

disincentives to those clients interacting with U.S. personnel. Non-U.S. SBSDs would also still need to modify their systems to monitor for ANE activity on a transaction-by-transaction basis, thus requiring significant operational builds on the part of non-U.S. SBSDs. Non-registrants would also suffer the costs of building systems to report ANE transactions.

Moreover, there is no compelling justification for the Commission to treat ANE transactions in a different manner than the CFTC. The CFTC’s approach to ANE transactions has not impeded achievement of its goals of reducing systemic risk, promoting market transparency and integrity, and protecting customers. On the contrary, the CFTC’s rules have led over 100 swap dealers to register,⁹ over \$348 trillion¹⁰ in gross notional of outstanding positions to be reported to swap data repositories, over 80% of the interest rate derivative and credit derivative markets to be centrally cleared,¹¹ and over 50% of those markets to be traded on swap execution facilities.¹²

Nor is there evidence that the SBS markets exhibit distinguishing characteristics from the swaps markets that would merit a different approach to regulating ANE transactions. Market participants transact in single-name and narrow-based index equity and credit default swaps through the same legal entities, on the same trading desks, and as part of the same trading strategies, as they transact in broad-based index equity and credit default swaps. For both types of swaps, ANE transactions do not pose any risks to the U.S. financial system because no U.S. person is a party to such transactions either directly or as a guarantor. For both types of swaps, the market is almost entirely institutional, with transactions negotiated privately either over-the-counter or on electronic trading platforms. For both types of swaps, an integrated regulatory framework applies in other G20 jurisdictions, and this framework is not the same one that those jurisdictions apply to stocks, bonds, and other cash market securities transactions.

The SBS markets also differ significantly from other securities markets. These differences make it inappropriate for the Commission to model the cross-border application of its Title VII rules on the Commission’s traditional, territorial approach to broker-dealer regulation. There is greater cross-border participation in the SBS markets than other securities markets. There is no retail participation because SBS transactions typically must take place between eligible contract participants (“ECPs”). SBS are

⁹ National Futures Association (“NFA”), *Membership and Directories*, available at <https://www.nfa.futures.org/registration-membership/membership-and-directories.html> (last visited July 23, 2019).

¹⁰ CFTC, *Gross Notional Outstanding by Cleared Status (Millions of USD) – Open Interest Equivalent (Single-Count)*, available at <https://www.cftc.gov/MarketReports/SwapsReports/LIGrossExpCS.html> (last visited July 23, 2019).

¹¹ *Id.*

¹² International Swaps and Derivatives Association, *Interest Rate and Credit Derivatives Weekly Trading Volume: Week Ending July 19, 2019*, available at <http://analysis.swapsinfo.org/> (last visited July 23, 2019).

interests that would merit triggering SBSB registration, EBC, or reporting requirements. Accordingly, we support this proposed guidance.

ii. The Commission Should Modify its Proposed *De Minimis* Threshold Counting Exception

As discussed above, we recommend that the Commission no longer require a non-U.S. person to count ANE transactions toward the SBSB *de minimis* threshold. If the Commission does not adopt this recommendation, however, it should adopt a modified version of the Proposal’s conditional exception from the *de minimis* calculation (the “**ANE Counting Exception**”) for ANE transactions in which all the relevant ANE activity is conducted by U.S. personnel in their capacity as persons associated with an entity (the “**Registered Affiliate**”) that is (1) registered with the Commission in a qualifying capacity and (2) a majority-owned affiliate of the non-U.S. person relying on the ANE Counting Exception (the “**Relying Affiliate**”).¹⁵ We discuss our recommended modifications below.

1. Both Broker-Dealers and SBSBs Should Qualify as Registered Affiliates

The Proposal contains two alternatives for which types of entities could qualify as Registered Affiliates for purposes of the ANE Counting Exception. Under “Alternative 1,” Registered Affiliates would be limited to entities registered as SBSBs. Under “Alternative 2,” a Registered Affiliate could be registered as either an SBSB or a broker-dealer.

The Commission should adopt Alternative 2. Many of the U.S. entities whose APs engage in ANE activity on behalf of non-U.S. affiliates are registered solely as broker-dealers. Alternative 1 would require these U.S. entities to register dually as SBSBs in order to permit their non-U.S. affiliates to qualify for the ANE Counting Exception. Dually registering would subject these U.S. broker-dealers to significantly higher minimum net capital requirements under the Commission’s capital rules for nonbank SBSBs.¹⁶ These increased capital requirements would be far disproportional to the risk to a U.S. broker-dealer of merely facilitating these otherwise foreign transactions as agent. Very few firms would, as a practical matter, wish to incur these increased capital requirements solely to rely on the ANE Counting Exception. Instead, they would either need to establish special purpose U.S. SBSB affiliates—a step that would conflict with global resolution planning objectives for the rationalization of firms’ legal entity structures—or curtail ANE activity by relocating jobs outside the U.S.

¹⁵ *Id.* at 24,218–33.

¹⁶ *See* Capital, Margin, and Segregation Requirements for [SBSBs] and Major [SBS] Participants and Capital and Segregation Requirements for Broker-Dealers; Final Rule, SEC Release No. 34-86175 (June 21, 2019) (amending SEC Rule 15c3-1 to impose a higher, \$20 million minimum net capital requirement on a broker-dealer registered as an SBSB, versus requirements ranging from \$5,000 to \$250,000 for other broker-dealers).

U.S. On the other hand, the Registered Affiliate's disclosure of its material incentives and conflicts of interest should address any concerns arising out of its ANE activity.

- **Suitability.** In situations where the Registered Affiliate is not assigned primary client responsibility for a non-U.S. counterparty (*e.g.*, the counterparty's primary point of contact is not one of the Registered Affiliate's APs), the Commission should limit the ANE Counting Exception's suitability condition to requiring that the Registered Affiliate disclose that it is acting in its capacity as agent for the Relying Affiliate, which in turn is acting in its capacity as counterparty, and that neither of them is undertaking to assess the suitability of the SBS transaction or trading strategy. This modification would avoid requiring the non-U.S. counterparty to adhere to the August 2012 ISDA DF Protocol or execute similar documentation designed to satisfy safe harbors from U.S. suitability rules merely to interact with U.S. personnel, which would discourage such interactions. In addition, if primary client responsibility for a non-U.S. counterparty is held by the Relying Affiliate outside the U.S., the counterparty is less likely to expect the protections of U.S. suitability rules and more likely to be subject to parallel protections under foreign law.

