

SECURITIES AND EXCHANGE COMMISSION

This file is maintained pursuant to the Freedom of Information Act (5 U.S.C. 552). It contains a copy of each decision, order, rule or similar action of the Commission, for May 2013, with respect to which the final votes of individual Members of the Commission are required to be made available for public inspection pursuant to the provisions of that Act.

**Mary Jo White, SEC Chair
April 10, 2013 to Present**

**Kathleen L. Casey served as SEC Commissioner
July 17, 2006 until August 5, 2011***

Unless otherwise noted, each of the following individual Members of the Commission voted affirmatively upon each action of the Commission shown in the file:

MARY JO WHITE, CHAIR

KATHLEEN L. CASEY, COMMISSIONER

ELISSE B. WALTER, COMMISSIONER

LUIS A. AGUILAR, COMMISSIONER

TROY A. PAREDES, COMMISSIONER

*Kathleen L. Casey preceded Daniel M. Gallagher as SEC Commissioner. Commissioner Gallagher's term began November 2011 to Present.

(1 Document)

*Commissioner Casey
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9184 / February 7, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14237

-----	:	
In the Matter of	:	
	:	Order Fixing Time
	:	and Place of Public
the Registration Statement of	:	Hearing and Instituting
	:	Proceedings Pursuant
Sahas Technologies LLC	:	to Section 8(d) of the
3 East 3 rd Street	:	Securities Act of 1933
Apt. 27	:	
New York, NY 10003	:	
-----	:	

I.

The Commission's public official files disclose that:

On January 20, 2011, Sahas Technologies LLC ("Sahas"), with offices located at 3 East 3rd Street, Apartment 27, New York, NY, filed a registration statement (and attached exhibit, collectively "registration statement") with the Commission. Sahas's registration statement states that it plans to issue 75,000 shares of common stock at \$1 per share, for a total of \$75,000. Under the provisions of Section 8(a) of the Securities Act of 1933 ("Securities Act"), the registration statement will become effective by lapse of time on Wednesday, February 9, 2011, the twentieth day after it was filed.

II.

The Division of Enforcement alleges, as set forth in the Statement of Matters of the Division of Enforcement attached hereto and incorporated herein by reference, that the registration statement omits to state certain material facts as required by Commission forms and regulations governing the offer and sale of securities to the public. In particular, the Division of Enforcement alleges that Sahas's registration statement is materially deficient in that it fails to include audited financial statements meeting the requirements of Regulation S-X and fails to include numerous items required by Regulation S-K: Items 303 (management's discussion and analysis); 202 (description of securities); 501 (outside front cover page of a prospectus); 503(c) (risk factors); 504 (use of proceeds); and 601(exhibits).

III.

The Commission, having considered the aforesaid, deems it appropriate and in the public interest that public proceedings pursuant to Section 8(d) of the Securities Act be instituted with respect to the registration statement to determine whether the allegations of the Division of Enforcement, as set forth in the Statement of Matters attached hereto and incorporated herein by reference, are true; to afford Respondent with an opportunity to establish any defenses to these allegations; and to determine whether a stop order should issue suspending the effectiveness of the Sahas registration statement referred to herein. Accordingly,

IT IS ORDERED that public proceedings be and hereby are instituted under Section 8(d) of the Securities Act, such hearing to be commenced at 10:30 a.m. on February 22, 2011, at the Commission's offices at 100 F Street N.E., Washington, DC 20549, and to continue thereafter at such time and place as the hearing officer may determine.

IT IS FURTHER ORDERED that these proceedings shall be presided over by an Administrative Law Judge to be designated by further order, who is authorized to perform all the duties of an Administrative Law Judge as set forth in the Commission's Rules of Practice or as otherwise provided by law.

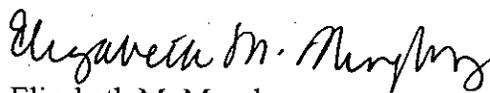
IT IS FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, pursuant to Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

If Respondent fails to file the directed answer, or fails to appear at a hearing after being duly notified, Respondent may be deemed in default and the proceedings may be determined against Respondent upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 221(f) and 201.310. This Order shall be served forthwith upon Respondent personally.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.



Elizabeth M. Murphy
Secretary

SECURITIES AND EXCHANGE COMMISSION

This file is maintained pursuant to the Freedom of Information Act (5 U.S.C. 552). It contains a copy of each decision, order, rule or similar action of the Commission, for May 2013, with respect to which the final votes of individual Members of the Commission are required to be made available for public inspection pursuant to the provisions of that Act.

**Elisse B. Walter, served as SEC Chairman
December 14, 2012 to April 10, 2013**

Unless otherwise noted, each of the following individual Members of the Commission voted affirmatively upon each action of the Commission shown in the file:

ELISSE B. WALTER, COMMISSIONER

LUIS A. AGUILAR, COMMISSIONER

TROY A. PAREDES, COMMISSIONER

DANIEL M. GALLAGHER, COMMISSIONER

(11 documents)

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

May 24, 2012

IN THE MATTER OF INDOCAN
RESOURCES, INC.

File No. 500-1

ORDER OF SUSPENSION
OF TRADING

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Indocan Resources, Inc. ("IDCN") because of questions concerning the adequacy of publicly available information about the company.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company.

THEREFORE, IT IS ORDERED, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 9:30 a.m. EDT, on May 24, 2012 through 11:59 p.m. EDT, on June 7, 2012.

By the Commission.

Elizabeth M. Murphy
Elizabeth M. Murphy
Secretary

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 69492 / May 1, 2013

INVESTMENT ADVISERS ACT OF 1940
Release No. 3598 / May 1, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15089

In the Matter of

IRWIN LIPKIN,

Respondent.

**ORDER MAKING FINDINGS AND
IMPOSING REMEDIAL SANCTIONS
PURSUANT TO SECTION 15(b) OF THE
SECURITIES EXCHANGE ACT OF 1934
AND SECTION 203(f) OF THE
INVESTMENT ADVISERS ACT OF 1940**

I.

On November 9, 2012, the Securities and Exchange Commission ("Commission") instituted public administrative proceedings pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act"), and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Irwin Lipkin ("Lipkin" or "Respondent").

II.

In response to these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, Respondent consents to the Commission's jurisdiction over him and the subject matter of these proceedings and to the entry of this Order Making Findings and Imposing Remedial Sanctions Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, as set forth below.

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 69483 / May 1, 2013

INVESTMENT ADVISERS ACT OF 1940
Release No. 3597 / May 1, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15309

In the Matter of

MARC DUDA,

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 15(b)(6) OF
THE SECURITIES EXCHANGE ACT OF
1934 AND SECTION 203(f) OF THE
INVESTMENT ADVISERS ACT OF 1940,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Marc Duda ("Duda" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, Respondent consents to the Commission's jurisdiction over him and the subject matter of these proceedings and to the entry of this Order

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*Commissioner Gallagher
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 69485 / May 1, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15311

In the Matter of

KENNETH E. MAHAFFY,
JR.,

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 15(b) OF THE
SECURITIES EXCHANGE ACT OF 1934,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Kenneth E. Mahaffy, Jr. ("Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions

("Order"), as set forth below.

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 69533 / May 8, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15319

In the Matter of

**CoreCare Systems, Inc.,
Forticell Bioscience, Inc.,
Michelex Corporation, and
Rx for Africa, Inc.,**

Respondents.

**ORDER INSTITUTING
ADMINISTRATIVE
PROCEEDINGS AND NOTICE
OF HEARING PURSUANT TO
SECTION 12(j) OF THE
SECURITIES EXCHANGE ACT
OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against the Respondents named in the caption.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. CoreCare Systems, Inc. ("CRCS")¹ (CIK No. 1067937) is a void Delaware corporation located in Philadelphia, Pennsylvania with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). CRCS is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-KSB for the period ended June 30, 2005. As of May 3, 2013, the common stock of CRCS was quoted on OTC Link (formerly "Pink Sheets") operated by OTC Markets Group Inc. ("OTC Link"), had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

¹The short form of each issuer's name is also its stock symbol.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

May 8, 2013

In the Matter of

CoreCare Systems, Inc.,
Forticell Bioscience, Inc.,
Michelex Corporation, and
Rx for Africa, Inc.

File No. 500-1

ORDER OF SUSPENSION OF
TRADING

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of CoreCare Systems, Inc. because it has not filed any periodic reports since the period ended June 30, 2005.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Forticell Bioscience, Inc. because it has not filed any periodic reports since the period ended September 30, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Michelex Corporation because it has not filed any periodic reports since the period ended September 30, 2006.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Rx for Africa, Inc. because it has not filed any periodic reports since the period ended March 31, 2007.

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3611 / May 23, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15331

In the Matter of

**INSTITUTIONAL
SHAREHOLDER
SERVICES INC.,**

Respondent.

**ORDER INSTITUTING ADMINISTRATIVE
AND CEASE-AND-DESIST PROCEEDINGS
PURSUANT TO SECTIONS 203(e) and
203(k) OF THE INVESTMENT ADVISERS
ACT OF 1940, MAKING FINDINGS, AND
IMPOSING REMEDIAL SANCTIONS AND
A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act") against Institutional Shareholder Services Inc. ("ISS" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

¹ The findings herein are made pursuant to Respondent's Offer and are not binding on any other person or entity in this or any other proceeding.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 69637 / May 24, 2013

INVESTMENT ADVISERS ACT OF 1940
Release No. 3612 / May 24, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15068

In the Matter of

LARRY MICHAEL
PARRISH,

Respondent.

ORDER MAKING FINDINGS AND
IMPOSING REMEDIAL SANCTIONS
PURSUANT TO SECTION 15(b) OF THE
SECURITIES EXCHANGE ACT OF 1934
AND SECTION 203(f) OF THE
INVESTMENT ADVISERS ACT OF 1940

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest to accept the offer of settlement of Larry Michael Parrish ("Respondent" or "Parrish") pursuant to Rule 240(a) of the Rules of Practice of the Commission, 17 C.F.R. § 201.240(a), for the purpose of settlement of the proceedings instituted against Parrish on October 16, 2012 pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act").

II.

Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Making Findings and Imposing Remedial Sanctions Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940 ("Order"), as set forth below.

*Commissioner Aguilar
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 69652 / May 29, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15337

In the Matter of

INTEGRITY BANCSHARES, INC.

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS,
MAKING FINDINGS, AND REVOKING
REGISTRATION OF SECURITIES
PURSUANT TO SECTION 12(j) OF THE
SECURITIES EXCHANGE ACT OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act"), against Integrity Bancshares, Inc. ("Integrity" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, Respondent consents to the entry of this Order Instituting Administrative Proceedings, Making Findings, and Revoking Registration of Securities Pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

A. Integrity Bancshares, Inc., was a Georgia corporation with its principal place of business in Alpharetta, Georgia. Integrity formerly operated as the holding company for now-

UNITED STATES OF AMERICA
Before The
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 69654 / May 29, 2013

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3461 / May 29, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15338

----- X
In the Matter of : **ORDER INSTITUTING**
 : **CEASE-AND-DESIST**
 : **PROCEEDINGS PURSUANT**
 : **TO SECTION 21C OF THE**
 : **SECURITIES EXCHANGE**
 : **ACT OF 1934, MAKING**
 Respondent. : **FINDINGS, AND IMPOSING**
 : **A CEASE-AND-DESIST**
 : **ORDER**
----- X

I.

The Securities and Exchange Commission (the "Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 (the "Exchange Act"), against Total, S.A. ("Total" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, Respondent consents to the Commission's jurisdiction over it and the subject matter of these proceedings and to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Exchange Act, Making Findings, and Imposing a Cease-and-Desist Order ("Order"), as set forth below.

