

Staff Questionnaire – Information Regarding Foreign Supervisory Compliance and Enforcement Programs for Substituted Compliance Applications

This questionnaire represents the views of the staff of the Securities and Exchange Commission. It is not a rule, regulation, or statement of the Securities and Exchange Commission (“Commission” or “SEC”). The Commission has neither approved nor disapproved its content. This questionnaire, like all staff guidance, has no legal force or effect: it does not alter or amend applicable law, and it creates no new or additional obligations for any person.

The Commission has adopted rules under the Securities Exchange Act of 1934 (“Exchange Act”) that provide that the Commission may, conditionally or unconditionally, determine that a registered non-U.S. security-based swap dealer¹ or major security-based swap participant² (together, “Regulated Entities”), or class thereof, may satisfy certain Exchange Act provisions and SEC rules governing these non-U.S. Regulated Entities by complying with specified requirements under a foreign financial regulatory system. This regime is known as “substituted compliance.”³ A foreign financial regulatory authority or authorities may request substituted compliance by filing an application with the Commission.⁴

Before the Commission may make a substituted compliance determination, it must determine that the foreign requirements are comparable to the corresponding U.S. requirements, taking into account factors such as the scope and objectives of the foreign requirements, the effectiveness of

¹ Subject to certain exceptions, a security-based swap dealer is defined as any person who (a) holds itself out as a dealer in security-based swaps; (b) makes a market in security-based swaps; (c) regularly enters into security-based swaps with counterparties as an ordinary course of business for its own account; or (d) engages in any activity causing it to be commonly known in the trade as a dealer or market maker in security-based swaps. See Exchange Act Rule 3a71-1 for the complete definition.

² The definition of major security-based swap participant is set forth in Exchange Act Rule 3a67-1, and generally includes any person that is not a security-based swap dealer and (a) maintains a substantial position in security-based swaps for any of the major security-based swap categories (subject to certain exclusions); (b) whose outstanding security-based swaps create substantial counterparty exposure; or (c) is a financial entity that (i) is highly leveraged relative to the amount of capital it holds and not subject to the capital requirements of a federal banking agency and (ii) maintains a substantial position in outstanding security-based swaps in any major category.

³ See Exchange Act Rule 3a71-6, which sets forth the requirements for substituted compliance, and is available at: <https://www.govinfo.gov/content/pkg/CFR-2017-title17-vol4/pdf/CFR-2017-title17-vol4-sec240-3a71-6.pdf>.

⁴ See Exchange Act Rule 3a71-6(c)(1). The application must be submitted pursuant to Exchange Act Rule 0-13, which requires an application in the form of a letter, along with the supporting documents necessary to make the application complete. For more information on the procedures to submit an application, see Exchange Act Rule 0-13, which is available at: <https://www.govinfo.gov/content/pkg/CFR-2018-title17-vol4/pdf/CFR-2018-title17-vol4-sec240-0-13.pdf>.

the foreign supervisory compliance program, and the exercise of foreign enforcement authority.⁵ Substituted compliance also will be predicated, in part, on there being an arrangement between the Commission and the relevant foreign authority(ies) addressing supervisory and enforcement cooperation and other matters related to substituted compliance.⁶

This questionnaire is intended to assist you in preparing an application for substituted compliance as well as assist the Commission in conducting its comparability assessment of your jurisdiction's regulatory regime. Sections I and II contain questions relating to the supervision and enforcement portions of the comparability assessment. Section III has specific questions relating to supervisory and enforcement cooperation, including the requirements of Exchange Act Rule 3a-71-6(c)(3). In completing the questionnaire, please provide detailed responses and hyperlinks to the relevant laws, regulations, policies, or other sources, as applicable.

Please note, Commission staff intends to keep the information provided in response to this questionnaire non-public to the extent permitted by law. However, in accordance with Exchange Act Rule 0-13, once a completed application has been submitted, the Commission will publish a notice in the Federal Register for public comment. Commission staff anticipates that the published notice will include the information contained in the filed application, which may incorporate the information provided in response to this questionnaire. As such, please note that the information provided in response to this questionnaire could become public.

Furthermore, under the Freedom of Information Act (FOIA), the information provided in response to this questionnaire may be provided to any person unless the records are protected by an exemption to FOIA. However, certain records received from foreign securities authorities may be considered exempt from disclosure by the Commission under the Exchange Act.⁷

⁵ Staff from the Division of Trading and Markets has prepared guidance for potential applicants regarding the U.S. requirements for which substituted compliance is available. The guidance is available here: <https://www.sec.gov/files/staff-guidance-substituted-compliance-applications.pdf>.

