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Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
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Re: FINRA Request for Access to Security-Based Swap Data Obtained by Registered Security-Based Swap Data Repositories

Dear Ms. Countryman:

The Financial Industry Regulatory Authority, Inc. ("FINRA") respectfully requests that the Securities and Exchange Commission ("SEC" or "Commission") issue an order under Securities Exchange Act ("Exchange Act") Rule 13n-4(b)(9)(x)¹ setting forth the Commission's determination that it is appropriate for FINRA to receive access to security-based swap ("SBS")² data, including individual counterparty trade and position data, maintained by security-based swap data repositories ("SBDRs")³ registered with the Commission pursuant to the requirements of Exchange Act Sections 13(n)(5)(G) and (H)⁴ ("Determination Order").

FINRA refers to the "Confidentiality Arrangement Between the U.S. Securities and Exchange Commission and the Financial Industry Regulatory Authority Concerning Access to Security-Based Swap Data Obtained by Registered Security-Based Swap Data Repositories" executed by FINRA and the Commission on August 11, 2022 (the "Confidentiality Arrangement"). Pursuant to paragraphs 2 and 3 of the Confidentiality Arrangement, as provided by Exchange Act Rule 13n-4(b)(10),⁵ the Confidentiality Arrangement constitutes an arrangement between the Commission and FINRA to address the confidentiality of SBS data made available to FINRA and shall be deemed to satisfy the requirement, set forth in Exchange

¹ See 17 CFR 240.13n-4(b)(9)(x).

² As used herein, "security-based swap" has the meaning as defined in Exchange Act Section 3(a)(68) and Exchange Act Rules 3a-68-1a through 3a-68-5 thereunder.

³ As used herein, "security-based swap data repository" has the meaning as defined in Exchange Act Section 3(a)(75).

⁴ See 15 U.S.C. 78m(n)(5)(G) and (H).

⁵ See 17 CFR 240.13n-4(b)(10).

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Act Section 13(n)(5)(H), that an SBSDR receive a written agreement from FINRA stating that FINRA shall abide by the confidentiality requirements described in Exchange Act Section 24⁶ relating to the information on SBS transactions that is provided to FINRA under Exchange Act Section 13(n)(5)(G).

As set forth in Appendix A to the Confidentiality Arrangement, FINRA requests that the Determination Order provide that it is appropriate for FINRA to access and receive: (i) all transaction-level SBS data held by each SBSDR, on a non-anonymized basis; and (ii) position-level SBS data held by each SBSDR, on a non-anonymized basis, for all SBS counterparties in connection with SBS described in (i) (collectively, the “SBS Data”). FINRA will engage in a dialogue with each relevant SBSDR to establish processes by which the SBSDR makes the SBS Data electronically available to FINRA in a timely and efficient manner.

Further, in accordance with paragraph 4 of the Confidentiality Arrangement, FINRA requests that the Determination Order specify that (i) FINRA may access, directly from any and all SBSDRs, the SBS Data, to fulfill FINRA’s regulatory mandate or legal responsibility or authority; and (ii) FINRA may use, but not disclose except in accordance with paragraphs 8 through 11 and paragraphs 20 and 21 of the Confidentiality Arrangement, the SBS Data that it has accessed from an SBSDR for any purpose within FINRA’s regulatory mandate or legal responsibility or authority, including but not limited to, as applicable, supervisory activities, regulatory analyses, enforcement investigations, and administrative, civil and criminal proceedings; provided, however, that in each case FINRA will notify promptly the Commission and each relevant SBSDR of any change to FINRA’s regulatory mandate or legal responsibility or authority that may affect the parameters of the SBS Data.

In support of this request, FINRA below provides (i) background on FINRA’s role and regulatory mandate; (ii) FINRA’s regulatory interest in, and proposed use of, the SBS Data; (iii) an overview of the confidentiality framework that FINRA will apply to the SBS Data; and (iv) a discussion of certain circumstances under which the SBS Data may be disclosed.

I. Background on FINRA

FINRA is the only national securities association registered with the Commission under Exchange Act Section 15A⁷ and is organized as a not-for-profit corporation. FINRA has statutory responsibility for the regulation and supervision of member broker-dealers, including broker-dealers’ off-exchange activities; in general, broker-dealers doing business with the public are required to become members of FINRA.⁸

⁶ See 15 U.S.C. 78x.

⁷ See 15 U.S.C. 78o-3.