*Commissioner Gallagher
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3614 / May 31, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15345

In the Matter of

MING SIU,

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 203(f) OF THE
INVESTMENT ADVISERS ACT OF 1940,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Ming Siu ("Siu" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Siu is a resident of Hayward, California. From November 2007 to May 2008, he was employed by an unregistered investment adviser.

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SECURITIES AND EXCHANGE COMMISSION

This file is maintained pursuant to the Freedom of Information Act (5 U.S.C. 552). It contains a copy of each decision, order, rule or similar action of the Commission, for May 2013, with respect to which the final votes of individual Members of the Commission are required to be made available for public inspection pursuant to the provisions of that Act.

Mary Jo White, SEC Chair
April 10, 2013 to Present

Elisse B. Walter, served as SEC Chairman
December 14, 2012 to April 10, 2013

Unless otherwise noted, each of the following individual Members of the Commission voted affirmatively upon each action of the Commission shown in the file:

MARY JO WHITE, CHAIR

ELISSE B. WALTER, COMMISSIONER

LUIS A. AGUILAR, COMMISSIONER

TROY A. PAREDES, COMMISSIONER

DANIEL M. GALLAGHER, COMMISSIONER

(62 Documents)

*Commissioner Gallagher
not participating*

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Rel. No. 9189 / February 17, 2011

Admin. Proc. File No. 3-14237

In the Matter of
the Registration Statement of

Sahas Technologies LLC

ORDER DISMISSING
PROCEEDINGS

On February 7, 2011, we issued an Order Fixing Time and Place of Public Hearing and Instituting Proceedings ("OIP") against Sahas Technologies LLC ("Sahas") under Section 8(d) of the Securities Act of 1933.¹ As stated in the OIP, Sahas filed a registration statement (and an exhibit attached thereto, collectively the "registration statement") on January 20, 2011. The registration statement states that Sahas plans to issue 75,000 shares of common stock at \$1 per share, for a total offering of \$75,000. The OIP alleges, however, that Sahas' registration statement is materially deficient because it fails to include audited financial statements meeting the requirements of Regulation S-X. The OIP also alleges that the registration statement is materially deficient because it fails to include the following items required by Regulation S-K: Items 303 (management's discussion and analysis); 202 (description of securities); 501 (outside front cover page of a prospectus); 503(c) (risk factors); 504 (use of proceeds); and 601 (exhibits).

The OIP further ordered that public proceedings be instituted to determine whether the allegations with respect to the registration statement are true, whether Sahas has any defenses to those allegations, and whether the Commission should issue a stop order suspending the effectiveness of Sahas' registration statement. The OIP ordered that such proceedings be commenced on February 22, 2011, that a law judge preside over those proceedings, and that Sahas file an answer to the allegations in the OIP within ten days after service of the OIP.

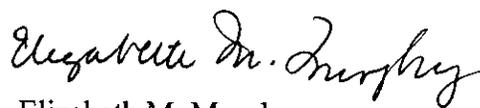
On February 9, 2011, the Division of Enforcement (the "Division") moved to dismiss the OIP and related proceedings against Sahas. The Division states that Sahas filed an application, in proper form, on February 8, 2011 to withdraw the registration statement before its effective date. Securities Act Rule 477 provides that such an application to withdraw a registration statement is deemed granted at the time of filing unless the Commission, within fifteen calendar days after the

¹ 15 U.S.C. § 77h(d).

application is filed, notifies the applicant that it will not be granted.² The Division explains that the Division of Corporation Finance has informed the Division of Enforcement that it does not object to the grant of this motion "because the application to withdraw the Registration is in proper form and has been marked as accepted." The Division adds that Sahas' chief executive officer telephoned the Division on February 8, 2011 to advise the Division that Sahas had filed an application to withdraw the registration statement, and Sahas has not filed a response to the Division's motion. The Division, therefore, requests that "the Commission not exercise its authority to reject the application, but instead, dismiss the proceedings as moot."

Accordingly, it is ORDERED that the proceeding with respect to Sahas Technologies LLC be, and it hereby is, dismissed.

By the Commission.


Elizabeth M. Murphy
Secretary

²

17 C.F.R. § 230.477.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

January 27, 2012

IN THE MATTER OF
ONYX SERVICE & SOLUTIONS, INC.

File No. 500-1

ORDER OF SUSPENSION
OF TRADING

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Onyx Service & Solutions, Inc. ("ONYX") because of questions regarding the accuracy of assertions by ONYX in press releases concerning, among other things, the company's business projects and prospects.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company.

THEREFORE, IT IS ORDERED, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 9:30 a.m. EST, on January 27, 2012 through 11:59 p.m. EST, on February 9, 2012.

By the Commission.

Elizabeth M. Murphy
Elizabeth M. Murphy
Secretary

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

September 26, 2012

IN THE MATTER OF

TITAN RESOURCES INTERNATIONAL, CORP. :

ORDER OF SUSPENSION
OF TRADING

File No. 500-1

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Titan Resources International, Corp. ("Titan"). Titan is a Wyoming corporation purportedly based in Ontario, Canada. Questions have arisen concerning the adequacy and accuracy of press releases and other public statements concerning Titan's business operations and financial condition.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of Titan.

THEREFORE, IT IS ORDERED, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 9:30 a.m. EDT, on September 26, 2012 through 11:59 p.m. EDT, on October 9, 2012.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9366/ October 29, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-15083

In the Matter of

the Registration Statement of

Caribbean Pacific Marketing, Inc.,
2295 Corporate Blvd., NW,
Suite 131,
Boca Raton, FL 33431.

ORDER FIXING TIME AND PLACE
OF PUBLIC HEARING AND
INSTITUTING PROCEEDINGS
PURSUANT TO SECTION 8(d) OF
THE SECURITIES ACT OF 1933

I.

The Commission's public official files disclose that:

On August 24, 2012, Caribbean Pacific Marketing, Inc. ("Respondent") filed an amended Form S-1 registration statement (the "Registration Statement") with the Commission that became effective on August 29, 2012, registering up to 1,000,000 shares of common stock for sale to the public by Respondent.

II.

The Division of Enforcement alleges, as set forth in the Statement of Matters of the Division of Enforcement attached hereto and incorporated herein by reference, that the Registration Statement is materially misleading and deficient as it fails to disclose that William J. Reilly, a disbarred attorney subject to an injunction, is a de facto executive officer and control person of the Respondent. The Registration Statement failed to include any information about Reilly's position with Respondent and his business experience.

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III.

The Commission, having considered the aforesaid, deems it appropriate and in the public interest that public proceedings pursuant to Section 8(d) of the Securities Act be instituted with respect to the Registration Statement to determine whether the allegations of the Division of Enforcement, as set forth in the Statement of Matters attached hereto and incorporated herein by reference, are true; to afford the Respondent with an opportunity to establish any defenses to these allegations; and to determine whether a stop order should issue suspending the effectiveness of the Registration Statement referred to herein.

Accordingly, IT IS ORDERED that public proceedings be and hereby are instituted under Section 8(d) of the Securities Act, such hearing to be commenced at 9:30 a.m. on November 15, 2012, at the Commission's offices at 100 F Street N.E., Washington, DC 20549, and to continue thereafter at such time and place as the hearing officer may determine.

IT IS FURTHER ORDERED that these proceedings shall be presided over by an Administrative Law Judge to be designated by further order, who is authorized to perform all the duties of an Administrative Law Judge as set forth in the Commission's Rules of Practice or as otherwise provided by law.

IT IS FURTHER ORDERED that the Respondent shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, pursuant to Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220. If the Respondent fails to file the directed answer, or fails to appear at a hearing after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against the Respondent upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 221(f) and 201.310. This Order shall be served forthwith upon the Respondent personally.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 60 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice. In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

October 29, 2012

In the Matter of

the Registration Statement of

Caribbean Pacific Marketing, Inc.,
2295 NW Corporate Blvd., NW,
Suite 131,
Boca Raton, FL 33431.

Statement of Matters of the
Division of Enforcement to be
Considered at a Public Hearing
Pursuant to Section 8(d) of the
Securities Act of 1933

I.

A. On August 24, 2012, Caribbean Pacific Marketing, Inc. ("Respondent") filed an amended Form S-1 registration statement Respondent (the "Registration Statement") with the Commission that became effective on August 29, 2012, registering up to 1,000,000 shares of common stock for sale to the public by Respondent. The Division Enforcement alleges that the Registration Statement is materially misleading and deficient as it fails to disclose a de facto executive officer and control person of the Respondent.

B. The following are the matters to be considered at a hearing to commence at 9:30 a.m. on November 15, 2012 at the Commission's offices at 100 F Street, NE, Washington, DC 20549, pursuant to Section 8(d) of the Securities Act of 1933 to determine whether a stop order should be issued suspending the effectiveness of the Registration Statement.

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II.

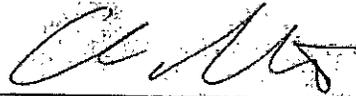
A. Respondent filed a Form S-1 registration statement with the Commission on March 9, 2012, which it amended several times between March and August 24, 2012. The Registration Statement was declared effective on August 29, 2012.

B. The Registration Statement represented that Respondent sought to raise \$150,000 through a self-underwritten offer and sale of up to 1 million shares of common stock at \$0.15 per share, to conduct its business operations. The Registration Statement lists the Respondent's president and its principal financial officer and includes background information for both officers.

C. The Registration Statement is materially misleading and deficient as it fails to disclose that William J. Reilly ("Reilly"), a disbarred attorney subject to an injunction, is a de facto executive officer and control person of the Respondent. The Registration Statement failed to include any information about Reilly's position with Respondent and his business experience. A Form S-1 registration statement must include the identification of all officers and directors of the registrant, including their names, ages, positions and business experience. See Regulation S-K, Part I, Item 401.

D. Accordingly, the Division of Enforcement believes that a stop order should be issued suspending the effectiveness of the Respondent's Registration Statement with such stop order.

Date: October 29, 2012



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Division of Enforcement
United States Securities
and Exchange Commission
Miami Regional Office
801 Brickell Ave, Suite 1800
Miami, FL 33131

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

November 15, 2012

IN THE MATTER OF

American Realty Funds Corporation

File No. 500-1

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ORDER OF SUSPENSION
OF TRADING

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of American Realty Funds Corporation ("American Realty") because of questions concerning the accuracy of publicly disseminated information in the company's public filings and financial statements. American Realty is a Tennessee corporation based in Bay City, Michigan. Its stock is quoted on the OTCBB under the symbol ANFDE.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company.

THEREFORE, IT IS ORDERED, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 9:30 a.m. EST, on November 15, 2012 through 11:59 p.m. EST, on November 29, 2012.

By the Commission.

Kevin M. O'Neill

Kevin M. O'Neill
Deputy Secretary

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period from 9:30 a.m. EST, on December 6, 2012 through 11:59 p.m. EST, on December 19, 2012.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

February 19, 2013

IN THE MATTER OF
VITAMINSPICE INC.

ORDER OF SUSPENSION
OF TRADING

File No. 500-1

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of VitaminSpice Inc. ("VitaminSpice") because of questions regarding the adequacy of current financial information available about VitaminSpice; and the accuracy of assertions by VitaminSpice, and by others, in press releases to investors, in periodic financial filings and in internet promotions concerning, among other things, the company's revenues and operations.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company.

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THEREFORE, IT IS ORDERED, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 9:30 a.m. EST, on February 19, 2013 through 11:59 p.m. EST, on March 4, 2013.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240, 242, and 249

Release No. 34-69490; File Nos. S7-02-13; S7-34-10; S7-40-11

RIN 3235-AL25

Cross-Border Security-Based Swap Activities; Re-Proposal of Regulation SBSR and Certain Rules and Forms Relating to the Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rules; proposed interpretations.