⁶ Furthermore, if a foreign financial regulatory authority or authorities apply for substituted compliance, the authority/(ies) must provide the Commission with adequate assurances that no law or policy of any relevant foreign jurisdiction would impede the ability of any Regulated Entity under its supervision to provide the Commission prompt access to its books and records or submit to onsite inspections by the Commission. See Exchange Act Rule 3a71-6(c)(3).

⁷ Exchange Act Section 24(d) provides that the Commission generally shall not be compelled to disclose records obtained from a foreign securities authority if: (1) the foreign authority in good faith determines and represents that public disclosure of the records would violate the laws applicable to that foreign securities authority; and (2) the Commission obtains the records pursuant to procedures authorized for use in connection with the administration or enforcement of the securities laws, or a memorandum of understanding. Please indicate in your response whether you believe there are portions of your response that could qualify for this exemption.

Section I - Supervisory Framework

1. Please generally describe your jurisdiction's supervisory authority and related requirements or procedures to identify deficiencies and weaknesses in its Regulated Entities' relevant market activities. To the extent relevant, please consider the following:
 - a. the statutory, regulatory or other provisions under law that grant the relevant supervisory authority, or that otherwise describe or limit the scope of this supervisory authority;
 - b. a description of how you supervise recordkeeping and retention requirements applied to Regulated Entities;
 - c. a description of the authority of the applicable regulator to access and inspect the records of Regulated Entities for domestic and cross-border activities, including activities in foreign offices or branches;
 - d. a description of the authority of the applicable regulator to conduct on-site or off-site inspections of Regulated Entities, including the ability to inspect foreign offices or branches;
 - e. a description of the authority of the applicable regulator to obtain information related to the customers, clients, or employees of Regulated Entities;
 - f. a description of the ability of the applicable regulator to test or verify responses or other information obtained from the Regulated Entities during the course of supervisory efforts;
 - g. a description of how examination priorities are developed and the process for adjusting and updating such priorities, including what factors are used in developing priorities; and
 - h. any other information that would assist in understanding the scope of the relevant supervisory authority.
2. Please describe the supervisory tools your jurisdiction uses in practice to identify risk and detect potential breaches of law. To the extent relevant, please consider the following:
 - a. any form(s) of ongoing or ad hoc monitoring and surveillance by the regulator or another organization;
 - b. any process to receive tips or complaints about the activities of a Regulated Entity;
 - c. the submission of periodic filings from Regulated Entities; and
 - d. the submission of reports from Regulated Entities based on any event or trigger.
3. Please describe your jurisdiction's examination or inspection processes. In responding, please include:
 - a. a description of the examination cycle (e.g., routine periodic basis or risk-based). If the examination is periodic, please include the time frame;
 - b. a description of the processes and factors considered when selecting Regulated Entities for examination (e.g. time since last examination, tip, complaint or referral, etc.);
 - c. a description of the processes, including factors considered, to determine the scope for examination or inspection and the process for amending the scope if warranted;
 - d. a description of the types of books and records typically reviewed during examinations;

<ul style="list-style-type: none"> e. whether you conduct interviews with employees of the Regulated Entities; f. whether you test or verify responses given to you by the Regulated Entities; g. how you communicate deficiencies or other areas of concern to Regulated Entities, whether such communications are public, and how such communications are documented; h. to whom you direct communications (e.g., compliance office, senior management); and i. how Regulated Entities respond to identified issues.
<p>4. Please describe the resources available for your supervisory efforts. In responding, please include:</p> <ul style="list-style-type: none"> a. the typical background and qualification of your supervisory staff; b. the use of experts, such as persons who can analyze models or perform data analytics; c. the use of analytical software and tools in conducting examinations and other supervisory work; d. the use of SROs or exchanges to perform supervisory functions; e. training programs for supervisory staff; and f. the resources/size of the supervisory group relative to the volume and complexity of Regulated Entities.
<p>5. Please describe whether your jurisdiction has regulatory authority and related requirements or procedures to obtain the information necessary from Regulated Entities (or their offices or branches) to support your supervisory functions.</p>
<p>6. How do you communicate deficiencies or other areas of concern to Regulated Entities? For example, what remedies, or other corrective actions, are available to your supervisory program (e.g., deficiency letters, referrals to other regulators, enforcement actions, etc.)? Please include whether one type of action may be more prevalent than another and whether the actions are verbal or in writing. Please include recent statistics on how often each type of action is used.</p>
<p>7. Does your jurisdiction use risk monitoring and assessment or surveillance as part of your supervisory framework? If so, how do you use this information and what actions do you take if potential violations are identified?</p>
<p>8. Please describe how your jurisdiction reviews and evaluates corrective action undertaken by Regulated Entities.</p>
<p>9. Please describe any regulatory consequences for non-compliance with corrective actions, including the form and frequency of referrals to enforcement or other judicial authorities.</p>
<p>10. Please describe how your jurisdiction communicates with the industry and the public about best practices, common compliance issues or other areas of misconduct risk, including how Regulated Entities are informed about the consequences of misconduct or noncompliance.</p>
<p>11. Please describe your jurisdiction's participation in international organizations of securities and other regulators, such as the IMF and IOSCO.</p>
<p>12. Please provide a copy of Principles 10 and 12 from your most recent self-assessment for the FSAP.</p>