⁸ In general, broker-dealers are required by the Exchange Act to become members of a national securities association (of which currently the only one is FINRA). There are two cases where broker-dealers may be exchange-only self-regulatory organization (“SRO”) members. First, there is a statutory exception for a broker-dealer that transacts business solely on an exchange of which it is a member. See 15 U.S.C. 78o(b). Second, there is a rule-based exemption for firms

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FINRA is required under the Exchange Act and the rules thereunder to adopt rules to prevent fraud and market manipulation and to promote just and equitable principles of trade, as well as provide for disciplinary actions against FINRA members who violate federal securities law or FINRA rules. Specifically, pursuant to Exchange Act Section 15A(b)(6), FINRA's rules must be designed to "prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest." Pursuant to Exchange Act Section 15A(b)(7), FINRA's rules must provide that FINRA members and associated persons "be appropriately disciplined for violation of any provision of" the Exchange Act, Exchange Act rules, the rules of the Municipal Securities Rulemaking Board, or FINRA rules.

Further, as an SRO, FINRA must comply with all provisions of the Exchange Act and enforce compliance by its members with the Exchange Act and its rules. Title VII of the Dodd-Frank Act⁹ amended the definition of "security" under the Exchange Act to expressly include SBS,¹⁰ in addition to establishing a new regulatory framework specific to SBS under the Exchange Act.¹¹ Therefore, FINRA is required to supervise the compliance by FINRA members with the Exchange Act, SEC rules and FINRA rules applicable to SBSs—including both requirements specifically applicable to SBS and, by virtue of the inclusion of SBS within the definition of "security," other generally applicable requirements.¹² In addition, FINRA operates regulatory programs on behalf of national securities exchanges pursuant to regulatory services agreements ("RSAs"), and such RSA exchanges are also SROs with similar regulatory obligations pursuant to Exchange Act Section 6(a).¹³

that carry no customer accounts and conduct limited off-exchange business, which has become used primarily by proprietary trading firms. See 17 C.F.R. 240.15b9-1.

⁹ Pub. L. No. 111-203, 124 Stat. 1376 (2010).

¹⁰ See Dodd-Frank Act Section 761(a)(2) (inserting "security-based swap" in the definition of "security" in Exchange Act Section 3(a)(10)); see also 15 U.S.C. 78c(a)(10).

¹¹ See Dodd-Frank Act Section 763.

¹² Effective February 6, 2022, FINRA Rule 0180 clarifies that, except as provided in Rule 0180, all FINRA rules apply to members' activities and positions with respect to SBS. Paragraphs (b) through (g) of Rule 0180 provide specified, limited exceptions from the application of certain FINRA rules to SBS, subject to the conditions set forth therein. In addition, effective April 6, 2022, FINRA Rule 4240 establishes a margin framework for uncleared SBS applicable to members that are not registered SBS dealers. See Securities Exchange Act Release No. 93914 (January 6, 2022), 87 FR 1962 (January 12, 2022) (Order Approving File No. SR-FINRA-2021-008) ("SBS Approval Order").

¹³ In its role as a party to RSAs with other SROs, FINRA performs surveillance, examination, investigative and enforcement services and brings actions as warranted to enforce SRO member compliance with applicable equity and options trading rules. Accordingly, the regulatory services

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II. FINRA's Regulatory Interest and Use of the SBS Data

As discussed above, FINRA has a statutory mandate to supervise its members' compliance with the Exchange Act, SEC rules and FINRA rules applicable to SBS, including SBS-specific rules and rules applicable to SBS as securities. Access to the SBS Data would significantly enhance FINRA's ability to detect members' wrongdoing and enforce compliance with these statutory requirements and rules, as described below.

As an initial matter, FINRA plans to develop data integrity reviews that would review the timeliness and accuracy of reporting. These reviews could also compare execution prices across transactions to identify potential outliers or misreports. These types of data integrity reviews are important to ensure the accuracy of the data that will be used to inform the cross-market and cross-product aspects of an SBS surveillance program. Additionally, access to SBS data from all reporting parties would help FINRA to develop a baseline of overall industry-wide compliance levels. FINRA provides Report Cards for member firms for existing products and could develop one for SBS reporting to assist with compliance efforts.

Access to data regarding specific SBS transactions and positions involving FINRA members would naturally improve FINRA's ability to conduct effective reviews, examinations and investigations into potential violations of rules by FINRA members with respect to their specific SBS activities. FINRA's examination program would incorporate the SBS Data of the member firms subject to examination into its examination planning and risk evaluations of these entities. While FINRA may request specific records from its members for purposes of these reviews, the ability to access the SBS Data on a systematic, comprehensive basis would bolster FINRA's ability to detect potential wrongdoing in the first instance and better understand the full scope of its members' activities, thereby furthering FINRA's mandate to enforce its rules and protect investors.

More broadly, comprehensive access to the SBS Data—including all SBS transaction and position data maintained by SBSDRs, whether directly involving FINRA members or otherwise—would provide FINRA with a more holistic view of the behavior of its member firms, including interactions between markets. As part of its statutory mandate to prevent fraudulent and manipulative acts and practices and to protect investors, FINRA conducts extensive cross-market and cross-product surveillance. FINRA always seeks to broaden the foundation of such surveillance to further develop, expand and refine FINRA's ability to track trading across a wide variety of trading venues and across securities and interrelated products.¹⁴ A holistic view

that FINRA performs on behalf of FINRA's RSA exchange customers with respect to their markets and members would produce the same benefits of market regulation and investor protection as FINRA's regulation of its own members.

