April 20, 2012

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

Re: *Uncleared Security-Based Swap Transactions Involving Eligible Contract Participants (File Number S7-26-11)*

Dear Ms. Murphy:

The Securities Industry and Financial Markets Association ("**SIFMA**") and the International Swaps and Derivatives Association ("**ISDA**")[1] appreciate the opportunity to comment on the Securities and Exchange Commission's (the "**Commission**") interim final rules (the "**Interim Final Rules**") that exempt uncleared security-based swaps (or "**SBS**") entered into between eligible contract participants from certain provisions of the Securities Act of 1933 (the "**Securities Act**"), the Securities Exchange Act of 1934 (the "**Exchange Act**"), and the Trust Indenture Act of 1939 (the "**Trust Indenture Act"**).[2]

We request that the Commission provide permanent relief for uncleared security-based swaps[3] between eligible contract participants from the Securities Act, Section 12(g) of the Exchange Act, and the Trust Indenture Act.

I. Interim Final Rules

On July 1, 2011, the Commission adopted the Interim Final Rules providing exemptions under the Securities Act, the Exchange Act, and the Trust Indenture Act

[1] Further information about SIFMA and ISDA is available in the Appendix.

[2] Exemptions for Security-Based Swaps, Rel. Nos. 33-9231; 34-64794; 39-2475, 76 Fed Reg. 40,605 (June 15, 2011) ("**Interim Final Rules Release**"), *available at* http://www.gpo.gov/fdsys/pkg/FR-2011-07-11/pdf/2011-17039.pdf.

[3] In response to Questions 6 and 7 in the Interim Final Rules Release, we respectfully request that the Commission provide permanent relief to "security-based swaps" as defined in the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "**Dodd-Frank Act**") rather than "security-based swap agreements."

for certain security-based swaps that are securities solely because of the provisions of Title VII of the Dodd-Frank Act.[4] Specifically, under the Interim Final Rules, the Securities Act (other than Section 17(a) thereof), Sections 12(a) and (g) of the Exchange Act, and the Trust Indenture Act do not apply to any security-based swap that is (i) a "security-based swap agreement," as defined in Section 2A of the Securities Act as in effect prior to the July 16, 2011 effective date (the "**Effective Date**") and (ii) entered into between eligible contract participants (as defined in Section 1a(12) of the Commodity Exchange Act as in effect prior to the Effective Date, other than a person who is an eligible contract participant under Section 1a(12)(C) of the Commodity Exchange Act as in effect prior to the Effective Date).[5]

The Interim Final Rules and no-action relief will expire on the compliance date for final rules that the Commission adopts further defining the terms security-based swap and eligible contract participant.

We strongly support the Commission's actions to provide interim relief for security-based swaps. The Interim Final Rules, and the associated no-action relief, were necessary and appropriate steps to prevent disruption of the SBS market and ensure an orderly implementation of the Dodd-Frank Act. We also appreciate the Commission's ongoing efforts to learn more about the types of SBS transactions that have been and will be transacted, as well as the Commission's consideration of our

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[4] *See* Sections 761(a)(2) and 768(a)(1) of the Dodd-Frank Act (amending Sections 3(a)(10) of the Exchange Act, 15 U.S.C. 78c(a)(10), and 2(a)(1) of the Securities Act, 15 U.S.C. 77b(a)(1), respectively).

[5] The definition of "security-based swap agreement," however, is narrower than the definition of "security-based swap" in that it is limited to a swap agreement of which a material term is based on the price, yield, value, or volatility of any security or group or index of securities, or any interest therein. Therefore, certain security-based swaps that are based on or reference loans and indices of only loans ("**Loan SBS**"), and that are "securities" because they are security-based swaps, do not qualify as security-based swap agreements. This definitional gap meant that, at the time the Interim Final Rules were adopted, Loan SBS were not eligible for the exemptive relief provided by the Rules.