SUMMARY: The Securities and Exchange Commission (“SEC” or “Commission”) is publishing for public comment proposed rules and interpretive guidance to address the application of the provisions of the Securities Exchange Act of 1934, as amended (“Exchange Act”), that were added by Subtitle B of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”), to cross-border security-based swap activities. Our proposed rules and interpretive guidance address the application of Subtitle B of Title VII of the Dodd-Frank Act with respect to each of the major registration categories covered by Title VII relating to market intermediaries, participants, and infrastructures for security-based swaps, and certain transaction-related requirements under Title VII in connection with reporting and dissemination, clearing, and trade execution for security-based swaps. In this connection, we are re-proposing Regulation SBSR and certain rules and forms relating to the registration of security-based swap dealers and major security-based swap participants. The proposal also contains a proposed rule providing an exception from the aggregation requirement, in the context of the security-based swap dealer definition, for affiliated groups with a registered security-based swap dealer. Moreover, the proposal addresses the sharing of information and preservation of

confidentiality with respect to data collected and maintained by SDRs. In addition, the Commission is proposing rules and interpretive guidance addressing the policy and procedural framework under which the Commission would consider permitting compliance with comparable regulatory requirements in a foreign jurisdiction to substitute for compliance with requirements of the Exchange Act, and the rules and regulations thereunder, relating to security-based swaps (i.e., "substituted compliance"). Finally, the Commission is setting forth our view of the scope of our authority, with respect to enforcement proceedings, under Section 929P of the Dodd-Frank Act.

DATES: Submit comments on or before [INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/proposed.shtml>);
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-02-13, and File Numbers S7-34-10 (Regulation SBSR) and/or S7-40-11 (registration of security-based swap dealers and major security-based swap participants), as applicable, on the subject line; or
- Use the Federal eRulemaking Portal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-02-13, and File Numbers S7-34-10 (Regulation SBSR) and/or S7-40-11 (registration of security-based swap dealers and major security-based swap participants), as applicable. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/proposed.shtml>). Comments also are available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Matthew A. Daigler, Senior Special Counsel, at 202-551-5578, Wenchi Hu, Senior Special Counsel, at 202-551-6268, Richard E. Grant, Special Counsel, at 202-551-5914, or Richard Gabbert, Special Counsel, at 202-551-7814, Office of Derivatives Policy, Division of Trading and Markets, regarding security-based swap dealers and major security-based swap participants; Jeffrey Mooney, Assistant Director, Matthew Landon, Senior Special Counsel, or Stephanie Park, Special Counsel, Office of Clearance and Settlement, Division of Trading and Markets, at 202-551-5710, regarding security-based swap clearing agencies, security-based swap data repositories, and the security-based swap clearing requirement; David Michehl, Senior Counsel, Office of Market Supervision, Division of Trading and Markets, at 202-551-5627, regarding security-based swap reporting; Leah Mesfin, Special Counsel, at 202-551-5655, or Michael P. Bradley, Special Counsel, at 202-551-5594, Office of Market Supervision, Division of Trading and Markets, regarding the trade

execution requirement and swap execution facilities; Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-7010.

SUPPLEMENTARY INFORMATION: The Commission is proposing new rules and interpretive guidance under the Exchange Act relating to the application of Subtitle B of Title VII of the Dodd-Frank Act to cross-border activities and re-proposing Regulation SBSR and certain rules and forms relating to the registration of security-based swap dealers and major security-based swap participants.

The Commission is proposing the following rules under the Exchange Act: Rule 0-13 (Substituted Compliance Request Procedure); Rule 3a67-10 (Foreign Major Security-Based Swap Participants); Rule 3a71-3 (Cross-Border Security-Based Swap Dealing Activity); Rule 3a71-4 (Exception from Aggregation for Affiliated Groups with Registered Security-Based Swap Dealers); Rule 3a71-5 (Substituted Compliance for Foreign Security-Based Swap Dealers); Rule 3Ca-3 (Application of the Mandatory Clearing Requirement to Cross-Border Security-Based Swap Transactions); Rule 3Ch-1 (Application of the Mandatory Trade Execution Requirement to Cross-Border Security-Based Swap Transactions); Rule 3Ch-2 (Substituted Compliance for Mandatory Trade Execution); Rule 13n-4(d) (Exemption from the Indemnification Requirement); Rule 13n-12 (Exemption from Requirements Governing Security-Based Swap Data Repositories for Certain Non-U.S. Persons); Rule 18a-4(e) (Segregation Requirements for Foreign Security-Based Swap Dealers); and Rule 18a-4(f) (Segregation Requirements for Foreign Major Security-Based Swap Participants). The Commission also is re-proposing the following rules and forms: 17 CFR §§ 242.900 – 242.911 (Regulation SBSR) (RIN 3235-AK80) and 17 CFR §§ 249.1600 (Form SBSE), 249.1600a (Form SBSE-A), and 249.1600b (Form SBSE-BD) (RIN 3235-AL05).

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I. Background

The global nature of the security-based swap market highlights the critical importance of addressing the application of the Title VII of the Dodd-Frank Act¹ (“Title VII”) to cross-border activities.² The Commission has received numerous inquiries and comments from market participants, foreign regulators, and other interested parties concerning how Title VII and the Commission’s implementing regulations thereunder will apply to the cross-border activities of U.S. and non-U.S. market participants. To respond to these inquiries and comments, the Commission is providing our preliminary views on the application of Title VII to cross-border security-based swap activities³ and non-U.S. persons that act in capacities regulated under the Dodd-Frank Act in the proposed rules and interpretations discussed below.

A. The Dodd-Frank Wall Street Reform and Consumer Protection Act

The Dodd-Frank Act was enacted, among other reasons, to promote the financial stability of the United States by improving accountability and transparency in the financial system.⁴ The

¹ The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

² Unless otherwise indicated, references to Title VII of the Dodd-Frank Act in this release are to Subtitle B of Title VII.

³ Generally, in this release, the application of Title VII to “cross-border activities” refers to the application of Title VII to a security-based swap transaction involving (i) a U.S. person and a non-U.S. person, (ii) two non-U.S. persons where one or both are located within the United States, or (iii) two non-U.S. persons conducting a security-based swap transaction that otherwise occurs in relevant part within the United States, including by negotiating the terms of the security-based swap transaction within the United States or where performance of one or both counterparties under the security-based swap is guaranteed by a U.S. person.

⁴ The Dodd-Frank Act was enacted “[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end ‘too big to fail’, to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes.” Pub. L. No. 111-203, Preamble.

2008 financial crisis highlighted significant issues in the over-the-counter (“OTC”) derivatives markets, which have experienced dramatic growth in recent years⁵ and are capable of affecting significant sectors of the U.S. economy.⁶ Title VII of the Dodd-Frank Act provides for a comprehensive new regulatory framework for swaps and security-based swaps, including by: (i) providing for the registration and comprehensive regulation of swap dealers, security-based swap dealers, major swap participants, and major security-based swap participants; (ii) imposing clearing and trade execution requirements on swaps and security-based swaps, subject to certain exceptions; (iii) creating recordkeeping and real-time reporting regimes and public dissemination; and (iv) enhancing the rulemaking and enforcement authorities of the Commission and the Commodity Futures Trading Commission (“CFTC”).⁷

Specifically, the Dodd-Frank Act provides that the CFTC will regulate “swaps,” the Commission will regulate “security-based swaps,”⁸ and both the CFTC and the Commission

⁵ From their beginnings in the early 1980s, the notional value of these markets grew to approximately \$650 trillion globally by the end of 2011. See Bank for International Settlements, Statistical release: OTC derivatives statistics at end-December 2011 (May 2012) at 1, available at: http://www.bis.org/publ/otc_hy1205.pdf.

⁶ See Section II.A.6(b), *infra*.

⁷ See Pub. L. 111-203 §§ 701-774.

⁸ The definition of “security” in both the Exchange Act and the Securities Act of 1933 (“Securities Act”), 15 U.S.C. 77a *et seq.*, was amended by the Dodd-Frank Act to include security-based swaps. Pub. L. 111-203, Section 761(a)(2) (inserting “security-based swap” after “security future” in Section 3(a)(10) of the Exchange Act, 15 U.S.C. 78c(a)(10)) and Section 768(a)(1) (inserting “security-based swap” after “security future” in Section 2(a)(1) of the Securities Act, 15 U.S.C. 77b(a)(1)). The revision of the Exchange Act’s definition of “security” raises, among other things, issues related to the definition of “broker” in Section 3(a)(4) of the Exchange Act, 15 U.S.C. 78c(a)(4), the definition of “dealer” in Section 3(a)(5) of the Exchange Act, 15 U.S.C. 78c(a)(5), the exchange registration requirements in Sections 5 and 6 of the Exchange Act, 15 U.S.C. 78e and 78f, respectively, and the requirement in Section 12 of the Exchange Act that securities be registered before a transaction is effected on a national securities exchange. See 15 U.S.C. 78l(a). The Securities Act requires that any offer and sale of a security

(together, the “Commissions”) will regulate “mixed swaps.”⁹ Title VII also amends the Exchange Act to include many specific provisions governing security-based swaps that could

must either be registered under the Securities Act (see Section 5 of the Securities Act, 15 U.S.C. 77e) or made pursuant to an exemption from registration (see, e.g., Sections 3 and 4 of the Securities Act, 15 U.S.C. 77c and 77d, respectively). In addition, the Securities Act requires that any offer to sell, offer to buy or purchase or sell a security-based swap to any person who is not an eligible contract participant (“ECP”) must be registered under the Securities Act. See Section 5(e) of the Securities Act, 15 U.S.C. 77e(e). Because of the statutory language of Section 5(e), exemptions from this requirement in Sections 3 and 4 of the Securities Act are not available. This release does not address the requirements under Section 5 of the Securities Act.

The Commission adopted interim final rules that provide exemptions from certain provisions of the Securities Act, the Exchange Act, and the Trust Indenture Act of 1939 (“Trust Indenture Act”), 15 U.S.C. 77aaa et seq., for those security-based swaps that prior to July 16, 2011 were “security-based swap agreements” and are defined as “securities” under the Securities Act and the Exchange Act as of July 16, 2011 due solely to the provisions of Title VII of the Dodd-Frank Act. See Exemptions for Security-Based Swaps, Securities Act Release No. 9231 (July 1, 2011), 76 FR 40605 (July 11, 2011); see also Extension of Exemptions for Security-Based Swaps, Securities Act Release No. 9383 (Jan. 29, 2013), 78 FR 7654 (Feb. 4, 2013). The Commission also issued temporary exemptions under the Exchange Act regarding certain issues raised by the inclusion of security-based swaps in the definition of “security.” See Order Extending Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with the Revision of the Definition of “Security” to Encompass Security-Based Swaps, and Request for Comment, Exchange Act Release No. 68864 (Feb. 7, 2013), 78 FR 10218 (Feb. 13, 2013); see also Order Granting Temporary Exemptions Under the Securities Exchange Act of 1934 in Connection With the Pending Revision of the Definition of “Security” To Encompass Security-Based Swaps, and Request for Comment, Exchange Act Release No. 64795 (July 1, 2011) 76 FR 39927 (July 7, 2011).