¹⁴ FINRA's surveillance programs already leverage comprehensive data from the Consolidated Audit Trail ("CAT") to analyze activity across the listed and over-the-counter ("OTC") equities markets and the listed options markets. In addition to stocks and options, FINRA monitors trading activity in more than 2.5 million fixed-income securities, including corporate bonds, municipal securities, mortgage backed securities and U.S. Treasury securities for potential manipulative activity. FINRA would similarly establish a program to review trading activity, including potentially fraudulent and manipulative activity, in SBS transactions.

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across markets and products enables FINRA to provide more effective and nimble regulatory oversight in a complex and increasingly fragmented market environment.

With respect to the SBS Data specifically, FINRA notes that SBS can impact the cash securities markets, which FINRA is also required to supervise, and the cash markets can similarly impact the SBS market. SBS market participants often engage in activity related to their SBS transactions in the underlying securities markets, and manipulative conduct may occur in the underlying securities markets that affects the SBS market and vice versa. For example, market participants may enter into credit default swaps (“CDS”) while also engaging in trading involving underlying fixed income instruments such as corporate bonds or asset-backed securities, which are already part of FINRA’s surveillance programs. Similarly, market participants may engage in trading in listed or OTC equities and also enter into total return swaps (“TRS”) or other SBS referencing those equities. Furthermore, multiple market participants can potentially engage in coordinated trading activity, both within one market or product type and across markets or products, which may include both FINRA member and non-member market participants, and trading involving only non-members can affect the markets more broadly and the activities of FINRA members.

Accordingly, FINRA believes that comprehensive access to the SBS Data would provide FINRA with a more holistic view of the behavior of member firms, including interactions between markets, products and market participants, and thereby enhance FINRA’s ability to understand such activity by allowing FINRA to incorporate the SBS Data into its surveillance pattern reviews. FINRA anticipates that SBS Data would be incorporated into patterns and reviews that it uses in its surveillance programs—both with respect to the stand-alone SBS market, where FINRA would establish an SBS-specific surveillance program, and on a cross-market basis—to detect, among other things, manipulation (including intraday market manipulation); layering and spoofing; front-running; issues related to settlements of indices, index products and structured products; and insider trading. Incorporation of the SBS Data into its surveillance programs would enable FINRA to better understand the types of activities in which market participants are engaging and the reasons why that activity may be occurring, which would allow FINRA to more efficiently and effectively analyze alerts with additional context.

Having full and complete access to the SBS Data, including SBS transactions and positions involving non-members, will enhance FINRA’s ability to conduct effective surveillance, examinations and investigations. With comprehensive access, FINRA would be able to conduct more comprehensive and conclusive reviews, examinations or investigations. As an example, it would be difficult to review for front-running or pre-arranged trading without a holistic view of all market participants’ activity in SBS. Complete SBS data would enhance FINRA’s ability to understand the entire scope of potentially problematic conduct, and thus FINRA’s ability to conclude that such conduct is violative or identify evidence that establishes the conduct was not violative. FINRA notes in this regard that its surveillance programs today identify potential market abuses and violations by FINRA members, non-FINRA members that are members of an RSA exchange customer, and other entities that are not under the jurisdiction of any SRO. FINRA refers persons not under FINRA jurisdiction to the SEC or other appropriate regulator, including SROs that are members of the Intermarket Surveillance Group (“ISG”). FINRA would similarly refer potential violations involving SBS by non-members to the SEC.

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Finally, FINRA would also use the SBS Data, including SBS position information aggregated across multiple SBSDRs, for other purposes in furtherance of its statutory mandate. For example, FINRA would use information about SBS transactions and positions to enhance its monitoring of FINRA members for compliance with financial responsibility requirements, including to assess members' capital sufficiency and outstanding leverage. More broadly, the SBS Data would also allow FINRA to obtain a better understanding of risks in the market and to our members, including insight into when a member, a member together with its affiliates, or a counterparty interacting with a member or multiple members, is building a concentrated or potentially risky position that warrants further monitoring or that may impact liquidity and pricing in the market. Thus, access to SBS transaction and position data also would improve FINRA's financial exam planning and risk evaluation for firms. Comprehensive access to SBS Data would also enhance FINRA's understanding of the SBS activities of its member firms and their associated persons—including, for example, the types of counterparties, types of activities, and volume of transactions—and how those activities may evolve over time. This information will be valuable as FINRA continues to consider whether any changes to its rules may be appropriate to account for future developments in the SBS markets.¹⁵

III. FINRA's Confidentiality Framework for the SBS Data

FINRA maintains robust policies and procedures governing data privacy and data security that ensure the appropriate safeguarding of all FINRA data. These policies and procedures would apply to SBS data that FINRA may receive. FINRA's privacy policies and data security policies work in concert with one another—with the privacy policy establishing data classification guidelines, end-user practices and procedures for safeguarding data, reporting loss, and ensuring only authorized users gain access to data, and the data security policies establishing the technical security controls for systems and applications based on such classifications.