To remedy this issue, the Division of Corporate Finance (the "**Division**") issued a no-action letter on July 15, 2011 providing that it will not recommend enforcement action to the Commission if eligible contract participants engage in offers or sales of Loan SBS without compliance with the provisions of the Securities Act (other than Section 17(a) thereof), Sections 12(a) and (g) of the Exchange Act, or the Trust Indenture Act, subject to the following conditions: the Loan SBS are within the definition of "swap agreement" under Section 206A of the Gramm-Leach-Bliley Act as in effect prior to July 16, 2011, but not the definition of "security-based swap agreement" and the eligible contract participants satisfy the conditions in Securities Act Rule 240, Exchange Act Rules 12a-11 and 12h-1(i), and Trust Indenture Act Rule 4d-12 as if such Loan SBS were a security-based swap agreement under such Rules. The no-action relief also provided that the Division will not recommend enforcement action to the Commission with respect to Exchange Act Sections 12(a) and (g) if eligible contract participants do not register under Section 12(g) of the Exchange Act a class of Loan SBS offered or sold without registration under the Securities Act in reliance on the provisions of the no-action letter.

concerns regarding the implications of including security-based swaps in the definition of "security" for purposes of the Securities Act and the Exchange Act.

II. Overview of the SBS Market

This section provides an overview of the SBS market as it functions today and may function in the near future. Our request for relief is limited to SBS transactions functioning in the manner we describe below.

A. Uncleared Security-Based Swaps Are Bilateral Contracts Between Sophisticated Parties

A security-based swap is a "swap," as defined in section 1a(47) of the Commodity Exchange Act, that is based on (i) a narrow-based security index, including any interest therein or on the value thereof, (ii) a single security or loan, including any interest therein or on the value thereof, or (iii) the occurrence, nonoccurrence or extent of the occurrence of an event relating to a single issuer of a security or the issuers of securities in a narrow-based security index, when the event directly affects the financial statements, financial condition, or financial obligations of the issuer.[6] Functionally, a security-based swap is a contract in which two counterparties agree to exchange cash flows based on the performance of a referenced security, obligation, issuer or obligor, or narrow-based security index. For example, with a credit default swap, one party may pay a periodic fee to the other party in return for the other's agreement to pay on the occurrence of a default or other credit event affecting the referenced obligor or obligation.

As presently constituted, the SBS market largely functions on an "uncleared" basis as an ongoing series of bilateral trades between eligible contract participants.[7]

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[6] *See* Section 3(a)(68) of the Exchange Act. Section 2(a)(17) of the Securities Act references section 1(a) of the CEA, paragraph 42 of which references section 3(a) of the Exchange Act, paragraph 68 of which sets forth the definition of "security-based swap." The definition excludes agreements, contracts or transactions that only meet the definition of security-based swap due to referencing or being based on government securities and certain other "exempted securities" (not including municipal securities). Identified banking products are also excluded from the definition of security-based swap.

[7] Most eligible contract participants also satisfy the definition of "accredited investor" found in rule 501(a) of Regulation D. Certain eligible contract participants, however, may not qualify as accredited investors under rule 501(a). These include, for example, an entity whose net worth exceeds $1 million (but not $5 million) that enters into a security-based swap in connection with the conduct of the entity's business. Furthermore, while certain government entities, such as a municipality that owns and invests on a discretionary basis more than $50 million, are eligible contract participants, they may not be included within the definition of "accredited investor." The Commission, however, has determined that certain governmental entities qualify as accredited investors under one of the named categories in rule 501(a). For example, governmental entities that engage primarily in charitable activities comparable to those engaged in by non-profit corporations are "accredited investors." *See e.g.*, Voluntary Hospitals of America, Inc., SEC No-Action Letter (Dec. 30, 1982). Although the Commission proposed to include some government entities in the (…continued)

Counterparties use security-based swaps to hedge risks associated with third-party credit defaults. They also use security-based swaps to hedge risks associated with equity and debt security ownership, to speculate, to assume credit risk generally and to gain synthetic exposure to securities and other obligations. The counterparty base is primarily composed of SBS dealers, banks, large corporations, insurance companies, asset managers, hedge funds, and other investment vehicles. Although individuals can qualify as eligible contract participants, the SBS market is overwhelmingly institutional in nature and in practice only a very small number of participants are natural persons (generally high net worth individuals).

Security-based swaps are documented using standardized industry forms published by ISDA. It is standard practice for SBS counterparties to include representations in the ISDA SBS documentation that each counterparty is an eligible contract participant and understands the risks associated with the transaction, which representations are repeated on each date that an SBS transaction is entered into.