⁹ In addition, the Dodd-Frank Act adds to the Commodity Exchange Act (“CEA”) and Exchange Act definitions of the terms “swap dealer,” “security-based swap dealer,” “major swap participant,” and “major security-based swap participant,” and amends the CEA definition of the term “eligible contract participant.” These terms are defined in Sections 721 and 761 of the Dodd-Frank Act and, with respect to the term “eligible contract participant,” in Section 1a(18) of the CEA, 7 U.S.C. 1a(18), as redesignated and amended by Section 721 of the Dodd-Frank Act. Section 712(d)(1) of the Dodd-Frank Act provides that the CFTC and the Commission, in consultation with the Board of Governors of the Federal Reserve System, shall jointly further define the terms “swap,” “security-based swap,” “swap dealer,” “security-based swap dealer,” “major swap participant,” “major security-based swap participant,” “eligible contract participant,” and “security-based swap agreement.” Further, Section 721(c) of the Dodd-Frank Act

apply to cross-border security-based swap transactions and to non-U.S. persons who act in capacities regulated under the Dodd-Frank Act.¹⁰ These provisions primarily relate to Commission oversight of security-based swap dealers,¹¹ major security-based swap

requires the CFTC to adopt a rule to further define the terms “swap,” “swap dealer,” “major swap participant,” and “eligible contract participant,” and Section 761(b)(3) of the Dodd-Frank Act permits the Commission to adopt a rule to further define the terms “security-based swap,” “security-based swap dealer,” “major security-based swap participant,” and “eligible contract participant,” with regard to security-based swaps, for the purpose of including transactions and entities that have been structured to evade Title VII or the amendments made by Title VII.

The Commission and the CFTC jointly adopted rules and interpretive guidance further defining the terms “swap,” “security-based swap,” and “security-based swap agreement,” and regulations regarding mixed swaps. See Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, Exchange Act Release No. 67453 (July 18, 2012), 77 FR 48208 (Aug. 13, 2012) (“Product Definitions Adopting Release”). The Commission and the CFTC also jointly adopted rules further defining the terms “swap dealer,” “security-based swap dealer,” “major swap participant,” “major security-based swap participant,” and “eligible contract participant.” See Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant,” Exchange Act Release No. 66868 (Apr. 27, 2012), 77 FR 30596 (May 23, 2012) (“Intermediary Definitions Adopting Release”).

¹⁰ The provisions of the Exchange Act relating to security-based swaps that were enacted by Title VII also are referred to herein as “Title VII requirements” or “requirements in Title VII.”

¹¹ See Section 764(a) of the Dodd-Frank Act. The Commission, jointly with the CFTC, adopted rules further defining the term “security-based swap dealer.” See Intermediary Definitions Adopting Release, 77 FR 30596.

The Commission has proposed rules regarding the registration and substantive requirements for security-based swap dealers and major security-based swap participants. See Proposed Rules Governing Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker-Dealers, Exchange Act Release No. 68071 (Oct. 18, 2012) 77 FR 70214 (Nov. 23, 2012) (“Capital, Margin, and Segregation Proposing Release”); Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants, Exchange Act Release No. 65543 (Oct. 12, 2011) (RIN 3235-AL05), 76 FR 65784 (Oct. 24, 2011) (“Registration Proposing Release”); Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants, Exchange

participants,¹² security-based swap data repositories (“SDRs”),¹³ security-based swap clearing agencies,¹⁴ security-based swap execution facilities (“SB SEFs”),¹⁵ and mandatory security-based swap reporting and dissemination,¹⁶ clearing,¹⁷ and trade execution.¹⁸

Act Release No. 64766 (June 29, 2011), 76 FR 42396 (July 18, 2011) (“External Business Conduct Standards Proposing Release”); and Trade Acknowledgment and Verification of Security-Based Swap Transactions, Exchange Act Release No. 63727 (Jan. 14, 2011), 76 FR 3859 (Jan. 21, 2011) (“Trade Acknowledgment Proposing Release”). The Commission has not yet proposed rules governing the recordkeeping, reporting, and notification requirements for security-based swap dealers and major security-based swap dealers pursuant to Section 15F(f) of the Exchange Act, 15 U.S.C. 78o-10(f), as added by Section 764(a) of the Dodd-Frank Act.

¹² See Section 764(a) of the Dodd-Frank Act. The Commission, jointly with the CFTC, adopted rules further defining the term “major security-based swap participant.” See Intermediary Definitions Adopting Release, 77 FR 30596. In a number of releases, the Commission also has proposed rules regarding the registration and substantive requirements for major security-based swap participants. See note 11, *supra*.

¹³ See Section 763(i) of the Dodd-Frank Act. The Commission has proposed rules regarding the registration and regulation of SDRs. See Security-Based Swap Data Repository Registration, Duties, and Core Principles, Exchange Act Release No. 63347 (Nov. 19, 2010), 75 FR 77306 (Dec. 10, 2010), corrected at 75 FR 79320 (Dec. 20, 2010) and 76 FR 2287 (Jan. 13, 2011) (“SDR Proposing Release”).

¹⁴ See Section 763(b) of the Dodd-Frank Act. The Commission adopted rules regarding the standards for risk management practices and operations of registered clearing agencies, including security-based swap clearing agencies. See Clearing Agency Standards, Exchange Act Release No. 68080 (Oct. 22, 2012), 77 FR 66220 (Nov. 2, 2012) (“Clearing Agency Standards Adopting Release”).

¹⁵ See Section 763(c) of the Dodd-Frank Act. The Commission has proposed rules regarding the registration and regulation of SB SEFs. See Registration and Regulation of Security-Based Swap Execution Facilities, Exchange Act Release No. 63825 (Feb. 2, 2011), 76 FR 10948 (Feb. 29, 2011) (“SB SEF Proposing Release”).

¹⁶ See Sections 763 and 766 of the Dodd-Frank Act. The Commission has proposed rules on trade reporting, data elements, and real-time public reporting for security-based swaps. See Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, Exchange Act Release No. 63346 (Nov. 19, 2010) (RIN 3235-AK80), 75 FR 75208 (Dec. 2, 2010) (“Regulation SBSR Proposing Release”).

¹⁷ See Section 763(b) of the Dodd-Frank Act. The Commission has proposed or adopted rules relating to the end-user clearing exception and the process for submitting for review of security-based swaps for mandatory clearing. See Process for Submissions for Review

B. Overview of the Cross-Border Proposal

With limited exceptions, the Commission has not proposed specific provisions of rules or forms or provided guidance regarding the application of Title VII to cross-border activities.¹⁹ Rather than addressing these issues in a piecemeal fashion through the various substantive rulemaking proposals implementing Title VII, the Commission instead is addressing the application of Title VII to cross-border activities holistically in a single proposing release.²⁰ This approach provides market participants, foreign regulators, and other interested parties with an opportunity to consider, as an integrated whole, the Commission's proposed approach to the application of Title VII to cross-border security-based swap activities and non-U.S. persons that

of Security-Based Swaps for Mandatory Clearing and Notice Filing Requirements for Clearing Agencies; Technical Amendments to Rule 19b-4 and Form 19b-4 Applicable to All Self-Regulatory Organizations, Exchange Act Release No. 67286 (June 28, 2012), 77 FR 41602 (July 13, 2012) ("Clearing Procedures Adopting Release"); End-User Exception to Mandatory Clearing of Security-Based Swaps (Corrected), Exchange Act Release No. 63556 (Dec. 15, 2010), 75 FR 79992 (Dec. 21, 2010) ("End-User Exception Proposing Release").

¹⁸ See Section 763(b) of the Dodd-Frank Act.

¹⁹ The Commission has proposed a rule addressing the application of the security-based swap trade reporting requirement to cross-border transactions and to non-U.S. persons. See Regulation SBSR Proposing Release, 75 FR at 75239-40, as discussed in Section VIII, *infra*. The Commission also has proposed rules imposing special requirements on "nonresident security-based swap dealers," "nonresident major security-based swap participants," "non-resident swap data repositories," and "non-resident SB SEFs." See Registration Proposing Release, 76 FR at 65799-801, as discussed in Section III.E, *infra*; SDR Proposing Release, 75 FR at 77310, as discussed in Section VI, *infra*; and SB SEF Proposing Release, 76 FR at 11000-3, as discussed in Section VII, *infra*.

²⁰ Tables reflecting the Commission's proposed approach as it would apply to security-based swap transactions between different types of entities are included in this release as Appendix A. Each table focuses on a specific type of security-based swap dealing entity or market participant and sets out the Title VII requirements that would apply to such person under different transaction scenarios.

act in capacities regulated under the Dodd-Frank Act.²¹

After providing an overview of the security-based swap market, the Commission's preliminary views on the scope of application of Title VII to cross-border security-based swap activity, and the legal and policy principles guiding the Commission's approach to the application of Title VII to cross-border activities in Section II, we set forth our proposed approach in the subsequent sections of the release.

In Sections III and IV, we propose rules and interpretive guidance regarding the registration and regulation of security-based swap dealers and major security-based swap participants, including the treatment of foreign branches of U.S. banks and the provision of guarantees in the cross-border context. In connection with this, we are re-proposing the following rules and forms: 17 CFR §§ 249.1600 (Form SBSE), 249.1600a (Form SBSE-A), and 249.1600b (Form SBSE-BD).²²

In Sections V - VII, we propose rules and interpretive guidance regarding the registration of security-based swap clearing agencies, SDRs, and SB SEFs, as well as discuss generally under what circumstances the Commission would consider granting exemptions from registration for these infrastructures. To facilitate relevant authorities' access to security-based swap data

²¹ Cf. CFTC Proposed Interpretive Guidance and Policy Statement, Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, 77 FR 41214 (July 12, 2012) ("CFTC Cross-Border Proposal"); Exemptive Order Regarding Compliance with Certain Swap Regulations, 77 FR 41110 (July 12, 2012) ("CFTC Proposed Cross-Border Exemptive Order"); Final Exemptive Order Regarding Compliance with Certain Swap Regulations, 78 FR 858 (Jan. 7, 2013) ("Final CFTC Cross-Border Exemptive Order"); Further Proposed Guidance Regarding Compliance With Certain Swap Regulations, 78 FR 909 (Jan. 7, 2013) ("CFTC Further Proposed Guidance"). In Section XIII.B below, we solicit general comment on the differences between our proposed approach and the CFTC's proposed approach.

²² See Registration Proposing Release, 76 FR 65784, as discussed in Section III.E, *infra*.

collected and maintained by Commission-registered SDRs, the Commission also is proposing interpretive guidance to specify how SDRs may comply with the notification requirement in the Exchange Act and specifying how the Commission proposes to determine whether a relevant authority is appropriate for purposes of receiving security-based swap data from an SDR.²³ In addition, the Commission is proposing a tailored exemption from the indemnification requirement in the Exchange Act.²⁴

In Sections VIII – X, we propose rules and interpretive guidance regarding the application of Title VII to cross-border activities with respect to certain transactional requirements in connection with reporting and dissemination, clearing, and trade execution for security-based swaps. As discussed further below, these requirements apply to persons independent of their registration status. In connection with this, we are re-proposing the following rules: 17 CFR §§ 242.900 – 242.911 (Regulation SBSR).²⁵

In Section XI, we set forth a proposed policy and procedural framework under which we would consider permitting compliance with comparable regulatory requirements in a foreign jurisdiction to substitute for compliance with certain requirements of the Exchange Act, and the rules and regulations thereunder, relating to security-based swaps (i.e., “substituted compliance”).²⁶ Generally speaking, the Commission is proposing a policy and procedural

²³ See Section VI.C, infra.

²⁴ Id.

²⁵ See Regulation SBSR Proposing Release, 75 FR 75208, as discussed in Section VIII, infra.

²⁶ See Section XI, infra. As discussed in Section XI, in permitting substituted compliance, the Commission might use different procedural approaches depending on the different substantive requirements that are the subject of the substituted compliance determinations. See also note 27, infra.

framework that would allow for the possibility of substituted compliance in recognition of the potential, in a market as global as the security-based swap market, for market participants who engage in cross-border security-based swap activity to be subject to conflicting or duplicative compliance obligations.²⁷ In addition, the Commission is proposing a rule that would set forth procedures for requesting a substituted compliance determination.