For similar reasons, the Commission should also work with FINRA to adopt a parallel exemption from FINRA Rule 2111 for situations when a U.S. broker-dealer acts as the Registered Affiliate, such that the broker-dealer is only required to disclose that it is acting in its capacity as agent for the Relying Affiliate, which in turn is acting in its capacity as counterparty, and that neither of them is undertaking to assess the suitability of the SBS transaction or trading strategy. Otherwise, the counterparty would likely need to provide the broker-dealer with an institutional account certification or other documentation or information designed to satisfy FINRA Rule 2111.

- **Trade Acknowledgment and Verification.** In order to avoid requiring both the Relying Affiliate and Registered Affiliate to provide a non-U.S. counterparty with duplicative trade acknowledgments, the ANE Counting Exception's trade acknowledgement and verification condition should be satisfied if the Relying Affiliate provides written documentation of the SBS's terms to the counterparty in compliance with the Relying Affiliate's home country confirmation requirements. Similarly, in connection with a Registered Affiliate that is registered as a broker-dealer, the Commission and FINRA should exempt such Registered Affiliate from compliance with the confirmation requirements of SEC Rule 10b-10 and FINRA Rule 2232, respectively, if the Relying Affiliate provides this documentation to

the counterparty and discloses that the Registered Affiliate is acting as agent.²⁰

- **Portfolio Reconciliation.** In order to avoid undue burdens on non-U.S. counterparties, the Commission should eliminate the proposed portfolio reconciliation condition to the ANE Counting Exception or, at a minimum, permit a Registered Affiliate to satisfy the condition if the Relying Affiliate is subject to portfolio reconciliation requirements in its home country jurisdiction. Otherwise, compliance with this condition would require non-U.S. counterparties to agree in writing regarding the terms of the portfolio reconciliation, which, like other written documentation requirements, would likely discourage non-U.S. counterparties from having the interactions with U.S. personnel that could trigger the condition. In addition, the reconciliation process would itself be burdensome on non-U.S. counterparties because, as currently proposed by the Commission, it would encompass non-economic terms of SBS transactions.²¹ We understand that the Commission is proposing this approach so that the portfolio reconciliation process could be used to validate data reported under SEC Regulation SBSR. As discussed further below, however, we recommend that ANE transactions not be subject to Regulation SBSR. Also, portfolio reconciliation and trade reporting are two different processes involving different systems and third-party vendors and subject to different requirements in foreign jurisdictions; non-U.S. counterparties would accordingly need to develop new systems to satisfy this condition, which likewise would deter them from interacting with U.S. personnel.

3. The Commission Should Permit a Registered Affiliate to Provide the Proposal’s Additional Disclosures on a Relationship-Wide Basis

The Proposal would require that a Registered Affiliate, in connection with a transaction conducted in reliance on the ANE Counting Exception (other than one in which the identity of the counterparty is not known to the Registered Affiliate at a reasonably sufficient time prior to execution of the transaction), notify the counterparty of the Relying Affiliate that the Relying Affiliate is not registered with the Commission as an SBSR and that certain other Securities Exchange Act of 1934 (“**Exchange Act**”) provisions or rules addressing the regulation of SBS would not be applicable to the transaction, including provisions affording clearing rights to counterparties. The Proposal would require the Registered Affiliate to provide this disclosure contemporaneously with, and in the same manner as, the ANE activity at issue.

²⁰ See also Letter from SIFMA, *Proposed Guidance and Exemptions to Clarify Treatment of [SBS] Under the Exchange Act* (Nov. 8, 2018).

²¹ See Letter from ISDA and SIFMA, *Re: Risk Mitigation Techniques for Uncleared [SBS]; Proposed Rule – RIN 3235-AL83* (Apr. 16, 2019) (expressing general concern with this approach).

The Commission should modify this condition to permit the Registered Affiliate to provide this disclosure on a relationship-wide basis. Requiring a Registered Affiliate to provide such disclosures at the same time and in the same manner as any ANE activity would be highly cumbersome and disruptive to APs' normal behaviors and relationships (e.g., requiring an AP to interrupt a telephone call or electronic chat to provide a legalistic disclosure). Also, for transactions negotiated over longer periods of time or when multiple transactions are negotiated at around the same time, it would be nearly impossible to track whether the required disclosure was provided in connection with each transaction. It moreover would be highly incongruous, and unjustified, to require this disclosure on a transaction-by-transaction basis when most of the Exchange Act requirements that the Registered Affiliate is disclaiming may be satisfied through relationship-wide disclosure (e.g., were the Relying Affiliate registered as an SBSB, it could provide the counterparty with disclosures regarding its clearing rights on a relationship-wide basis).

4. All G20 Jurisdictions Should Qualify as Listed Jurisdictions

The Proposal would require that a Relying Affiliate be located in a "listed jurisdiction," which would be a foreign jurisdiction that the Commission has determined to satisfy public interest criteria relating to margin and capital requirements and supervisory compliance programs. We generally support this condition and agree with the Commission that Australia, Canada, France, Germany, Hong Kong, Japan, Singapore, Switzerland, and the United Kingdom should satisfy these criteria. In addition, we think that the remaining G20 jurisdictions should satisfy this criteria given their progress toward adopting capital and margin requirements consistent with international standards.²²

We also support the Commission's proposal to provide the public with notice and an opportunity to comment on any withdrawal of a "listed jurisdiction" determination; this process is critical in order to allow market participants to respond to any such proposed withdrawal and, if necessary, adjust their SBS business accordingly.