B. Most SBS Transactions are Conducted with Counterparties with Whom SBS Dealers Have Substantive Pre-existing Relationships

Most SBS transactions are conducted with counterparties with whom SBS dealers have substantive pre-existing relationships. Given that the pool of potential counterparties for SBS trades is limited to persons that have substantial enough assets to be eligible contract participants, dealers generally only approach persons with whom they have a pre-existing relationship and whom they know based on those prior relationships to be eligible contract participants.

SBS dealers source new counterparties for SBS trades through a variety of methods. Dealers may solicit SBS trades from their institutional client base via phone calls, email, and in-person meetings. Clients sometimes contact SBS dealers who are well known in the market to request a quote for a particular transaction. These transactions are then negotiated on a purely bilateral basis. These bilaterally negotiated transactions are particularly common for less liquid security-based swaps, or in situations where parties prefer a privately negotiated transaction, such as in executing block trades. SBS dealers also disseminate SBS quotes by sending messages via Bloomberg. These electronic messages are sent only to accounts with whom SBS dealers and brokers have pre-existing relationships, albeit possibly not SBS relationships.

SBS dealers also make use of a variety of electronic trading arrangements. First, SBS dealers have proprietary, single-dealer request for quote ("**RFQ**") platforms on which the dealer may post indicative quotes for security-based swaps in various SBS asset classes that the dealer is willing to trade. These platforms require

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definition of "accredited investor" in 2007, it has not yet acted on this proposal. *See* Revisions of Limited Offering Exemptions in Regulation D, Rel. No. 33-8828, 72 Fed. Reg. 45,116 (Aug. 3, 2007).

pre-clearance for access and are accessible exclusively by the dealer's approved customers. Customers post requests for executable quotes; if the dealer provides a quote that is acceptable to the customer, the transaction is executed electronically. There also are aggregator-type platforms that combine two or more single-dealer RFQ platforms. In those platforms, both the aggregator and the dealers must authorize participants to access the platform and see indicative quotes from the dealers. Although participants can be authorized to see quotes from multiple dealers, the participant can request a firm quote from only one dealer at a time. Finally, there are RFQ systems where the participant can send an RFQ to multiple dealers at the same time, although these platforms are generally required by the dealers to set limits on the number of dealers to whom a customer may send an RFQ. Dealers then send firm quotes back to the participant, which the participant may choose to accept and execute. Participants must be authorized by both the system operator and the dealers in order to request quotes from dealers through a multiple dealer RFQ system.

In Europe, limit order book systems are used to transact in security-based swaps. In a limit order book system, firm bids and offers are posted, on an anonymous basis, for all participants to see, and bids and offers are then matched on price-time priority and other established parameters and trades are executed accordingly.

SBS dealers also may engage in SBS transactions with counterparties through electronic brokering platforms. These platforms are analogous to the electronic trading platforms used by exchanges, where bid and offer quotes are displayed. All participants can enter bids and offers, and observe others entering bids and offers. Unlike exchanges, SBS electronic brokering platforms do not automatically match bids and offers in order to execute trades. Typically, once a buyer and seller express interest in a trade at the price posted on the electronic trading platform, an interdealer broker would assist them in negotiating a final trade over the telephone. Electronic brokering platforms for security-based swaps serve only a narrow range of major market players, all of whom are eligible contract participants.

SBS dealers also publish and distribute research on security-based swaps to existing and prospective clients, some of which may be available on an unrestricted basis.

C. Eligible Contract Participants Do Not Acquire Security-Based Swaps With a View to a Distribution

The structure of the SBS market is such that counterparties do not purchase security-based swaps with any expectation that they can be resold, even to other eligible contract participants. There is no secondary SBS market where an extant SBS can be resold. In addition, unlike securities or even loans, SBS are bilateral contracts that typically carry counterparty credit risk which makes the transfer or distribution of the contracts difficult. Furthermore, novating a security-based swap to a different counterparty requires the consent of the original SBS dealer; most if not all security-based swaps are governed by one of two ISDA Master Agreements,

and section 7 of each such agreement provides, with limited exceptions, that "neither this Agreement nor any interest or obligation in or under this Agreement may be transferred (whether by way of security or otherwise) by either party without the prior written consent of the other party."[8] The exceptions to the general prohibition on transfers address relatively infrequent situations where (i) a transfer is necessary to avoid an adverse tax impact on one of the counterparties due to an event or change of law that occurs after the trade is executed; (ii) a counterparty engages in a business combination with a third party and the security-based swap is effectively transferred to the third party or combined entity; (iii) one counterparty is in default of a payment obligation to the other counterparty (and even then, only the non-defaulting counterparty's interest in the amount payable may be transferred); and (iv) under the 2002 ISDA Master Agreement, where applicable law would override the counterparties' agreement prohibiting transfers. Purported transfers that are not in compliance with section 7 of the 1992 or 2002 ISDA Master Agreement are void.