In Section XII, the Commission sets forth our view of the scope of our authority, with respect to enforcement proceedings, under Section 929P of the Dodd-Frank Act.²⁸ Section XIII sets forth a general request for comment, including request for comment on the consistency of our proposed approach with the CFTC's proposed approach to applying the provisions of the CEA that were enacted by Title VII in the cross-border context.

Finally, in Section XIV, the Commission addresses the Paperwork Reduction Act, and Section XV provides an economic analysis of the proposed approach, including a discussion of the associated costs and benefits of the proposals discussed in Sections III - XI, as well as a discussion of issues related to efficiency, competition, and capital formation.

Because this release is directly related to security-based swap data reporting and dissemination, clearing, and trade execution, as well as the regulation of various persons required

²⁷ Separately, in Sections V - VII below, the Commission also discusses generally when we would consider exempting non-resident security-based swap clearing agencies and SB SEFs that are subject to comparable, comprehensive supervision and regulation in their home countries, and certain SDRs that are non-U.S. persons, from certain obligations under the Exchange Act, including the requirement to register.

²⁸ The rules, forms, and interpretive guidance proposed herein and discussed in Sections II - XI below relate solely to the applicability of the registration (and the attendant substantive regulation) and reporting and dissemination, clearing, and trade execution requirements in Title VII, and are not intended to limit or address the cross-border reach or extraterritorial application of the antifraud or other provisions of the federal securities laws.

to register as a result of amendments made to the Exchange Act by Title VII, we anticipate that some of the rules, forms, and interpretive guidance proposed herein, and comments received thereon, will be addressed in the adopting releases relating to the impacted substantive rules. In some areas, we may decide to address comments received on the proposals contained in this release by adopting rules in a separate rulemaking.²⁹

C. Consultation and Coordination

As discussed more fully below, a number of market participants, foreign regulators, and other interested parties have already provided their views on the application of Title VII to cross-border activities through both written comment letters to the Commission and/or the CFTC and meetings with Commissioners and Commission staff.³⁰ The Commission has taken the commenters' views expressed thus far into consideration in developing these proposed rules, forms, and interpretive guidance.³¹ In addition, in developing this proposal, the Commission has,

²⁹ The Commission is not addressing in this release issues relating to compliance dates of final rules adopted pursuant to amendments made to the Exchange Act by Title VII. Compliance issues, including compliance dates, will be addressed in connection with the various Title VII final rules. See Statement of General Policy on the Sequencing of the Compliance Dates for Final Rules Applicable to Security-Based Swaps Adopted Pursuant to the Securities Exchange Act of 1934 and the Dodd-Frank Wall Street Reform and Consumer Protection Act, Exchange Act Release No. 67177 (June 11, 2012), 77 FR 35625 (June 14, 2012) ("Implementation Policy Statement"). See also Reopening of Comment Periods for Certain Rulemaking Releases and Policy Statement Applicable to Security-Based Swaps Proposed Pursuant to the Securities Exchange Act of 1934 and the Dodd-Frank Wall Street Reform and Consumer Protection Act, Exchange Act Release No. 34-69491 (May 1, 2013).

³⁰ The views expressed in comment letters and meetings are collectively referred to as the views of "commenters." See Appendix D for a list of commenters referred to in this release and the location of their comment letters on the Commission's (or the CFTC's) website.

³¹ In addition, the Commission and the CFTC held a joint public roundtable regarding the application of Title VII to cross-border activities. See Joint Public Roundtable on

in compliance with Sections 712(a)(2)³² and 752(a)³³ of the Dodd-Frank Act, consulted and coordinated with the CFTC, the prudential regulators,³⁴ and foreign regulatory authorities.

Efforts to regulate the swaps market are underway not only in the United States but also abroad. In 2009, leaders of the Group of 20 (“G20”)—whose membership includes the United States, 18 other countries, and the European Union (“EU”)—called for global improvements in the functioning, transparency, and regulatory oversight of OTC derivatives markets.

Specifically, the G20 leaders declared that:

[a]ll standardised OTC derivative contracts should be traded on exchanges or electronic trading platforms, where appropriate, and cleared through central counterparties by end-2012 at the latest. OTC derivative contracts should be reported to trade repositories. Non-centrally cleared contracts should be subject to higher capital requirements. We ask the [Financial Stability Board] and its relevant members to assess regularly implementation and whether it is sufficient to improve transparency in the derivatives

International Issues Relating to the Implementation of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Exchange Act Release No. 64939 (July 21, 2011), 76 FR 44507 (July 26, 2011).

³² Section 712(a)(2) of the Dodd-Frank Act states, in part, that “the Securities and Exchange Commission shall consult and coordinate to the extent possible with the Commodity Futures Trading Commission and the prudential regulators for the purposes of assuring regulatory consistency and comparability, to the extent possible.”

³³ Section 752(a) of the Dodd-Frank Act states, in part, that “[i]n order to promote effective and consistent global regulation of swaps and security-based swaps, the Commodity Futures Trading Commission, the Securities and Exchange Commission, and the prudential regulators (as that term is defined in Section 1a(39) of the Commodity Exchange Act), as appropriate, shall consult and coordinate with foreign regulatory authorities on the establishment of consistent international standards with respect to the regulation (including fees) of swaps.”

³⁴ The term “prudential regulator” is defined in Section 1a(39) of the CEA, 7 U.S.C. 1a(39), and that definition is incorporated by reference in Section 3(a)(74) of the Exchange Act, 15 U.S.C. 78c(a)(74). Pursuant to the definition, the Board of Governors of the Federal Reserve System (“Federal Reserve Board”), the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Farm Credit Administration, or the Federal Housing Finance Agency (collectively, the “prudential regulators”) is the “prudential regulator” of a security-based swap dealer if the entity is directly supervised by that agency.

markets, mitigate systemic risk and protect against market abuse.³⁵

In subsequent summits, the G20 leaders have reiterated their commitment to OTC derivatives regulatory reform.³⁶ The Commission has participated in numerous bilateral and multilateral discussions with foreign regulatory authorities addressing the regulation of OTC derivatives.³⁷

Through these discussions and our participation in various international task forces and working groups,³⁸ we have gathered information about foreign regulatory reform efforts and have

³⁵ G20 Meeting, Pittsburgh, United States, September 25, 2009, available at: http://www.treasury.gov/resource-center/international/g7-g20/Documents/pittsburgh_summit_leaders_statement_250909.pdf.

³⁶ For example, on June 18-19, 2012, the leaders of the G20 convened in Los Cabos, Mexico, and reaffirmed their commitments with respect to the regulation of the OTC derivatives markets. See the G20 Leaders Declaration (June 2012), para. 39, available at: <http://www.g20.org/documents/>.

³⁷ Senior representatives of OTC derivatives market regulators from G20 jurisdictions have met on a number of occasions to discuss international coordination of OTC derivatives regulations. See, e.g., Joint Press Statement of Leaders on Operating Principles and Areas of Exploration in the Regulation of the Cross-Border OTC Derivatives Market (Dec. 4, 2012), available at: <http://www.sec.gov/news/press/2012/2012-251.htm>; Joint Statement on Regulation of OTC Derivatives Markets (May 7, 2012), available at: <http://www.sec.gov/news/press/2012/2012-85.htm>; and Joint Statement on Regulation of OTC Derivatives Markets (Dec. 9, 2011), available at: <http://www.sec.gov/news/press/2011/2011-260.htm>. See also Financial Stability Board (“FSB”), OTC Derivatives Market Reforms, Fifth Progress Report on Implementation (April 15, 2013) (“FSB Progress Report April 2013”), at 47, available at: http://www.financialstabilityboard.org/publications/r_130415.pdf (noting that SEC staff has regularly consulted its counterparts in other jurisdictions to discuss and compare approaches to the application of Title VII of the Dodd-Frank Act in cross-border contexts); FSB Progress Report April 2013 at 5 and 45-46 (discussing meetings of the group of market regulators “to identify and explore ways to address issues and uncertainties in the application of rules in a cross-border context, including options to address identified conflicts, inconsistencies, and duplication.”).

³⁸ The Commission participates in the FSB’s Working Group on OTC Derivatives Regulation (“ODWG”), both on its own behalf and as the representative of the International Organization of Securities Commissions (“IOSCO”), which is co-chair of the ODWG. The Commission also serves as one of the co-chairs of the IOSCO Task Force on OTC Derivatives Regulation.

discussed the possibility of conflicts and gaps, as well as inconsistencies and duplications, between U.S. and foreign regulatory regimes. We have taken these discussions into consideration in developing these proposed rules, forms, and interpretations.

In addition, the Commission and the CFTC have conducted staff studies to assess developments in OTC derivatives regulation abroad. As directed by Congress in Section 719(c) of the Dodd-Frank Act, on January 31, 2012, the Commission and the CFTC jointly submitted to Congress a “Joint Report on International Swap Regulation” (“Swap Report”).³⁹ The Swap Report discussed swap and security-based swap regulation and clearinghouse regulation in the Americas, Asia, and the European Union, and identified similarities and differences in jurisdictions’ approaches to areas of regulation, as well as other areas of regulation that could be harmonized. The Swap Report also identified major clearinghouses, clearing members, and regulators in each geographic area and described the major contracts (including clearing volumes and notional values), methods for clearing swaps, and the systems used for setting margin in each geographic area.⁴⁰

³⁹ See CFTC and SEC, Joint Report on International Swap Regulation (Jan. 31, 2012), available at: <http://www.sec.gov/news/studies/2012/sec-cftc-intlswapreg.pdf>.

⁴⁰ In addition, Commission and CFTC staff submitted a joint study to Congress on the feasibility of requiring the derivatives industry to adopt standardized computer-readable algorithmic descriptions which may be used to describe complex and standardized financial derivatives. See Joint Study on the Feasibility of Mandating Algorithmic Descriptions for Derivatives: A Study by the Staff of the Securities and Exchange Commission and the Commodity Futures Trading Commission as Required by Section 719(c) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Apr. 7, 2011), available at: <http://www.sec.gov/news/studies/2011/719b-study.pdf>. In preparing this report, Commission and CFTC staff coordinated extensively with international financial institutions and foreign regulators.

D. Substituted Compliance

As noted above, we recognize the potential, in a market as global as the security-based swap market, that market participants who engage in cross-border security-based swap activity may be subject to conflicting or duplicative compliance obligations. To address this possibility, we are proposing a “substituted compliance” framework under which we would consider permitting compliance with requirements in a foreign⁴¹ regulatory system to substitute for compliance with certain requirements of the Exchange Act relating to security-based swaps, provided that the corresponding requirements in the foreign regulatory system are comparable to the relevant provisions of the Exchange Act.⁴² The availability of substituted compliance should reduce the likelihood that market participants would be subject to potentially conflicting or duplicative sets of rules.

As discussed more fully below, the Commission would perform comparability analysis and make substituted compliance determinations with respect to four separate categories of requirements.⁴³ If, for example, a foreign regulatory system achieves comparable regulatory outcomes in three out of the four categories, then the Commission would permit substituted compliance with respect to those three categories of comparable requirements, but not for the one, non-comparable category for which comparable regulatory outcomes are not achieved. In

⁴¹ In this release, the term “foreign” is used interchangeably with the term “non-U.S.” See, e.g., note 372, infra (discussing the definition of “foreign security-based swap dealer”).

⁴² See Section XI, infra.