Section II - Enforcement Framework

1. Please describe your jurisdiction's ability to investigate and bring administrative or judicial actions against domestic and foreign parties to enforce your regulatory framework. In responding, please address:
 - a. your jurisdiction's authority (statutory, regulatory or otherwise) to take enforcement action both domestically and in connection with cross-border activity, describing both judicial and non-judicial forms of action where applicable; and
 - b. the impact of any privacy laws or other related provisions that may impede your ability to conduct thorough investigations.
2. Please describe the tools your jurisdiction can utilize to conduct investigations, including the ability to obtain detailed records to reconstruct transactions and identify parties to a transaction. For example, please address the ability to:
 - a. obtain electronic communication and other records from internet service providers or other third-parties;
 - b. compel statements and information from witnesses; and
 - c. receive tips, complaints and referrals from corporate insiders (such as whistleblowers) and the public.
3. Please describe the investigative capacities your jurisdiction has under relevant law, including methods and technology used for market surveillance. Please also describe the role of experts, self-regulatory organizations and exchanges in assisting or performing enforcement functions.
4. Please describe the legal proceedings, remedies, and sanctions available in your jurisdiction to support your enforcement mechanism, including, for example, available tribunals, types of penalties or other monetary sanctions, and the ability to seek prospective relief, temporary restraining orders, asset freezes or make criminal referrals.
5. Please describe how your jurisdiction publishes information about enforcement initiatives, including disclosure of enforcement matters and violations and public disclosure of enforcement objectives.
6. Please provide information regarding your jurisdiction's track record of enforcement activity for the last three years and the use of civil or criminal enforcement authority against individuals and entities, including
 - a. information about the number of actions taken;
 - b. the types of violations subject to action, including in connection with requirements for which substituted compliance is sought (*e.g.*, capital and margin, business conduct, etc.); and
 - c. the outcomes of such actions, including whether money was returned to harmed investors. In responding, please provide information about the types of penalties assessed and length of time from initiation of an investigation to the date of charge or closure.
7. Please describe whether the enforcement authorities in your jurisdiction have readily accessible mechanisms to obtain documents and other forms of assistance from a foreign enforcement authority. In responding, please address:
 - a. whether your jurisdiction has ratified international conventions, treaties and agreements relevant to cooperation in enforcement matters,

- b. whether the relevant authorities in your jurisdiction have signed the IOSCO MMoU or IOSCO EMMoU, and
- c. whether your jurisdiction has any legal requirements to preserve records obtained in the course of investigative matters such that those records would be available upon request from another enforcement authority.

Section III – Supervisory and Enforcement Cooperation

1. Please describe your jurisdiction's ability to share, and the process for sharing, non-public information with (or obtain it for) authorities such as the SEC. In responding, please address any limitations for sharing (a) information from Regulated Entities and (b) internal work product. Please address whether any blocking statutes, privacy or secrecy laws, or other legal or regulatory requirements impede sharing information, including customer or employee information, by authorities or firms located in your jurisdiction.
2. Under your jurisdiction's relevant laws, regulations, and policies, would the SEC, (a) have prompt access to the books and records of a Regulated Entity located in your jurisdiction, and (b) be able to conduct onsite inspections or examinations of a Regulated Entity located in your jurisdiction? Please describe any applicable limitations or conditions on such access.