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[8] Section 7 of the ISDA 1992 Master Agreement provides that:

> "7. **Transfer**
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> "Subject to Section 6(b)(ii), neither this Agreement nor any interest or obligation in or under this Agreement may be transferred (whether by way of security or otherwise) by either party without the prior written consent of the other party, except that: —
>
> "(a) a party may make such a transfer of this Agreement pursuant to a consolidation or amalgamation with, or merger with or into, or transfer of all or substantially all its assets to, another entity (but without prejudice to any other right or remedy under this Agreement); and
>
> "(b) a party may make such a transfer of all or any part of its interest in any amount payable to it from a Defaulting Party under Section 6(e).
>
> "Any purported transfer that is not in compliance with this Section will be void."

Section 7 of the ISDA 2002 Master Agreement provides that:

> "7. **Transfer**
>
> "Subject to Section 6(b)(ii) and to the extent permitted by applicable law, neither this Agreement nor any interest or obligation in or under this Agreement may be transferred (whether by way of security or otherwise) by either party without the prior written consent of the other party, except that: —
>
> "(a) a party may make such a transfer of this Agreement pursuant to a consolidation or amalgamation with, or merger with or into, or transfer of all or substantially all its assets to, another entity (but without prejudice to any other right or remedy under this Agreement); and
>
> "(b) a party may make such a transfer of all or any part of its interest in any Early Termination Amount payable to it by a Defaulting Party, together with any amounts payable on or with respect to that interest and any other rights associated with that interest pursuant to Section 8, 9(h) and 11.
>
> "Any purported transfer that is not in compliance with this Section 7 will be void."

Although it is possible for counterparties to negotiate additional exceptions to the general prohibition on transfers, we understand that it is extremely unlikely for broad exceptions to be granted by SBS dealers. Given the existence of these prohibitions on transfer, it would not be feasible for a counterparty to enter into an SBS transaction with a view to distributing the security-based swap.

III. Request for Permanent Relief [9]

In these sections, we discuss why relief is requested from the Securities Act, Section 12(g) of the Exchange Act, and the Trust Indenture Act for uncleared security-based swaps between eligible contract participants.

A. Securities Act

In light of the nature of the SBS market discussed above, we request that the Commission provide for relief from the Securities Act registration requirement. Although we believe the sophisticated nature of eligible contract participants[10] in the SBS market and the usual manner in which transactions in this market are conducted today, and will in the future be conducted on SBS execution facilities, qualify these transactions for the section 4(2) exemption from registration under the Securities Act for any transaction by an issuer "not involving any public offering," there may be questions as to whether the full range of SBS transactions, as described above, qualify for this exemption. We respectfully request that the Commission provide permanent relief from Section 5 of the Securities Act for offers and sales of uncleared security-based swaps between eligible contract participants from. Such relief is necessary to provide certainty to the marketplace.

We believe that it is appropriate for the Commission to provide relief from the Securities Act registration requirement for security-based swaps between eligible contract participants because imposing a registration requirement would not fulfill the disclosure purposes of the Securities Act. Registration under the Securities Act is designed to protect investors by requiring full and fair disclosure. However, we do not believe that the protections afforded by registration are necessary in the context of uncleared security-based swaps between eligible contract participants. Such persons are capable of negotiating for the disclosure that they believe is necessary for determining whether, and on what terms, to enter into a security-based swap.

In addition, Congress's decision to expressly require SBS transactions to be registered under the Securities Act only when the SBS transaction involves a person

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[9] We believe this section is responsive to Questions 2, 3, and 9 in the Interim Final Rules Release.