²² We note that the concentration of the SBS markets in the G20 jurisdictions limits the negative consequences of conditioning the ANE Counting Exception on the SBSB being located in a "listed jurisdiction." In comparison, the swaps markets in emerging markets are significantly larger, and any expansion of U.S. swaps regulation to dealers in those markets would have implications beyond those discussed here.

iii. The Commission Should Harmonize the EBC Requirements That Apply to a Registered Non-U.S. SBSB's ANE Transactions with the More Limited Set of EBC Requirements That Apply Under the ANE Counting Exception

Commission rules currently apply the full range of EBC requirements to a registered non-U.S. SBSB's ANE transactions, not just the subset of EBC requirements that would apply as conditions to the ANE Counting Exception.²³ However, as discussed above in connection with that exception, several EBC requirements would impose documentation burdens on non-U.S. counterparties that would deter them from having the interactions with U.S. personnel that would trigger these requirements. These requirements include counterparty ECP/special entity status verification, suitability (other than disclosure that a non-U.S. SBSB is acting in its capacity as a counterparty and is not undertaking to assess the suitability of the SBS transaction or trading strategy), and know your counterparty requirements. In addition, daily mark disclosure requirements would unduly impose obligations throughout the life of an SBS transaction, long after any U.S. ANE activity has concluded.

Consistent with the ANE Counting Exception as it would be modified by our recommendations set forth above, the foregoing EBC requirements should not be triggered by ANE transactions so long as the U.S. personnel acting for the non-U.S. SBSB have not been assigned primary client responsibility for the relevant non-U.S. counterparty (e.g., the counterparty's primary point of contact is not one of the non-U.S. SBSB's U.S. APs). In these situations, the non-U.S. counterparty would not expect the protections of these U.S. EBC requirements. Such a non-U.S. counterparty would also not expect to be required to provide the onboarding information required by these EBC requirements, such as adhering to industry protocols, providing representations, agreeing to covenants, and filling out questionnaires designed to comply with the EBC requirements. Moreover, non-U.S. SBSBs are often subject to home country relationship-level rules. Subjecting non-U.S. SBSBs engaging in ANE transactions to duplicative EBC requirements is unnecessary, particularly given that the home country regulators have a more compelling interest in providing protections to foreign counterparties than the Commission. Imposing such additional requirements adds significant burden without corresponding benefit and may persuade foreign counterparties to move their transactions away from the U.S. market or avoid interacting with U.S. personnel.

iv. Regulation SBSR Should Not Be Triggered by ANE Transactions

Regulation SBSR would currently be triggered by ANE transactions. In particular, in connection with ANE transactions entered into by a non-U.S. person that is not registered as an SBSB, ANE activity would trigger both regulatory reporting and public dissemination requirements; if the non-U.S. person was registered as an SBSB,

²³ 17 C.F.R. § 240.3a71-3(c).

regulatory reporting would already apply to the transaction by virtue of the non-U.S. person's SBS registration status, but ANE activity would trigger public dissemination requirements.²⁴ Also, SBS transactions between non-U.S. persons that are effected by a registered broker-dealer would trigger Regulation SBSR.²⁵ Because in many instances the personnel who engage in ANE activity are APs of a registered broker-dealer, this prong of Regulation SBSR would also capture ANE transactions.

Although we continue to recommend that ANE activity generally should not trigger additional requirements under Regulation SBSR, if the Commission nonetheless maintains its current approach, it should exclude ANE transactions where one or both of the parties is organized or located in a jurisdiction that applies trade reporting rules to SBS, including a jurisdiction where SBS are generally in-scope for trade reporting rules but the relevant regulatory authority has determined that one or more types of SBS are not sufficiently liquid to be subject to public dissemination rules. Because, as noted above, ANE activity will in many cases be performed by APs of a registered broker-dealer, this exclusion should apply to both the prong of Regulation SBSR that captures ANE transactions²⁶ and the prong that captures transactions effected by a registered broker-dealer.²⁷

The Commission should defer to foreign reporting standards in connection with ANE transactions, without requiring a full-blown comparability analysis, because the Commission has relatively less interest in data for such transactions due to the limited U.S. nexus and absence of risk to the U.S. financial markets. Such an approach is consistent with FINRA Rule 6622, which exempts a foreign equity securities transaction from U.S. trade reporting requirements "if (1) the transaction is executed on and reported through a foreign securities exchange or (2) the transaction is executed OTC and reported to the regulator of a foreign securities markets."²⁸

If the Commission does not adopt this approach, then duplicative U.S. trade reporting requirements (as well as public dissemination requirements when they solely apply in the U.S.) would likely dissuade non-U.S. clients from interacting with U.S. personnel. These clients would have concerns that public dissemination of their transactions in two jurisdictions would more likely identify their transactional activity to other market participants (and, at a minimum, such double dissemination is likely to be confusing to the market). Public dissemination in the U.S. under Regulation SBSR might also be inconsistent with the balance between transparency and liquidity objectives the

²⁴ 17 C.F.R. § 242.908(a)(v).

²⁵ 17 C.F.R. § 242.908(a)(iv).

²⁶ 17 C.F.R. § 242.908(a)(v).

²⁷ 17 C.F.R. § 242.908(a)(iv).

²⁸ FINRA, *Trade Reporting FAQ*, Question 700, available at <https://www.finra.org/industry/trade-reporting-faq#700> (last visited June 29, 2019).

home country regulator sought to achieve when it calibrated its own public dissemination requirements.

In addition, based on some firms' experience with implementing CFTC trade reporting rules in foreign jurisdictions, we believe many non-U.S. clients will find it intrusive for their identifying information to be disclosed directly to U.S. regulators in connection with transactions where they face a non-U.S. dealing entity, as opposed to U.S. regulators obtaining such information through information-sharing agreements with foreign regulators and trade repositories.

The operational burdens associated with tracking ANE transactions that would trigger the application of Regulation SBSR would further cause a loss of U.S. jobs. The burden of implementing the requirements would, in many cases, outweigh the benefits of using U.S.-located personnel. This operational burden is particularly pronounced for inter-dealer transactions in which the SBSB on the reporting side would have to track ANE activity by the other dealer counterparty in order to tell the SBS data repository whether the transaction is subject to public dissemination rules; similarly, for transactions between two non-U.S. persons not registered as SBSBs, if one side is engaged in ANE activity it must ascertain whether the other side is as well in order to determine which side is the reporting side.