FINRA's primary privacy policy is the Information Privacy and Protection Policy ("IPPP"), which classifies data as Public, Internal or Confidential. Confidential data is then put into subcategories of restricted ("RCI"), personal ("PCI") or general confidential information ("GCI"). The technical security and end user requirements for FINRA RCI and PCI are strict, requiring limited entitlements and access, encryption solutions and other mandates designed to ensure that the data is protected. As of the date of the Confidentiality Arrangement, the SBS data would be classified as RCI. Information classified as RCI has special handling requirements reflecting the nature of the data and handling expectations required under law or agreement. SBS data access would be limited to only FINRA staff with a need to know. Additionally, prior to the date of receipt of the SBS data, FINRA will create special handling guidelines for the SBS data that will address the classification of SBS data, requirements for entitlement to SBS data, and use, handling and storage of SBS data. FINRA will also train staff regarding the special handling and protection requirements identified in the guidelines for this data.

The IPPP is updated regularly to address changes in legal requirements, new data requirements and policy guidance; and FINRA requires all staff and contractors to complete mandatory annual training and certification for the IPPP. Through the IPPP, technical security

¹⁵ See SBS Approval Order, *supra* note 12.

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initiatives and other security-based practices and reviews, FINRA meets or exceeds all federal and state legal requirements with respect to the safeguarding of data.

FINRA's information security policies set forth technical security controls and requirements for management of RCI data, in conjunction with the policies of the department deemed responsible for use of the data (for SBS data, Market Regulation and Transparency Services ("MRTS")). These policies cover access controls and entitlements, encryption at rest (i.e., storage encryption), encryption in motion (i.e., network encryption), activity logging, data masking, vulnerability management, secure configurations and the other aspects of FINRA's cyber and information security program. The Information Manager for MRTS will provide approval for the entitlement of users and systems to SBS data as set forth in the special handling guidelines. Entitlement approvals are documented and managed by a centralized information and access management system. This process for entitlement approval seeks to prevent leakage of data. The technology requirements and information security monitoring that will apply to SBS data seek to protect this data from breaches and unauthorized access as data is at rest and as it passes through FINRA's regulatory systems. FINRA's case management system and examination tracking systems will identify matters that contain SBS data, limiting non-assigned staff from review of documents and sensitive content.

Additionally, to the maximum extent practicable, FINRA will afford the Confidential Information confidentiality protections that are not less rigorous than applicable confidentiality protections that FINRA affords to Consolidated Audit Trail ("CAT") data pursuant to the CAT National Market System Plan.

IV. Potential Disclosures of SBS Data

FINRA Rule 8313 mandates that FINRA release to the public certain information related to disciplinary complaints and disciplinary decisions, actions relating to statutory disqualifications, suspensions, cancellations, expulsions, bars, and other FINRA decisions or notices relating to such disciplinary actions or disqualifications, suspensions, cancellations, expulsions, or bars (each, a "FINRA 8313 Action"). FINRA Rule 9251 provides that evidence used in an enforcement/market regulation case may be required to be produced to the respondent or the respondent's counsel (such evidence, "FINRA 9251 Evidence").

Except as otherwise permitted under the Confidentiality Arrangement, to the extent that any such FINRA 8313 Action or FINRA 9251 Evidence contains Confidential Information (as defined by the Confidentiality Arrangement), FINRA will obtain prior written consent by the Commission prior to the disclosure of that information.

Finally, as noted above, FINRA performs surveillance, enforcement, disciplinary and investigative services on behalf of FINRA's RSA exchange customers. FINRA anticipates leveraging the SBS data as part of its regulation activities for these RSA exchange customers to advance the common interests of investor protection and market regulation. However, as required by the Confidentiality Arrangement, FINRA will share Confidential Information with such RSA exchange customers only if (a) such RSA exchange itself has entered into a separate confidentiality arrangement with the Commission in connection with access to Confidential Information; and (b) that separate confidentiality arrangement specifically provides that FINRA

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may share Confidential Information with such RSA exchange pursuant to a Regulatory Services Agreement.

FINRA thanks the Commission for its consideration of this request. If you have any questions, please contact the undersigned at (202) 728-8176 (stephanie.dumont@finra.org) or Jon Kroeper, Executive Vice President, Quality of Markets, FINRA, at (240) 386-5952 (jon.kroeper@finra.org).

Very truly yours,

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