[10] Although some eligible contract participants may not meet the technical requirements for accredited-investor status under Regulation D, we believe that eligible contract participants should nevertheless be understood to meet the *Ralston Purina* standard required for investors in a section 4(2) private placement.

that is not an eligible contract participant evidences a legislative judgment that eligible contract participants can obtain sufficient information on transactions in security-based swaps without required disclosures under the Securities Act and Exchange Act.[11] Providing relief from the disclosure requirements for security-based swaps involving eligible contract participants is consistent with the stated goals of swap and SBS reform to protect unsophisticated investors.[12] Requiring registration under the Securities Act would merely provide information that pertains to the SBS dealer given that Securities Act registration requires disclosure about the issuer (*i.e.*, the SBS dealer or other counterparty), and not the reference security (*i.e.*, the security-based swap).[13]

Moreover, Section 15F(h)(3) of the Dodd-Frank Act requires that the Commission adopt disclosure requirements for SBS dealers and major SBS participants (collectively, "**SBS entities**"). The Commission's proposed business conduct rules would require SBS entities to disclose to any counterparty, other than a counterparty that is an SBS entity, a swap dealer, or a major swap participant, the material risks and characteristics of the security-based swap and material incentives or conflicts of interest that an SBS entity may have in connection with the security-based swap, subject to a limited exception for security-based swaps that are executed on a registered SBS execution facility.[14] Disclosure regarding material incentives and conflicts of interest must be made "in a manner reasonably designed to allow the counterparty to assess" the information being provided. SBS entities would also have an on-going obligation to communicate with counterparties in a fair and balanced manner based on principles of fair dealing and good faith.[15] The

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[11] Section 768(b) of the Dodd-Frank Act amended section 5 of the Securities Act to add a new paragraph (d), which provides, in effect, that the exemptions from section 5 found in sections 3 and 4 of the Securities Act are unavailable for any offer or sale of a security-based swap to any person who is not an "eligible contract participant" as defined in section 1a(18) of the Commodity Exchange Act.

[12] *See* Letter from Timothy Geithner, Secretary of the Treasury, to Senate Majority Leader Harry Reid (May 13, 2009) (goals of the SBS market reform included "ensuring that OTC derivatives are not marketed inappropriately to unsophisticated parties").

[13] For example, Section 7 of the Securities Act requires disclosure of the name of the issuer, the name of the state or other sovereign power under which the issuer is organized, the location of the issuer's principal place of business; the names and address of the director or persons performing similar functions, and the chief executive, financial and account officers of the issuer, among other information.

[14] *See* Proposed Rule 15Fh-3(b), Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants, Rel. No. 34-64766, 76 Fed. Reg. 42,396 (July 18, 2011), *available at* http://www.gpo.gov/fdsys/pkg/FR-2011-07-18/pdf/2011-16758.pdf.

[15] *See* SEC Proposed Rule 15Fh–3(h) (The proposed rule would require SBS entities to communicate with counterparties in a manner that provides a sound basis for evaluating the facts with regard to any particular security-based swap or trading strategy involving a security-based swap. Communications may not imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast; and any statement referring to the potential opportunities or (…continued)

Commission's proposed business conduct requirements would also require SBS entities to disclose to the counterparty, other than an SBS entity, a swap dealer, or a major swap participant, in writing the "daily mark" of the security-based swap, and must also disclose, at or before delivery of the first disclosure of the daily mark, the SBS entity's data sources and a description of the methodology and assumptions to be used to prepare the daily mark for the security-based swap.[16]

Finally, requiring registration of security-based swaps would be burdensome and could dissuade parties from entering into such security-based swaps altogether. The expense and time associated with the preparation of the registration statement could easily outweigh the benefits of any single bilateral transaction. This is especially true with respect to SBS dealers that do not already have public disclosure about themselves or are unwilling to make such public disclosures. We estimate that this would result in yearly cost to the each firm of $5.4 to $10.4 million. The industry-wide yearly costs could surpass $14.5 to $28.3 billion.[17] For example, to register a security-based swap, an extensive amount of information must be gathered and disclosed. The information required would generally be irrelevant to a person's decision to enter into a security-based swap and time-consuming to provide. Such information requirements include, for example:

- the names and addresses of all persons, if any, owning of record or beneficially, if known, more than 10 per centum of any class of stock of the issuer, or more than 10 per centum in the aggregate of the outstanding stock of the issuer as of a date within twenty days prior to the filing of the registration statement;

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advantages presented by a security-based swap must be balanced by an equally detailed statement of the corresponding risks.).

[16] *See* SEC Proposed Rule 15Fh–3(c).