II. Certifications and Legal Opinions for Non-U.S. SBSBs

a. The Commission Should Modify its Non-U.S. SBSB Certification Requirement and Repeal its Non-U.S. SBSB Legal Opinion Requirement to Harmonize with the CFTC's Existing Approach to Non-U.S. Swap Dealers

The Commission's rules currently require that any non-U.S. SBSB²⁹ applying for registration submits with its application (1) a certification that it can, as a matter of law, and will provide the Commission with prompt access to the books and records of such non-U.S. SBSB, and can, as a matter of law, and will submit to onsite inspection and examination by the Commission and (2) an opinion of counsel that the non-U.S. SBSB can, as a matter of law, provide the Commission with prompt access to the books and records of such non-U.S. SBSB, and can, as a matter of law, submit to onsite inspection and examination by the Commission (the "**non-U.S. SBSB certification and legal opinion requirements**").³⁰

There is no equivalent requirement for an opinion of counsel under the CFTC's parallel Title VII rules for swaps and swap dealers. Additionally, although the registration form for swap dealers, NFA Form 7-R, requires a non-U.S. swap dealer to

²⁹ In this letter, when we refer to a non-U.S. SBSB, we mean one that qualifies as a nonresident SBSB. A "nonresident SBSB" is one that is organized, resides, or has its, his or her principal place of business in any place not in the U.S. SEC Rule 15Fb2-4(a).

³⁰ SEC Rule 15Fb2-4(c).

agree to provide the CFTC, U.S. Department of Justice, and NFA access to records and to permit them to inspect the non-U.S. swap dealer, that agreement contains an exception for those foreign blocking, privacy, and secrecy laws about which a swap dealer informs the CFTC in writing.³¹ In practice, the CFTC and NFA have worked with swap dealers and their home country regulators to facilitate U.S. access to books and records and exams without violating these foreign blocking, privacy, or secrecy laws. As a result, in the over six years since non-U.S. swap dealers initially registered with the CFTC, we are not aware of any material obstacles that the absence of a legal opinion requirement or unqualified certification requirement has posed to the CFTC or NFA's oversight of swap dealers.

Accordingly, it is doubtful that the Commission would derive material benefits from its non-U.S. SBSB certification and legal opinion requirements. On the other hand, the costs of those requirements would be significant. Because of their business in branches or with counterparties located in jurisdictions that restrict foreign access to information, virtually no non-U.S. SBSBs could register with the Commission without the changes reflected in the Proposal and our comments herein.³² Based on the Commission's own economic analysis, fully 88% of the market for North American corporate single-name credit default swaps involves at least one non-U.S. counterparty.³³ The sudden withdrawal of non-U.S. SBSBs from the U.S. market would thus have a devastating effect on market liquidity, competition for investors, and U.S. jobs.

Although the Proposal's clarifications and modifications to the non-U.S. SBSB certification and legal opinion requirements might mitigate these consequences by permitting some non-U.S. SBSBs to register with the Commission, to do so those non-U.S. SBSBs would still need to restructure their businesses and operations significantly. In particular, they would need to prevent personnel located in jurisdictions with problematic blocking, privacy, or secrecy laws from interacting with U.S. counterparties. They also would need to overhaul their booking and recordkeeping systems in order to ensure that any records relating to their U.S. business and any financial records are maintained outside those problematic jurisdictions. As noted above, the CFTC and NFA have been able to oversee non-U.S. swap dealers effectively without mandating these expensive and burdensome restructurings.

³¹ See NFA Form 7-R at p. 41, available at <https://www.nfa.futures.org/registration-membership/templates-and-forms/Form7-R-entire.pdf> (last visited June 29, 2019).

³² We note that the cost-benefit analysis accompanying the 2015 finalization of the non-U.S. SBSB certification and legal opinion requirements was incorrect because it assumed that the only non-U.S. SBSBs who might need to withdraw from the market because of those requirements would be those non-U.S. SBSBs organized in jurisdictions with problematic blocking, privacy, or secrecy laws. Registration Process for [SBSBs] and Major [SBS] Participants, SEC Release No. 34-75611 (Aug. 5, 2015), 80 Fed. Reg. 48,964, 49,008 (Aug. 14, 2015) (the "**SBSB Registration Release**"). In reality, because those laws apply to anyone doing business in those jurisdictions—not just companies organized there—a far greater number of non-U.S. SBSBs would be impacted.

³³ Proposal, 84 Fed. Reg. at 24,249.

We also are concerned that the Commission’s non-U.S. SBSB certification and legal opinion requirements violate national treatment principles. U.S. SBSBs who conduct business abroad are subject to the same foreign blocking, privacy, and secrecy laws as non-U.S. SBSBs who conduct business in the same foreign jurisdictions. But the Commission’s certification and legal opinion requirements unfairly target only non-U.S. SBSBs.

In light of these considerations, the Commission should harmonize with the CFTC by eliminating the non-U.S. SBSB legal opinion requirement and adopting exclusions from the non-U.S. SBSB certification requirement for foreign blocking, privacy, and secrecy laws about which the non-U.S. SBSB informs the Commission in writing.³⁴

b. If It Does Not Harmonize with the CFTC, the Commission Should Adopt Additional Clarifications and Modifications to its Non-U.S. SBSB Certification and Legal Opinion Requirements

The Proposal would clarify and modify the non-U.S. SBSB certification and legal opinion requirements by: (1) clarifying what foreign jurisdictions are covered by the requirements; (2) clarifying what books and records are covered by the requirements; (3) permitting a non-U.S. SBSB to predicate the certification and legal opinion on obtaining certain consents; (4) excluding books and records of SBS transactions entered into prior to the date on which a non-U.S. SBSB applies to register with the Commission; (5) permitting the certification and legal opinion to take into account certain approvals, authorizations, waivers, consents, or MOUs or other arrangements from or involving foreign regulators; and (6) extending the deadline for submitting the certification and legal opinion to 24 months after a non-U.S. SBSB applies to register, during which period the non-U.S. SBSB would be conditionally registered with the Commission.³⁵

Although helpful, these clarifications and modifications would not be sufficient to prevent the non-U.S. SBSB certification and legal opinion requirements from forcing a material number of SBSBs to exit the U.S. market. To mitigate this risk, if the Commission does not harmonize with the CFTC as we recommended above, then in the alternative the Commission should adopt the clarifications and modifications described below.

i. The Commission Should Narrow the Covered Foreign Jurisdictions for Firms Who Maintain Covered Books and Records Outside Their Home Countries

The Proposal would clarify that the non-U.S. SBSB certification and legal opinion requirements would only need to address the laws of the jurisdiction or jurisdictions where the non-U.S. SBSB maintains its “covered books and records” (as defined below), not other jurisdictions where customers or counterparties of the non-U.S.