⁴³ Specifically, the Commission is proposing to make substituted compliance determinations with respect to the following categories of requirements: (i) requirements applicable to registered security-based swap dealers in Section 15F of the Exchange Act and the rules and regulations thereunder; (ii) requirements relating to regulatory reporting and public dissemination of security-based swaps; (iii) requirements relating to clearing for security-based swaps; and (iv) requirements relating to trade execution for security-based swaps. See Section XI, infra.

other words, we are not proposing an “all-or-nothing” approach. In addition, in making comparability determinations within each category of requirements, the Commission is proposing to take a holistic approach; that is, we would ultimately focus on regulatory outcomes rather than a rule-by-rule comparison. Substituted compliance therefore should accept differences between regulatory regimes when those differences nevertheless accomplish comparable regulatory outcomes.

E. Conclusion

In proposing these rules, forms, and interpretations, the Commission is mindful that the security-based swap market is global in nature and developed prior to the enactment of the Dodd-Frank Act.⁴⁴ There are challenges involved in imposing a comprehensive regulatory regime on existing markets, particularly ones that have not been subject to the particular regulation that the Dodd-Frank Act provides. Any rules and interpretive guidance we adopt governing the application of Title VII to cross-border activities could significantly affect the global security-based swap market. As discussed further below, to the extent practicable and consistent with our statutory mandate,⁴⁵ the Commission has proposed these rules and interpretations with the intent to achieve the regulatory benefits intended by the Dodd-Frank Act and to facilitate a well-functioning global security-based swap market, including by taking into account the impact these proposed rules and interpretations will have on counterparty protection, transparency, systemic risk, liquidity, efficiency, and competition in the market. In addition, the Commission is mindful of the fact that the application of Title VII to cross-border activities

⁴⁴ See Section II, infra.

⁴⁵ See Section II.C, infra (discussing the principles guiding proposed approach to applying Title VII in the cross-border context).

raises issues of potential conflict or overlap with foreign regulatory regimes. Furthermore, the Commission is attentive to the fact that a number of registrants may be registered with both us and the CFTC.⁴⁶

The rules and interpretations proposed today represent the Commission's preliminary views regarding the application of Title VII to cross-border security-based swap activities and to non-U.S. persons who act in capacities regulated under the Dodd-Frank Act. We note that these proposed rules and interpretations are tailored to the unique circumstances of the security-based swap market, and as such would not necessarily be appropriate to apply to the Commission's regulation of traditional securities markets. We also recognize that there are a number of possible alternative approaches to applying Title VII in the cross-border context. Accordingly, the Commission invites public comment regarding all aspects of the proposed approach, including each proposed rule and interpretation contained herein, and potential alternative approaches. In particular, data and comment from market participants and other interested parties with respect to the likely effect of each proposed rule and interpretation regarding application of a specific Title VII requirement, and the effect of such proposed application in the aggregate, will be particularly useful to the Commission in evaluating possible modifications to the proposal and understanding the consequences of the substantive rules that have not yet been adopted under Title VII.

⁴⁶ All references in this release to an entity that is "registered" indicate an entity that is registered with the Commission, unless otherwise indicated.

II. Overview of the Security-Based Swap Market and the Legal and Policy Principles Guiding the Commission's Approach to the Application of Title VII to Cross-Border Activities

In this section, the Commission provides a general overview of the security-based swap market that informs our proposed implementation of Title VII, including a description of the various dealing structures used by U.S.-based and foreign-based entities to conduct their security-based swap businesses, and existing clearing, reporting, and trade execution practices. We also discuss the Commission's preliminary views on the scope of application of Title VII and the principles guiding our proposed approach to applying Title VII in the cross-border context.

A. Overview of the Security-Based Swap Market

1. Global Nature of the Security-Based Swap Market

The security-based swap market is a global market.⁴⁷ Security-based swap business currently takes place across national borders, with agreements negotiated and executed between counterparties often in different jurisdictions (and at times booked and risk-managed in still other jurisdictions).⁴⁸

⁴⁷ See, e.g., IIB Letter at 1 (noting the “truly global nature of the OTC derivatives market”); Cleary Letter IV at 2 (noting that swaps and security-based swaps trade in a “unique global market”); Société Générale Letter II at 2 (noting the “global nature of the derivatives business”); see also Bank of International Settlements (“BIS”), Committee on the Global Financial System, No. 46, The macro financial implications of alternative configurations for access to central counterparties in OTC derivatives markets (Nov. 2011) at 1, available at: <http://www.bis.org/publ/cgfs46.pdf> (referring to the “globalized nature of the market, in which a significant proportion of OTC derivatives trading is undertaken across borders”).

⁴⁸ See, e.g., SIFMA Letter I at 2.

The global nature of the security-based swap market is evidenced by the data available to the Commission.⁴⁹ Based on market data in the Depository Trust and Clearing Corporation's Trade Information Warehouse ("DTCC-TIW"),⁵⁰ viewed from the perspective of the domiciles of the counterparties booking credit default swap ("CDS") transactions, approximately 49% of U.S. single-name CDS transactions in 2011 were cross-border transactions between a U.S.-domiciled⁵¹ counterparty and a foreign-domiciled counterparty⁵² and an additional 44% of such CDS transactions were between two foreign-domiciled counterparties.⁵³ Thus, approximately 7% of the U.S. single-name CDS transactions in 2011 were between two U.S.-domiciled

⁴⁹ See Section XV.B, *infra* (discussing in detail the global nature of the security-based swap market).

⁵⁰ The information was made available to the Commission in accordance with the agreement between DTCC-TIW and the OTC Derivatives Regulatory Forum ("ODRF").

⁵¹ The domicile classifications in DTCC-TIW are based on the market participants' own reporting and may not have been verified. Prior to enactment of the Dodd-Frank Act, funds and accounts did not formally report their domicile to DTCC-TIW because there was no systematic requirement to do so. After enactment of the Dodd-Frank Act, the DTCC-TIW has collected the registered office location of the account or fund. This information is self-reported on a voluntary basis. It is possible that some market participants may misclassify their domicile status because the databases in DTCC-TIW do not assign a unique legal entity identifier to each separate entity. Notwithstanding this limitation, we believe that the cross-border and foreign activity presented in the analysis by the Commission's Division of Risk, Strategy, and Financial Innovation demonstrates the nature of the CDS market. See Section XV.B.2.c, *infra*.

⁵² DTCC-TIW classified a foreign branch or foreign subsidiary of a U.S. domiciled entity as foreign-domiciled. Therefore, CDS transactions with a foreign-domiciled counterparty include CDS transactions with a foreign branch or foreign subsidiary of a U.S.-domiciled entity as counterparty.

⁵³ Put another way, in 2011, a vast majority (approximately 93%) of U.S. single-name CDS transactions directly involved at least one foreign-domiciled counterparty. This observation is based on the data compiled by the Commission's Division of Risk, Strategy, and Financial Innovation on single-name CDS transactions with U.S. reference entities from the DTCC-TIW between January 1, 2011, and December 31, 2011. See Section XV.B.2.d, *infra*.

counterparties.⁵⁴ These statistics indicate that cross-border transactions are the norm, not the exception, in the security-based swap market.⁵⁵ Accordingly, the question of how the Commission is implementing Title VII with respect to security-based swaps will, to a large extent, be affected by how the Commission applies Title VII to the cross-border transactions that are the majority of security-based swaps.

2. Dealing Structures

Dealers use a variety of business models and legal structures to conduct security-based swap dealing business⁵⁶ with counterparties in jurisdictions all around the world.⁵⁷ Commenters have indicated that both U.S.-based and foreign-based entities use certain dealing structures for a variety of legal, tax, strategic, and business reasons that often pre-date the enactment of the Dodd-Frank Act.⁵⁸ Among the reasons cited for the variety of dealing structures is the desire of counterparties to reduce risk and enhance credit protection based on the particular characteristics of each entity's business.⁵⁹

⁵⁴ Id.

⁵⁵ We note, however, that, in addition to classifying transactions between a U.S. counterparty and a foreign branch of a U.S. bank as a cross-border transaction (see note 51, supra), these statistics characterize as cross-border transactions those in which all or substantially all of the activity takes place in the United States and all or much of the risk of the transactions ultimately is borne by U.S. persons.

⁵⁶ As used in this release, "security-based swap dealing," "security-based swap dealing activity," "dealing activity," and related concepts have the meaning described in the Intermediary Definitions Adopting Release, 77 FR 30596, unless otherwise indicated in this release.

⁵⁷ See, e.g., Cleary Letter IV at 5; Davis Polk Letter I at 2-3; IIB Letter at 7.

⁵⁸ See, e.g., Cleary Letter at 3.

⁵⁹ See, e.g., SIFMA Letter at 2.

In this subsection, we describe certain dealing structures that U.S.-based entities and foreign-based entities in the security-based swap market might use. In each of these dealing structures, because the booking entity is the counterparty to the security-based swap transaction resulting from the dealing activity (i.e., the principal) and bears the ongoing risk of performance on the transaction, we view the booking entity, and not the intermediary that acts as an agent on behalf of the booking entity to originate the transaction, as the dealing entity.⁶⁰

(a) U.S. Bank Dealer

A U.S. bank holding company may use a U.S. subsidiary that is a banking entity to deal directly with U.S. and foreign counterparties. Such U.S. bank dealer may use a sales force in its U.S. home office to originate security-based swap transactions in the United States and use separate sales force in foreign branches to originate security-based swap transactions with counterparties in foreign local markets.⁶¹ The resulting security-based swap transactions may be booked in the home office of the U.S. bank or in a foreign branch of the bank.⁶²

(b) U.S. Non-bank Dealer

A U.S.-based holding company may use a non-bank subsidiary to conduct security-based swap dealing activity in the U.S. market and foreign local markets. The U.S. non-bank dealer may act as principal to originate and book transactions in the United States and use a sales force in the foreign local markets (e.g., salespersons employed by its foreign affiliate) as agent to

⁶⁰ See Intermediary Definitions Adopting Release, 77 FR at 30617 n.264 (“A sales force, however, is not a prerequisite to a person being a security-based swap dealer. For example, a person that enters into security-based swaps in a dealing capacity can fall within the dealer definition even if it uses an affiliated entity to market and/or negotiate those security-based swaps (e.g., the person is a booking entity).”). See also Section III.D, infra.

⁶¹ See Sullivan & Cromwell Letter at 2.

⁶² See id. at 3-4.

originate transactions on its behalf, and then centrally book the resulting transactions in the U.S. non-bank dealer. In some situations, such as where the holding company has rated debt, but the U.S. non-bank dealer does not, the U.S. non-bank dealer's performance under security-based swaps may be supported by a parental guarantee provided by the holding company.⁶³ The guarantee would typically give counterparties to the U.S. non-bank dealer direct recourse to the holding company for obligations owed by such non-bank dealer under the security-based swaps as though the guarantor had entered into the transactions directly with the counterparties.⁶⁴

(c) Foreign Subsidiary Guaranteed by a U.S. Person

A U.S.-based holding company also may conduct dealing activity in both U.S. markets and foreign markets out of a foreign subsidiary.⁶⁵ The foreign subsidiary may use a sales force in the United States (e.g., salespersons employed by its U.S. affiliate) to originate security-based swap transactions with counterparties in the U.S. markets, or may directly solicit, negotiate, and execute security-based swap transactions with counterparties in the U.S. markets from outside the United States, and centrally book the resulting transactions itself. The foreign subsidiary also may conduct security-based swap dealing activity in various foreign markets using local salespersons as agent to originate and centrally book the resulting security-based swap transactions itself. In some situations, such as where the U.S.-based holding company has rated

⁶³ See Cleary Letter IV at 10 (discussing a U.S. holding company providing a guarantee of performance on the obligations of its foreign swap dealing subsidiary).