[17] The estimates of internal firm costs are derived from firm experience with structured note shelf takedown costs and include the following specific cost estimates:

- $1,000 in printing fees per offering;
- $4,000-$10,000 in outside counsel legal fees per offering;
- $1,325 of internal legal costs (based on distributed estimated costs of yearly salary and overhead for 2.5 attorneys ($300,000 per attorney) and 3 paralegals ($125,000 per paralegal) per firm); and
- 850 offerings per year per firm.

The estimate of new CDS contracts per year (2.3 million) is based on monthly CDS contracts of approximately 195,000 (based on DTCC aggregate weekly CDS Data from the weeks of March 2 through March 23, 2012, *available at* http://www.dtcc.com/products/derivserv/data_table_i.php, (Section III: All transaction data, Table 17: Summary of Weekly Transaction Data).

- the amount of securities of the issuer held by any director, chief executive, financial, and accounting officer, and person who owns more than 10% of any class of stock of the issuer, as of a date within twenty days prior to the filing of the registration statement;

- a statement of the capitalization of the issuer;

- the specific purposes in detail and the approximate amounts to be devoted to such purposes, so far as determinable, for which the security to be offered is to supply funds, and if the funds are to be raised in part from other sources, the amounts thereof and the sources thereof, shall be stated;

- the estimated net proceeds to be derived from the security to be offered;

- a balance sheet and an income statement, certified by an independent public or certified accountant; and

- a copy of all material contracts.

The costs and burden associated with registering a security-based swap would be especially pronounced for counterparties that are not SBS dealers and transact in security-based swaps infrequently. Because either party to a security-based swap could be deemed to be the "issuer," every counterparty to a security-based swap could be required to file a registration statement with the Commission.

Registration requirements also would result in practical difficulties that could deter SBS participants from entering into uncleared security-based swaps. For example, Section 6 of the Securities Act requires that the registration statement be signed by a majority of the board of directors of the issuer. At the very least, this requirement would introduce inefficiencies to SBS transactions from delays in obtaining such signatures.

We believe that any relief granted by the Commission should apply without limitation to all uncleared security-based swaps, including those that are made available to trade on an SBS execution facility and therefore might be viewed as involving a "public offering."[18] Providing such categorical relief is particularly important to avoid market disruption that would result from SBS participants having to determine whether security-based swaps traded on an SBS execution facility involve a "public offering," which determination would raise interpretive questions and likely require guidance or other action from the Commission.

[18] We believe this is responsive to Question 5 in the Interim Final Rules Release.

B. Section 12(g) of the Exchange Act[19]

Although we do not believe that at present any classes of uncleared security-based swaps satisfy the registration threshold under Section 12(g), we are concerned that ambiguity regarding the definition of a "class" as applied to uncleared security-based swaps could raise concerns regarding Section 12(g) registration that could interrupt the efficient functioning of the SBS market and dissuade parties from entering into these contracts. Therefore, we respectfully request that the Commission provide relief from Section 12(g) of the Exchange Act for offers and sales of uncleared security-based swaps between eligible contract participants from Section 12(g) of the Exchange Act.

A "class" of securities is defined in Section 12(g)(5) to include "all securities of an issuer which are of substantially similar character and the holders of which enjoy substantially similar rights and privileges." We believe that because standardized SBS generally will be subject to mandatory clearing pursuant to Title VII of the Dodd-Frank Act, it is unlikely that uncleared security-based swaps will be deemed to be part of the same class.

However, there are two circumstances in which we could foresee questions arising concerning the development of a "class" of security-based swaps. Both of these circumstances involve security-based swaps that are similar to one another as a result of the standardized ISDA documentation that may set the majority of terms of the security-based swap. First, although a type of security-based swap may be cleared by a derivatives clearing agency generally, a particular security-based swap would not be cleared in the event that one of the counterparties to the security-based swap qualifies for, and elects to take advantage of, the end user exception to mandatory clearing. Second, it is theoretically possible that the Commission could designate a security-based swap for mandatory clearing because of its level of standardization, but the security-based swap may not be cleared because there is not a clearing agency that is willing to accept the security-based swap for clearing.

To the extent that a "class" of uncleared security-based swaps exists in these circumstances, we believe that it would be inappropriate to require registration of that class. First, requiring an SBS dealer or eligible contract participant to register a class of uncleared security-based swaps would be burdensome and could dissuade parties from entering into such security-based swaps altogether. In the case of security-based swaps that are uncleared solely as a result of the end user exception, imposing a registration requirement on those security-based swaps, while providing an exemption from registration for cleared security-based swaps, would effectively undermine the end user clearing exception provided by Congress: SBS dealers would not enter into security-based swaps with end users who elect not to clear them because of the burdens associated with registration.