³⁴ See Letter from IIB and SIFMA, *SEC-CFTC Harmonization: Key Issues under Title VII of the Dodd-Frank Act* (June 21, 2018).

³⁵ Proposal, 84 Fed. Reg. at 24,233–38.

We generally support this clarification with respect to required (non-individual) counterparty consents. However, in order to allow SBSBs to take advantage of this guidance, the Commission should provide the additional relief and clarifications discussed in Section III below.

iv. The Commission Should Address Protected Personal Data with Relevant Foreign Regulatory Authorities

The Commission's proposals with respect to the non-U.S. SBSB certification and legal opinion requirements will not be sufficient to address the fundamental issues raised by the need to provide the Commission with access to personal data of individuals ("**protected personal data**") that is protected by certain foreign laws, such as the European Union General Data Protection Regulation ("**GDPR**"). The two key methods that non-U.S. SBSBs otherwise employ to address blocking or secrecy laws typically will not address personal data protection laws.

First, as noted in the Proposal, under certain regulations, consents will likely not effectively address data protection issues for protected personal data. For example, under the GDPR, consents must be freely given in order to be effective. However, guidance suggests that employee consent may not be considered freely given due to the nature of the relationship between employees and employers.³⁶ Additionally, consents may be withdrawn under certain foreign regulations, including under the GDPR. These restrictions make it untenable for SBSBs covered by GDPR or similar regulatory regimes to rely on consents to satisfy either the non-U.S. SBSB certification and legal opinion requirements or the Commission's recordkeeping requirements.

Second, SBSBs cannot avoid restrictions on protected personal data merely by ensuring that covered books and records containing that data or copies of such covered books and records are located in a jurisdiction that imposes no restraints on the Commission's access or conduct of onsite inspections or examinations. Personal data protection laws applicable to non-U.S. SBSBs (e.g., GDPR for an EU-based SBSB) frequently restrict the transfer of data to a non-protective jurisdiction such as the United States.

If the Commission allows these impediments to act as a bar against any firms covered by GDPR or similar personal data protection regimes from registering as SBSBs, there will be extremely negative consequences to the SBS market due to the extensive current participation by dealers subject to these laws, including EU-based dealers. Unable to mediate a solution between the conflicting requirements of their global regulators, non-U.S. SBSBs would be forced to withdraw from the U.S. market due to an inability to comply with these competing requirements and U.S. SBSBs may be forced to relocate personnel out of jurisdictions with such data protection laws. As discussed

³⁶ See Article 29 Working Party, *Guidelines on consent under Regulation 2016/679* (adopted Apr. 10, 2018), available at https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_guidelines_2_2018_derogations_en.pdf.

above in Section I.a, this would result in fragmentation in the market and a loss of U.S. jobs as well as skilled trading and risk management expertise from U.S. markets.

Consequently, the Commission should address such conflicts with personal data protection laws through MOUs with the appropriate foreign regulatory agencies.³⁷ Through these MOUs, the Commission would gain access to protected personal data. Although we appreciate the Commission's overall desire for direct access to books and records, we note that protected personal data is a relatively narrow category of the information required by the Commission. Even if it provided relief from the non-U.S. SBSB certification and legal opinion requirements and direct record access requirements for protected personal data, the Commission would still preserve its direct access to the vast majority of books and records it requires regarding (non-individual) counterparties and transaction terms.

v. The Commission Should Adopt its Proposed Clarification Regarding Open Contracts

The Proposal would exclude books and records of SBS transactions entered into prior to the date on which a non-U.S. SBSB applies to register with the Commission from the non-U.S. SBSB certification and legal opinion requirements. We support this proposal. Otherwise, a non-U.S. SBSB would need to renegotiate these open contracts, and counterparties may refuse to do so, which would prevent the non-U.S. SBSB from registering, absent this clarification.

vi. The Commission Should Adopt its Proposed Clarification Regarding Arrangements With Foreign Regulators

The Proposal would permit a non-U.S. SBSB's certification and legal opinion to take into account whether a relevant foreign authority has: (1) issued an approval, authorization, waiver, or consent; or (2) entered into an MOU or other arrangement with the Commission facilitating direct access to books and records. We support this proposal. These arrangements are, in our experience, the most appropriate and effective way to overcome conflicts with foreign blocking, privacy, and secrecy laws, and this proposal would provide a strong incentive for foreign regulators to enter into these arrangements.

vii. The Commission Should Adopt the Proposed Conditional Registration Framework and Eliminate Inconsistent Aspects of its Substituted Compliance Framework

The Proposal would extend the deadline for submitting the certification and legal opinion to 24 months after a non-U.S. SBSB applies to register, during which period the non-U.S. SBSB would be conditionally registered with the Commission. We support this

³⁷ For example, the Commission could provide a mechanism for the lawful transfer of protected personal data from the European Economic Area under an established Mutual Legal Assistance Treaty and/or an approved Administrative Arrangement.

proposal. However, in order for the conditional registration regime to be effective, the Commission would need to provide additional relief relating to substituted compliance.

Currently, the Commission requires that a party or group of parties (other than foreign financial regulatory authorities) that request substituted compliance provide the non-U.S. SBSB certification and legal opinion as if subject to those requirements at the time of the request, and foreign financial regulatory authorities making such a request must provide adequate assurances that no law or policy of any relevant foreign jurisdiction would impede prompt Commission access to books and records or onsite inspection or examination.³⁸ The Proposal suggests that the Commission may not grant substituted compliance if the Commission has not received the required certification and legal opinion or assurances.