⁶⁴ See Intermediary Definitions Adopting Release, 77 FR at 30689. See also Product Definitions Adopting Release, 77 FR at 48227 (stating that the Commission would consider issues involving cross-border guarantees of security-based swaps in a separate release addressing the application of Title VII in the cross-border context).

⁶⁵ See, e.g., Sullivan & Cromwell Letter, at 3-4 (stating that Bank of America Corporation, Citigroup Inc. and JPMorgan Chase & Co. conduct swap activities overseas through subsidiaries of the bank holding company, Edge Corporation subsidiaries of their U.S. banks and non-U.S. branches of the bank); Cleary Letter IV at 10-11.

debt, but the foreign subsidiary does not, the foreign subsidiary's performance under security-based swaps may be supported by a parental guarantee provided by the holding company.⁶⁶ Such guarantee would typically give its counterparty direct recourse to the U.S. parent acting as guarantor for obligations owed by such foreign subsidiary under the security-based swaps. As a result, a guarantee provided by a U.S. person of another person's obligations owed under a security-based swap transaction poses the same degree of risk to the United States as the risk posed by a transaction entered into directly by such U.S. person.

In circumstances where a foreign non-bank subsidiary of a U.S. holding company has sufficient credit-worthiness and does not rely on a U.S. parental guarantee to support its creditworthiness, the risk of the security-based swaps entered into by the foreign subsidiary of a U.S.-based holding company resides in the foreign subsidiary outside the United States.

(d) Foreign-Based Dealer

i. Direct Dealing

Foreign-based entities also may use a number of business models and legal structures to conduct global security-based swap dealing activity in both the U.S. and foreign markets. Like U.S. dealers, foreign dealers may deal directly with U.S. counterparties and non-U.S. counterparties without using any agents in the local market to intermediate and book the resulting transactions in the foreign entities themselves.⁶⁷

⁶⁶ See Cleary Letter IV at 10 (discussing a U.S. holding company providing a guarantee of performance on the obligations of its foreign swap dealing subsidiary).

⁶⁷ See Cleary Letter VI at 3, 13 (discussing direct dealing by a foreign dealer from abroad); IIB Letter at 7.

ii. Intermediation in the United States

Foreign dealers also may use local personnel with knowledge of and expertise on the local markets to intermediate security-based swap transactions in each local market, for instance, using salespersons in the United States to originate security-based swaps in the U.S. market, and either book the resulting transactions in an entity based in the United States (such as a U.S. affiliate) or centrally book the resulting transactions in a foreign central booking affiliate.⁶⁸

Intermediation activity within the United States on behalf of foreign entities may occur in two principal legal structures.

First, foreign dealers that are banking entities may conduct dealing activity with U.S. counterparties out of their U.S. branches. In this structure, a foreign banking entity may originate and book transactions in its U.S. branch, or the U.S. branch may originate transactions that are booked in the foreign home office.⁶⁹

Second, both bank and non-bank foreign dealers may conduct dealing activity out of their U.S. subsidiaries. The U.S. subsidiaries may act as principal to originate and book security-based swaps in the United States and enter into inter-affiliate back-to-back transactions with the foreign central booking entity (usually the foreign parent) for purposes of centralized booking and centralized risk management.⁷⁰ The U.S. subsidiary also may act as agent to originate security-based swaps in the United States on behalf of the foreign entity and the resulting transactions would be booked in a centralized foreign booking entity, usually the foreign parent. In some situations, such as where the foreign-based entity has rated debt, but the U.S. subsidiary

⁶⁸ See Cleary Letter IV at 4, 21 (discussing the use of U.S. affiliate to intermediate) and IIB Letter at 7.

⁶⁹ See IIB Letter at 8.

⁷⁰ See Cleary Letter IV at 10 (discussing inter-affiliate transactions).

does not, the U.S.-based subsidiary's performance under security-based swaps that it enters into as principal may be supported by a parental guarantee provided by the foreign-based entity.⁷¹

The transactions originated by the U.S. branch of a foreign bank or a U.S. subsidiary of a foreign bank or non-bank entity may not be limited to those with U.S. counterparties in the U.S. security-based swap market. Foreign bank or non-bank entities may utilize their U.S. branches or U.S. subsidiaries to conduct dealing activity with, for instance, non-U.S. counterparties located in various jurisdictions within the same region or same time zones, such as Canada or Latin America, and centrally book the resulting transactions in the home offices of the foreign entities themselves. For example, a Canadian counterparty might enter into a security-based swap with a non-U.S.-based dealer that solicits and negotiates the transaction out of a U.S. subsidiary acting as agent but books the transaction itself outside the United States.

3. Clearing Practices

Prior to the enactment of the Dodd-Frank Act, there was no provision in the Exchange Act or any other laws in the United States for the mandatory clearing of OTC derivatives. Although initiatives related to central clearing had been considered before 2008, the 2008 financial crisis brought a new focus on CDS as a source of systemic risk and contributed to a more general recognition that central clearing parties ("CCPs") could play a role in helping to manage bilateral counterparty credit risk in OTC CDS.⁷²

⁷¹ See *id.* (discussing a non-U.S. holding company providing a guarantee on the obligations of its U.S. swap dealing subsidiary).

⁷² The President's Working Group on Financial Markets made the central clearing of OTC derivatives a top policy objective in 2008. See Policy Objectives for the OTC Derivatives Market (Nov. 14, 2008), available at: <http://www.treasury.gov/resource-center/fin-mkts/Documents/policyobjectives.pdf>; see also Policy Statement on Financial Market Developments (Mar. 13, 2008), available at: <http://www.law.du.edu/images/uploads/presidents-working-group.pdf>; and Progress

In November 2008, the Commission, in consultation and coordination with the Federal Reserve Board and the CFTC, took steps to help facilitate the prompt development of CCPs for OTC derivatives.⁷³ Specifically, the Commission authorized the clearing of OTC security-based swaps by permitting certain clearing agencies to clear CDS on a temporary conditional basis.⁷⁴ As the Commission and other regulatory agencies monitored the activities of those clearing agencies, a significant volume of interdealer OTC CDS transactions and a smaller volume of dealer-to-non-dealer OTC CDS transactions were centrally cleared on a voluntary basis.⁷⁵ The

Update on March Policy Statement on Financial Market Developments (Oct. 2008), available at: <http://www.treasury.gov/resource-center/fin-mkts/Documents/q4progress%20update.pdf>.

⁷³ On November 14, 2008, the Commission executed a Memorandum of Understanding with the Board and the CFTC that established a framework for consultation and information sharing on issues related to central counterparties for the OTC derivatives market. See <http://www.sec.gov/news/press/2008/2008-269.htm>.

⁷⁴ The Commission authorized five entities to clear CDS. See CDS clearing by ICE Clear Europe Limited, Exchange Act Release Nos. 60372 (July 23, 2009), 74 FR 37748 (July 29, 2009) and 61973 (Apr. 23, 2010), 75 FR 22656 (Apr. 29, 2010); CDS clearing by Eurex Clearing AG, Exchange Act Release Nos. 60373 (July 23, 2009), 74 FR 37740 (July 29, 2009) and 61975 (Apr. 23, 2010), 75 FR 22641 (Apr. 29, 2010); CDS clearing by Chicago Mercantile Exchange Inc., Exchange Act Release Nos. 59578 (Mar. 13, 2009), 74 FR 11781 (Mar. 19, 2009), 61164 (Dec. 14, 2009), 74 FR 67258 (Dec. 18, 2009) and 61803 (Mar. 30, 2010), 75 FR 17181 (Apr. 5, 2010); CDS clearing by ICE Clear Credit LLC (formerly ICE Trust US LLC), Exchange Act Release Nos. 59527 (Mar. 6, 2009), 74 FR 10791 (Mar. 12, 2009), 61119 (Dec. 4, 2009), 74 FR 65554 (Dec. 10, 2009) and 61662 (Mar. 5, 2010), 75 FR 11589 (Mar. 11, 2010); Temporary CDS clearing by LIFFE A&M and LCH.Clearnet Ltd., Exchange Act Release No. 59164 (Dec. 24, 2008), 74 FR 139 (Jan. 2, 2009) (“CDS Clearing Exemption Orders”).

⁷⁵ Voluntary CCP clearing grew out of a series of meetings beginning in September 2005 hosted by the Federal Reserve Bank of New York with major market participants and their domestic and international supervisors for the purpose of discussing problems in the processing of CDS, and related risk management and control issues. See <http://www.ny.frb.org/newsevents/news/markets/2005/an050915.html>. In June 2008 the attendees agreed to an agenda for improvement in the derivatives market infrastructure that included “developing a central counterparty for credit default swaps that, with a robust risk management regime, can help reduce systemic risk.” See

level of voluntary clearing in swaps and security-based swaps has steadily increased since that time. Although the volume of interdealer CDS cleared to date is quite large,⁷⁶ many security-based swap transactions are still ineligible for central clearing, and many transactions in security-based swaps eligible for clearing at a CCP continue to settle bilaterally.

Voluntary clearing of security-based swaps in the United States is currently limited to CDS products. Central clearing of security-based swaps began in March 2009 for index CDS products, in December 2009 for single-name corporate CDS products, and in November 2011 for single-name sovereign CDS products. At present, there is no central clearing in the United States for security-based swaps that are not CDS products, such as those based on equity securities. The level of clearing activity appears to have steadily increased as more CDS have become eligible to be cleared.⁷⁷

4. Reporting Practices

The OTC derivatives markets have historically been largely opaque.⁷⁸ With respect to CDS, for example, the Government Accountability Office found in 2009 that “comprehensive and consistent data on the overall market have not been readily available,” that “authoritative

<http://www.ny.frb.org/newsevents/news/markets/2008/ma080609.html>; see also <https://www.theice.com/marketdata/reports/ReportCenter.shtml>.

⁷⁶ As of April 19, 2012, ICE Clear Credit had cleared approximately \$15.6 trillion notional amount of CDS contracts based on indices of securities and approximately \$1.5 trillion notional amount of CDS contracts based on individual reference entities or securities. As of April 19, 2012, ICE Clear Europe had cleared approximately €7.2 trillion notional amount of CDS contracts based on indices of securities and approximately €1.2 trillion notional amount of CDS contracts based on individual reference entities or securities. See Clearing Agency Standards Adopting Release, 77 FR at 66236 n.184 (citing <https://www.theice.com/marketdata/reports/ReportCenter.shtml>).

⁷⁷ See Section XV.B.2(e), *infra*.

⁷⁸ See FSB, Implementing OTC Derivatives Market Reforms (Oct. 25, 2010) (“FSB October 2010 Report”), at 11, available at: http://www.financialstabilityboard.org/publications/r_101025.pdf.

information about the actual size of the CDS market is generally not available,” and that regulators currently are unable “to monitor activities across the market.”⁷⁹ The reporting of comprehensive OTC derivative transaction data to trade repositories is intended to address the lack of transparency in this market, and as such it was one of the G20 regulatory reform commitments previously discussed.⁸⁰

The first trade repositories were established in the mid-2000s.⁸¹ The development of trade repositories for different asset classes accelerated following the 2009 G20 commitment in this area, and as legislative and regulatory requirements began to be put in place. As of the end of the first quarter of 2013, fourteen FSB member jurisdictions had legislation in place either requiring reporting of OTC derivatives contracts or authorizing regulators to implement such regulations.⁸² In addition, as of the date of publication of the FSB Progress Report April 2013, eighteen trade repositories were either registered or in the process of becoming registered and

⁷⁹ Government Accountability Office, “Systemic Risk: Regulatory Oversight and Recent Initiatives to Address Risk Posed by Credit Default Swaps,” GAO-09-397T (Mar. 2009), at 2, 5, 27, available at: <http://www.gao.gov/new.items/d09397t.pdf>.