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[19] We believe this section is responsive to Questions 2, 3, and 9 in the Interim Final Rules Release.

Second, registration would not provide any meaningful or useful information about the security-based swaps. As discussed above, investors in security-based swaps are primarily concerned with the referenced security or loan, issuer or narrow-based security index, and not the counterparty that is "issuing" the swap. Furthermore, any protections afforded by requiring registration are not necessary in SBS transactions between eligible contract participants given the specific reporting requirements regarding the security-based swap required under the SBS dealer rules, and the ability of eligible contract participants to obtain information about the SBS dealer counterparty either directly or from public sources. Finally, the ongoing periodic reporting requirements and proxy rules, among other requirements, that are triggered by registration under the Exchange Act would not make sense to apply in the context of security-based swaps. Such requirements include the preparation and filing of proxy statements under Section 14 of the Exchange Act and of annual, quarterly, and current reports under Section 15(d) of the Exchange Act.

It is also possible that a non-dealer eligible contract participant to a security-based swap could be required to register a class of securities, and thus file periodic reports, if it has entered into 2,000 identical SBS transactions referencing the same underlying asset. Not only would this be an illogical outcome, but it also would dissuade market participants from entering into security-based swaps. In light of these considerations, we request relief from section 12(g) for all uncleared security-based swaps between eligible contract participants.

C. Trust Indenture Act[20]

We agree with the view expressed by the Commission in the Interim Final Rules Release that the protections contained in the Trust Indenture Act are not necessary in the context of uncleared security-based swaps involving eligible contract participants. The Trust Indenture Act is designed to protect and enforce the rights of debtholders that take part in public offerings. Because a security-based swap is a contract between two persons, SBS counterparties would not meaningfully benefit from the substantive and procedural protections of the Trust Indenture Act. Eligible contract participants are capable of enforcing obligations under security-based swaps directly, and the Trust Indenture Act provisions would not provide any meaningful substantive or procedural protections in this regard. Therefore, imposing the requirements of the Trust Indenture Act on security-based swaps would not further the goals of the Trust Indenture Act and would introduce unnecessary costs and burdens. Accordingly, we request that the Commission provide permanent relief from Section 304(d) of the Trust Indenture Act for uncleared security-based swaps between eligible contract participants.

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[20] We believe this section is responsive to Question 9 in the Interim Final Rules Release.

We appreciate the Commission's careful consideration of the issues associated with security-based swaps becoming "securities" under the federal securities laws. We believe that it is necessary and appropriate in the public interest, consistent with the protection of investors and purposes fairly intended by the Securities Act, Exchange Act, and Trust Indenture Act for the Commission to adopt interim relief from the provisions discussed herein on a permanent basis.

If you have any questions with respect to the request contained in this letter, or require any further information, please feel free to contact the undersigned, or Annette L. Nazareth or Robert L.D. Colby, Davis Polk & Wardwell LLP, at (202) 962-7075 and (202) 962-7121, respectively.

Very truly yours,

Kenneth E. Bentsen, Jr.
Executive Vice President
Public Policy and Advocacy
SIFMA

Robert Pickel
Chief Executive Officer
ISDA

cc: Hon. Mary L Schapiro, Chairman
Hon. Elisse B. Walter, Commissioner
Hon. Luis A. Aguilar, Commissioner
Hon. Troy A. Paredes, Commissioner
Hon. Daniel M. Gallagher, Commissioner
Ms. Meredith Cross, Director, Division of Corporation Finance
Ms. Amy Starr, Chief, Office of Capital Markets Trends
Mr. Andrew Schoeffler, Special Counsel, Office of Capital Market Trends

Appendix

SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association. For more information, visit www.sifma.org.

The International Swaps and Derivatives Association's ("ISDA") mission is to foster safe and efficient derivatives markets to facilitate effective risk management for all users of derivative products. ISDA has more than 800 members from 58 countries on six continents. These members include a broad range of OTC derivatives market participants: global, international and regional banks, asset managers, energy and commodities firms, government and supranational entities, insurers and diversified financial institutions, corporations, law firms, exchanges, clearinghouses and other service providers. For more information, please visit: www.isda.org.