver of securities customer protection rules in favor of CFTC segregation rules by those customers who choose to margin SBSs under the CFTC's rules.
	• Apply possession or control and reserve account requirements to SBS counterparties' collateral, unless a counterparty elects use of a third-party custodian (a right that the Dodd-Frank Act grants them) or waives segregation entirely; and	• Segregate all required initial margin at an unaffiliated, third-party custodian and offer segregation at a third-party custodian for any other initial margin; and	• The CFTC, in turn, should expand its existing relief allowing a swap dealer to collect and post margin on a portfolio basis for swaps and SBSs under the CFTC's margin rules (No-Action Letter No. 16-71) by reciprocally allowing a dually registered swap/SBS dealer to portfolio margin swaps and SBSs under the SEC's margin rules. This relief would also provide benefits allowing customers of a broker-dealer that is also a swap/SBS dealer to portfolio margin their swaps and SBSs with related cash securities positions.
	• Except for uncleared SBSs with commercial end-users, apply a capital charge to the extent of any margin not collected by the SBS dealer, including margin not collected from legacy accounts, and initial margin held at a third-party custodian.	• If the swap dealer has an approved internal model, apply a risk-weighted credit risk charge calculated using that model to the extent of any uncollateralized current or potential future exposure.	• Instead of a capital charge to the extent of initial margin that an SBS dealer is not required to collect (*e.g.*, because of an exception, such as for legacy accounts, or an initial margin threshold), the SEC should apply a risk-weighted credit risk charge, similar to the CFTC's

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			2016 capital proposal and the SEC's existing approach for alternative net capital broker-dealers and OTC derivatives dealers. If an SBS dealer uses a third-party custodian to segregate initial margin collected from a counterparty (*e.g.*, because the counterparty elects segregation) and the custody agreement provides the SBS dealer with prompt access to that initial margin in the event of counterparty default, the SBS dealer should not face a capital charge; if the agreement does not satisfy this standard, then the SEC should apply a risk-weighted credit risk charge to the SBS dealer instead of a capital charge to the extent of initial margin segregated at the custodian. The SEC should also allow SBS dealers to rely on relief previously granted to broker-dealers posting initial margin in connection with swaps. Unsecured current exposure should be subject to a 100 percent capital charge except for exposure to commercial end-users.

Issue(s)	**SEC Rule(s)**	**CFTC Rule(s)**	**Recommendation(s)**
Foreign dealers are subject to home country margin and capital requirements that overlap or will overlap with CFTC and SEC rules. Simultaneously complying with overlapping but inconsistent requirements will lead to competitive disparities and impair effective risk management to such a degree that some foreign dealers may cease participating in the U.S. market so as to avoid triggering U.S. dealer registration requirements that will lead to these issues.	• A foreign SBS dealer is potentially eligible to substitute compliance with comparable home country capital and margin requirements.	• A foreign swap dealer is potentially eligible to substitute compliance with comparable home country capital and margin requirements, and the CFTC has made comparability determinations permitting such substituted compliance in connection with EU and Japanese margin requirements.	• Both the CFTC and SEC should permit a foreign dealer to substitute compliance with home country capital and margin requirements (and the related financial recordkeeping and reporting requirements) that are consistent with applicable international standards (like the CFTC has already done in connection with EU and Japanese margin requirements), without imposing additional conditions that could interfere with reliance on home country regulations.