As an initial matter, it is not necessary to tie substituted compliance to access to books and records, inspections, and examinations. The certification and legal opinion provide a separate, independent, and sufficient means of assuring the Commission that it can obtain direct access to books and records and conduct onsite inspections and examinations. The only reason to link substituted compliance to these topics is so that the Commission does not need to consider a substituted compliance request from a jurisdiction that imposes blocking, privacy, or secrecy laws. But since the Commission is now acknowledging, in connection with the Proposal, that non-U.S. SBSBs should be afforded a transition period following registration for them and their regulators to address these laws, that approach no longer makes sense.

In particular, linking substituted compliance to access to books and records, inspections, and examinations would make the proposed 24-month conditional registration period illusory for non-U.S. SBSBs. SBSBs, in practice, will not be able to take advantage of the conditional registration period before they receive all relevant substituted compliance determinations. Most SBS rules eligible for substituted compliance will be effective upon the conditional registration of the SBSB. Consequently, substituted compliance determinations will need to be finalized well in advance of the effectiveness of the registration requirements in order for SBSBs to evaluate whether they will be able to comply with the SBS regulations or will need to reorganize their SBS business lines or relocate U.S. personnel to avoid overlapping or conflicting rules. Even if an SBSB elected to conditionally register with the Commission, delaying substituted compliance determinations would force such SBSB to implement potentially duplicative Commission requirements in addition to its home country requirements.

Also, the linkage between substituted compliance requests and non-U.S. SBSB certification and legal opinion requirements is inconsistent with the Commission's recognition in the Proposal that a non-U.S. SBSB could comply with requirements for access to books and records, inspections, and examinations by maintaining its covered books and records outside of its home country in a jurisdiction that supports such access, inspections, and examinations. Such a non-U.S. SBSB might, however, still request

³⁸ 17 C.F.R. § 240.3a71-6(c).

substituted compliance with its home country regulatory requirements. In this situation, the non-U.S. SBSB certification and legal opinion requirements should be irrelevant to a substituted compliance determination for the non-U.S. SBSB's home country.

In light of these considerations, the Commission should eliminate the requirement to provide, in connection with a substituted compliance request, the non-U.S. SBSB certification and legal opinion or, for foreign financial regulators, assurances regarding prompt Commission access to books and records or onsite inspection or examination.

viii. The Commission Should Revise its Approach to Updating the Non-U.S. SBSB Certification and Legal Opinion Upon Changes in the Relevant Foreign Laws

SEC Rule 15Fb2-4 requires non-U.S. SBSBs to re-certify within 90 days after any changes in the legal or regulatory framework covered by such certification and legal opinion.³⁹ Such re-certification must also be accompanied by a revised opinion of counsel.

The Commission should clarify what would constitute a reasonable approach for a non-U.S. SBSB to identify changes in the laws covered by its non-U.S. SBSB certification and legal opinion. We recommend that together with the compliance review that would take place in connection with their annual CCO reports, non-U.S. SBSBs also conduct a review to confirm the continued accuracy and validity of the non-U.S. SBSB certification and legal opinion. This review would include, as necessary, consultation with outside legal counsel. A more frequent review or evergreen approach to identify changes in relevant laws would be unreasonably costly, and, moreover, it should not be necessary given that most material changes in law will be accompanied by lengthy transition periods (*e.g.*, the two-year transition period for GDPR).

Under this approach, if there has been a change in law that would affect the content of the legal opinion but not the validity of its ultimate conclusions, then a non-U.S. SBSB should be able to provide the Commission with the required re-certification and refreshed legal opinion within the 90-day timeframe. On the other hand, if there was a change in law that affected the validity of the certification or the conclusions of the legal opinion, then 90 days would not be enough time for a non-U.S. SBSB to address this issue. Addressing such a change in law could require significant changes to a non-U.S. SBSB's business or operations (*e.g.*, altering how it maintains its covered books and records or the locations from which it conducts its SBS business); in most cases, these changes would take longer than 90 days to complete. In some cases, changes in law could even pose an intractable legal conflict, such as the conflict posed by GDPR, which the non-U.S. SBSB would not be in a position to resolve on its own. In these latter cases, it may be necessary for the Commission and relevant foreign authorities to work together to address the conflict. In either case, a non-U.S. SBSB should be required to notify the Commission of the issue within 90 days of the SBSB's annual review and propose a plan for addressing the issue. Upon receiving this

³⁹ SEC Rule 15Fb2-4(c)(2).

notification, the Commission would have the discretion to accept, reject, or modify the plan and should work with the affected non-U.S. SBSB to ensure the issue is resolved to the Commission's satisfaction.

III. Recordkeeping and Reporting

a. The Commission Should Provide Additional Relief and Clarifications Regarding Counterparty Consents in Connection With Recordkeeping and Reporting Requirements

The Proposal notes that the Commission's recordkeeping rule has an independent requirement that the Commission be able to directly access the books and records of an SBSB, which is distinct from the non-U.S. SBSB certification and legal opinion requirements. This requirement would conflict with foreign laws for many SBSBs, both U.S. and non-U.S. To address these conflicts while still maximizing the Commission's direct access to books and records relevant to its regulatory oversight responsibilities, the Commission should provide the following additional relief and clarifications:

- **Scope of Required Consents.** The Proposal indicates that, to comply with SBS recordkeeping rules, a non-U.S. SBSB that intends to rely on consents must obtain them. The Commission should clarify the scope of the consents the non-U.S. SBSB is required to obtain. A non-U.S. SBSB should only be required to obtain the consents necessary to provide access to, and permit inspection and examination of, its covered books and records relating to SBS entered into on or after the date on which it applies for registration with the Commission. For the same reasons that the Commission believes that other books and records should not be covered by the non-U.S. SBSB certification and legal opinion requirements, a non-U.S. SBSB should not need to obtain consents in relation to those other books and records, at least unless and until the Commission requests access to them.
- **Withdrawal of Consents.** Under some foreign jurisdictions' data protection laws, a counterparty may subsequently withdraw its consent to sharing information after previously granting such consent to an SBSB. In the Proposal, the SEC asked how SBSBs plan to address situations where consent is withdrawn. If a counterparty withdraws its consent, an SBSB's approach would likely be to stop executing new trades with such counterparty.⁴⁰ This would be the same approach an SBSB would take if the counterparty did not give its consent in the first instance. The Commission should permit this approach, which is consistent with its view, as set forth in the Proposal, that "if a customer or counterparty provides a consent then later withdraws that consent, the firm may need to

⁴⁰ As noted above in the discussion of "Scope of Required Consents," for a non-U.S. SBSB, this approach would generally only be relevant for U.S. counterparties of the SBSB.

cease conducting a[n SBSD] business with that person.” A withdrawal of consent by a counterparty should not affect transactions an SBSD entered into with such counterparty when the counterparty’s initial consent was in force, because otherwise there would be confusion and disruptions in the market. Requiring an SBSD to take steps with respect to existing transactions upon the withdrawal of consents may force SBSDs to unwind existing transactions or take other steps that would have destabilizing effects and cause uncertainty within the U.S. and global markets.

- **Deadline for Obtaining Consents.** Under the Proposal, although a non-U.S. SBSD is not required to submit a legal opinion and certification until 24 months after it applies for registration, such SBSD would be required to have obtained all the necessary consents by the date it conditionally registers. This timing would limit the usefulness of this additional 24-month period as an SBSD would need to conduct significant analysis, obtain required consents, and potentially reorganize its personnel or business prior to conditional registration. Therefore, the 24-month period should apply to obtaining consents as well as submitting a legal opinion and certification.
- **Protected Personal Data.** As noted above in Section II.b.iv, targeted relief for protected personal data from direct record access requirements is necessary to address intractable legal conflicts that could otherwise cause a large number of non-U.S. SBSDs to exit the U.S. market. Such relief is also relevant for U.S. SBSDs doing business internationally; even though they are not subject to certification and legal opinion requirements that would bar them from registering absent relief, they will still face the same conflicts between the Commission’s direct record access requirements and non-U.S. personal data protections.

b. The Commission Should Provide Masking Relief for Certain Foreign Counterparties

Shortly after becoming conditionally registered, an SBSD will be required to comply with Regulation SBSR, which may conflict with the privacy laws of some foreign jurisdictions. Applicable law in a non-U.S. jurisdiction may require counterparty consent, regulatory authorization, or both prior to the disclosure of trade information.

The CFTC has issued and extended no-action relief allowing swap dealers to use substitute, “masked” privacy identifiers for counterparties who reside in enumerated jurisdictions where the local privacy or similar laws prohibit reporting un-masked identifiers.⁴¹ The Commission should provide similar relief until it can establish an information-sharing agreement (or other arrangement) with the relevant foreign regulatory authority.

⁴¹ CFTC No-Action Letter No. 17-16 (Mar. 10, 2017).

Additionally, if the Commission follows our recommendation above and does not require consents be obtained prior to an SBSB's conditional registration, the Commission should also allow an SBSB to use masked identifiers for the 24-month conditional registration period for those counterparties from which such SBSB has not yet obtained the requisite consents.

IV. Background Checks for APs of SBSBs

a. The Commission Should Adopt its Proposed Amendments to Rule of Practice 194 and Proposed Rule 18a-5, as Modified Herein

SEC Rule of Practice 194 establishes, among other things, a process by which an SBSB may seek an exemption from the prohibition against APs subject to a statutory disqualification.⁴² The Proposal would amend the Rule of Practice 194 to provide an exclusion for an AP of an SBSB subject to a statutory disqualification who (1) is not a U.S. person and (2) does not effect and is not involved in effecting SBS transactions with or for U.S. counterparties, other than through a foreign branch of such U.S. counterparties.⁴³ This exclusion is conditioned on the AP not being currently subject to an order prohibiting participation in the U.S. financial markets or a foreign financial market where the individual is employed or located.

We support this proposed amendment, which would help harmonize the Commission's rules with the CFTC's approach to APs⁴⁴ by providing an appropriate territorial scope for background checks of APs of SBSBs, except as stated below.

Proposed SEC Rule 18a-5, in turn, would require an SBSB to make and keep current a questionnaire or application for employment for each AP who is a natural person that covers a broad range of background information regarding the AP.⁴⁵ The Proposal would modify this requirement by exempting (1) APs excluded from the Exchange Act's statutory disqualification prohibition, including under amended Rule of Practice 194 as described above and (2) for non-U.S. APs, certain information if the receipt of that information, or the creation or maintenance of records reflecting that information, would result in violation of applicable law in the jurisdiction where the AP is employed or located.⁴⁶

⁴² 17 C.F.R. 240.194.

⁴³ Proposal, 84 Fed. Reg. at 24,238-42.

⁴⁴ CFTC No-Action Letter No. 12-43 (Dec. 7, 2012).

⁴⁵ Recordkeeping and Reporting Requirements for [SBSBs], Major [SBS] Participants, and Broker-Dealers; Capital Rule for Certain [SBSBs], SEC Release No. 34-71958 (Apr. 17, 2014), 79 Fed. Reg. 24,194, 25,205 (May 2, 2014).

⁴⁶ Proposal, 84 Fed. Reg. at 24,242-44.

We also support these proposed amendments, which would be consistent with the fact that the Exchange Act only requires an SBSB to exercise reasonable care to determine whether an AP is subject to a statutory disqualification, and it would not be reasonable to receive or maintain information in violation of applicable law.

b. The Commission Should Amend Rule of Practice 194 to Exempt APs Who Do Not Solicit or Accept SBS

The Commission has interpreted Exchange Act Section 15F(b)(6)'s statutory disqualification requirement to extend beyond APs engaged in front office activities, including APs who draft and negotiate master agreements and confirmations, manage collateral, or screen potential counterparties for creditworthiness.⁴⁷ The APs who perform these functions are typically in the middle or back office or a control group. Their discretion is frequently constrained in respects that make the potential for bad acts that could harm counterparties very limited, not only through detailed procedures but also multiple layers of controls. Accordingly, the benefits of subjecting these APs to the statutory disqualification requirement would be relatively low.

On the other hand, the costs of extending this requirement to these APs would be quite high. The number of APs implicated would be significant, and many of them would be located in non-U.S. jurisdictions. However, because they perform these functions centrally for U.S. and non-U.S. counterparties alike, it would not be feasible for them to rely on the proposed amendment to Rule of Practice 194. In addition, these APs frequently perform functions for a broad range of products not limited to SBS.

The CFTC, in contrast, does not subject swap dealers' middle office, back office, or control personnel to its parallel statutory disqualification prohibition. Instead, it only applies that prohibition to personnel who solicit or accept swaps or supervise such personnel. We are not aware of this more limited approach leading to material counterparty abuses or other problems.

To better balance the costs and benefits of the statutory disqualification requirement and harmonize with the CFTC, the Commission should amend Rule of Practice 194 to exempt APs who do not solicit or accept SBS, and do not supervise APs who solicit or accept SBS, from Exchange Act Section 15F(b)(6)'s statutory disqualification requirement. Should the Commission fail to adopt this exemption, it should adopt one for APs who neither engage in these front office functions nor exercise managerial or other discretionary, supervisory authority over the SBS business of an SBSB, which would be consistent with FINRA's approach to operations professionals.⁴⁸

⁴⁷ SBSB Registration Release, 80 Fed. Reg. at 48,976.

⁴⁸ See FINRA Rule 1220(b)(3).

c. **An SBSB's Chief Compliance Officer Should Not Be Required to Review and Sign Each Employment Application**

The Commission's rules currently require that an SBSB's CCO or his or her designee review and sign each employment questionnaire or application.⁴⁹ This requirement is overly burdensome on the SBSB's compliance staff and should be eliminated in favor of the SBSB's standing operating procedures for review of employment documents (such as human resources personnel).

Compliance staff are not typically involved in reviewing employment applications and so are not the most expert staff to handle such matters, and the Commission should not be involved in dictating the manner in which employment policies and procedures are executed. SBSBs should instead be allowed to follow their ordinary course personnel review and background check procedures. An SBSB's compliance staff will approve all of the requisite policies and procedures related to employment questionnaires and applications for APs of an SBSB, which can then be more effectively and efficiently carried out by those at the SBSB that have the requisite knowledge and time to review such questionnaires and applications.

Additionally, the CFTC does not require such review and signature by the CCO or his or her designee of each employment questionnaire or application. As a lack of this requirement has not hampered the CFTC's review of swap dealers, the Commission should likewise not necessitate this in order to effectively oversee SBSBs.

If the Commission does not eliminate the requirement that the CCO or his or her designee review and sign each employment questionnaire or application, the Commission should clarify that existing SBSB APs who were subject to background check policies and procedures reasonably designed to identify statutory disqualifications, as defined by the Commodity Exchange Act, should not be subject to this requirement. Requiring SBSBs to revisit their determinations regarding existing APs who were previously reviewed for purposes of the CFTC's regulations for swap dealers would result in essentially a double expenditure for SBSBs with respect to such employees, which would provide no additional regulatory benefit to the Commission. Instead, the employment questionnaires or applications to be reviewed and signed by the CCO or his or her designee should only be those for employees that only transact in SBS and have not previously been subjected to employment questionnaires or applications to comply with the CFTC's swap dealer requirements.

V. **Compliance Dates**

When the Commission finalized its rules concerning capital, margin and segregation requirements for SBSBs and major SBS participants, it provided that the compliance date (the "**Registration Compliance Date**") for its registration requirements would be 18 months after the later of: (1) the effective date of the final rules establishing

⁴⁹ 17 C.F.R. § 240.15Fb6-2(b).

recordkeeping and reporting requirements for SBSs and major SBS participants; or (2) the effective date of final rules addressing the Proposal.⁵⁰

Implementing the Commission's SBS regulatory framework will be a time-consuming exercise for both market participants and the Commission. Once SBSs know the exact scope of the Commission regulations with which they must comply, they will need time both to adjust their internal systems and businesses and to build any new systems required for compliance. In addition, if the Commission does not remove its requirements that non-U.S. persons count ANE transactions toward their SBS *de minimis* thresholds or apply additional EBC and reporting requirements to such transactions, non-U.S. SBSs will need to create processes and systems to track its ANE activity internally and potentially also the ANE activity of other dealer counterparties.

Additionally, non-U.S. SBSs and foreign authorities will need time to submit, and the Commission will need time to review, substituted compliance applications. As discussed above, most SBS rules eligible for substituted compliance will be effective upon the conditional registration, or registration, of an SBS. Consequently, substituted compliance determinations will need to be finalized well in advance of the effectiveness of the registration requirements in order for SBSs to organize their regulatory implementation projects around the rules they need to come into compliance with, and to evaluate whether they will be able to comply with the SBS regulations or will need to reorganize their SBS business lines or relocate U.S. personnel. Therefore, we continue to recommend that the Commission extend the Registration Compliance Date to 18 months after the date on which it has made all applicable substituted compliance determinations covering the same range of rules and foreign jurisdictions currently covered by the CFTC's corollary determinations and related no-action relief.⁵¹

If, however, the Commission does not take this approach, then it should adopt a provisional substituted compliance framework. Under this framework, if a requirement is already covered by a CFTC comparability determination for a particular foreign jurisdiction or the Commission has received a complete request for substituted compliance (subject to the recommendations above) at least 6 months prior to the Registration Compliance Date but has not yet granted or rejected the request by that date, then it should permit SBSs from the relevant foreign jurisdiction to rely on substituted compliance on a provisional basis until 18 months after the Commission completes its review. This 18-month post-review period would permit affected SBSs to conform their SBS activity to the *de minimis* threshold and accordingly withdraw from registration in the event the Commission rejects the substituted compliance request.

In addition, we recommend that the Commission adopt the following measures designed to avoid potentially significant disruption to the SBS markets.

⁵⁰ See Capital, Margin, and Segregation Requirements for [SBSs] and Major [SBS] Participants and Capital and Segregation Requirements for Broker-Dealers; Final Rule, SEC Release No. 34-86175 (June 21, 2019).

⁵¹ See CFTC No-Action Letter No. 13-45 Corrected (July 11, 2013).