⁸⁰ See note 35 and accompanying text, *supra*. See also SDR Proposing Release, 75 FR at 77307 (“Under the Dodd-Frank Act, SDRs are intended to play a key role in enhancing transparency in the [security-based swap] market by retaining complete records of [security-based swap] transactions, maintaining the integrity of those records, and providing effective access to those records to relevant authorities and the public in line with their respective information needs. The enhanced transparency provided by an SDR is important to help regulators and others monitor the build-up and concentration of risk exposures in the [security-based swap] market. Without an SDR, data on [security-based swap] transactions is dispersed and not readily available to regulators and others.”).

⁸¹ See Committee on Payment and Settlement Systems (“CPSS”) and Technical Committee of IOSCO, Report on OTC Derivatives Data Reporting and Aggregation Requirements (Jan. 2012), at 5, available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD366.pdf> (“CPSS-IOSCO Data Report”).

⁸² FSB Progress Report April 2013 at 19.

twelve were operational, meaning, typically, that they were at least accepting transaction reports from more than one asset class.⁸³

Prior to the Dodd-Frank Act, global trade repositories had been established for credit, interest rate, and equity derivatives.⁸⁴ In addition, in June 2010, the OTC Derivatives Regulators' Forum ("ODRF")⁸⁵ developed indicative guidance for Warehouse Trust⁸⁶ aiming to identify data that authorities would expect to request from Warehouse Trust to carry out their mandates.⁸⁷

⁸³ Id. at 20-21, 63-65. Ten trade repositories were offering trade reporting on interest rate derivatives transactions; eight were offering trade reporting on commodity derivative transactions; seven were offering trade reporting on equity derivatives transactions; eight were offering trade reporting on foreign exchange derivative transactions; and seven were offering trade reporting on credit derivatives.

⁸⁴ Pursuant to initiatives led by the OTC Derivatives Supervisors Group ("ODSG"), in 2009 the largest OTC derivatives dealers at the global level committed to reporting all of their CDS trades to a trade repository. At that time, a trade repository for credit derivatives was already in existence and used by the industry. To promote the development of trade repositories for all interest rate and equity derivatives, in 2008 and 2009 ISDA sought proposals for the creation of central trade repositories for these asset classes. Two entities were selected to provide trade repository functions for these asset classes. See FSB October 2010 Report at 44. The ODSG originated in 2005, when the Federal Reserve Bank of New York ("New York Federal Reserve") hosted a meeting with representatives of major OTC derivatives market participants and their domestic and international supervisors, including the Commission, in order to address the emerging risks of inadequate infrastructure for the rapidly growing market in credit derivatives. The ODSG is chaired by the New York Federal Reserve.

⁸⁵ The ODRF, formed in January 2009, brings together representatives from central banks, prudential supervisors, and securities and market regulators to discuss issues of common interest, regarding OTC derivatives central counterparties and trade repositories. The ODRF's scope and focus include information sharing/needs and oversight co-ordination and co-operation.

⁸⁶ The Warehouse Trust Company LLC ("Warehouse Trust") today provides certain post-trade processing services to DTCC-TIW. DTCC-TIW provides a centralized electronic trade database for OTC credit derivatives contracts.

⁸⁷ See FSB October 2010 Report at 63. Building on this work, CPSS and IOSCO have published a consultation paper setting forth more comprehensive guidance regarding

Public availability of trade repository data varies globally and has changed significantly over time. For example, since October 2008, on a weekly basis, DTCC has published aggregated data via its website.⁸⁸ More generally, in a recent FSB survey, all trade repositories that responded stated that they provide or intend to provide, transaction data on OTC derivatives to the public. In some cases and for some products, trading information is provided on a real-time basis. Some trade repositories publicly disclose only aggregated, end-of-day information.⁸⁹

5. Trade Execution Practices

Unlike the markets for cash equity securities and listed options, the market for security-based swaps currently is characterized generally by bilateral negotiation directly between two counterparties in the OTC market and is largely decentralized; many instruments are individually negotiated and often customized; and many security-based swaps are not centrally cleared.⁹⁰ The historical one-to-one nature of trade negotiation in security-based swaps has fostered various types of trading venues and execution practices, ranging among the following:

trade repositories more broadly. The paper provides guidance to authorities that supervise trade repositories; regulators, supervisors, resolution authorities, central banks, and other public-sector authorities (collectively, “authorities”) that request OTC derivative data from trade repositories; and trade repositories. This guidance concerns the types of data to which authorities will typically require access and possible approaches to addressing potential constraints and concerns that may prevent effective access to such data. See CPSS and IOSCO, Consultative Report on Authorities’ Access to Trade Repository Data (April 2013), available at: <http://iosco.org/library/pubdocs/pdf/IOSCOPD408.pdf?v=1>.

⁸⁸ See CPSS-IOSCO Data Report at 45-46.

⁸⁹ See OTC Derivatives Market Reforms, Fourth Progress Report on Implementation (Oct. 31, 2012) at 5, available at: http://www.financialstabilityboard.org/publications/r_121031a.pdf.

⁹⁰ See SB SEF Proposing Release, 76 FR at 10951.

Bilateral negotiations

“Bilateral negotiation” refers to the execution practice whereby one party uses the telephone, e-mail or other means of communication to directly contact a potential counterparty to negotiate and execute a security-based swap. In bilateral negotiation and execution, only the two parties to the transaction are aware of the terms of the negotiation and the final terms of the agreement.⁹¹

Single-dealer RFQ platforms

A single-dealer request for quote (“RFQ”) platform refers to an electronic trading platform where a dealer may post indicative quotes for security-based swaps in various asset classes that the dealer is willing to trade. Only the dealer’s approved customers have access to the platform. When a customer wishes to transact in a security-based swap, the customer requests an executable quote, the dealer provides one, and if the customer accepts the dealer’s quote, the transaction is executed electronically. This type of platform generally provides indicative quotes on a pricing screen, but only from one dealer to its customers.⁹²

Multi-dealer RFQ platforms

A multi-dealer RFQ electronic trading platform refers to a multi-dealer RFQ system whereby a requester can send an RFQ to solicit quotes on a certain security-based swap from multiple dealers at the same time. After the RFQ is submitted, the recipients have a prescribed amount of time in which to respond to the RFQ with a quote. Responses to the RFQ are firm. The requestor then has the opportunity to review the responses and accept the best quote. A

⁹¹ See id.

⁹² See id. at 10951.

multi-dealer RFQ platform provides a certain amount of pricing information, depending on its characteristics.⁹³

Central limit order books

A central limit order book system or similar system refers to a trading system in which firm bids and offers are posted for all participants to see, with the identity of the parties withheld until a transaction occurs. Bids and offers are then matched based on price-time priority or other established parameters and trades are executed accordingly. The quotes on a limit order book system are firm. In general, a limit order book system provides greater pricing information than the three platforms described above because all participants can view bids and offers before placing their bids and offers.⁹⁴ Currently, limit order books for the trading of security-based swaps in the United States are utilized by inter-dealer brokers for dealer-to-dealer transactions.

Brokerage trading

“Brokerage trading” refers to an execution practice used by brokers to execute security-based swaps on behalf of customers, often in larger sized transactions. In such a system, a broker receives a request from a customer (which may be a dealer) who seeks to execute a specific type of security-based swap. The broker then interacts with other customers (which may also be dealers) to fill the request and execute the transaction. This model often is used by dealers that seek to transact with other dealers through the use of an interdealer broker as an

⁹³ For example, to the extent that a RFQ platform sets limits on the number of dealers to whom a customer may send an RFQ, the customer’s pre-trade transparency is restricted to that number of quotes it receives in response to its RFQ. See SB SEF Proposing Release, 76 FR at 10952.

⁹⁴ See id.

intermediary. In this model, participants may or may not be able to see bids and offers of other participants.⁹⁵

These various trading venues and execution practices provide different degrees of pre-trade pricing information and different levels of access. The Commission currently does not have sufficient information with respect to the volume of security-based swap transactions executed across these different trading venues and execution practices to evaluate the individual impact of such venues and practices on pricing information available in the security-based swap market.

6. Broad Economic Considerations of Cross-Border Security-Based Swaps⁹⁶

Our primary economic considerations for promulgating rules and interpretations regarding the application of Title VII to cross-border activities include the potential risks of security-based swaps to the U.S. financial system⁹⁷ that could affect financial stability, the level of transparency and counterparty protection in the security-based swap market, the costs to market participants, and the impact of such rules and interpretations on liquidity, efficiency, and competition in the market. Unlike most other securities transactions, a security-based swap gives rise to ongoing obligations between transaction counterparties during the life of the transaction. This means that each counterparty to the transaction undertakes the obligation to perform the security-based swap in accordance with its terms and bears the counterparty credit risk and

⁹⁵ See id.

⁹⁶ See Section XV, infra (providing more detailed commentary on the economic effects of the proposed rules, including supporting citations).

⁹⁷ The Commission generally understands the “U.S. financial system” to include the U.S. banking system and the U.S. financial markets, including the U.S. security-based swap market, the traditional securities markets (e.g., the debt and equity markets), and the markets for other financial activities (e.g., lending).

market risk until the transaction is terminated.⁹⁸ The cross-border rules ultimately adopted by the Commission could materially impact the economic effects of the final Title VII regulatory requirements.

(a) Major Economic Considerations

In determining how Title VII requirements should apply to persons and transactions in the cross-border context, the Commission is aware of the potentially significant trade-offs inherent in our policy decisions. For example, it is possible that counterparties excluded from the Title VII regulatory framework would not, among other things, receive the same level of counterparty protection or impartial access to trading venues and information as those included in the Title VII regulatory framework. However, it is also possible that market participants excluded from the Title VII regulatory framework would face lower regulatory burdens and lower compliance costs associated with their security-based swap activity. Further, it is possible that these trade-offs could alter the incentives for individuals to participate in the security-based swap market, which may impact the overall market, affecting its liquidity, as well as its efficiency and the competitive dynamics among participants. In addition, we also recognize that regulators in other jurisdictions are currently engaged in implementing their own regulatory reforms of the OTC derivatives markets and that our proposed application of Title VII to cross-border activities may affect the policy decisions of these other regulators as they seek to address potential conflicts or duplication in the regulatory requirements that apply to market participants under their authority. In proposing our rules and interpretations in this release, the Commission

⁹⁸ See Intermediary Definitions Adopting Release, 77 FR at 30616-17 (noting that “the completion of a purchase or sale transaction” in the secondary equity or debt markets “can be expected to terminate the mutual obligations of the parties,” unlike security-based swap transactions, which often give rise to “an ongoing obligation to exchange cash flows over the life of the agreement”).

has considered the benefits of the Title VII regulatory framework, including counterparty protection and access to information, as well as the costs of compliance, taking into account the potential impact of the rules and interpretations on liquidity, efficiency, and competition in the security-based swap market.

Moreover, the costs and benefits of various Title VII substantive requirements may not be the same for each individual market participant, depending on the role it plays, the market function it performs, and the activity it engages in in the security-based swap market. For example, Title VII requirements for security-based swap dealers and major security-based swap participants may impose significant costs on persons falling within the definitions of security-based swap dealer and major security-based swap participant that are not borne by other market participants. The costs of these requirements may provide economic incentive for some market participants falling within the definitions of security-based swap dealer and major security-based swap participant to restructure their security-based swap business to operate wholly outside of the Title VII regulatory framework, exiting the security-based swap market in the United States and not transacting with U.S. persons. Conversely, certain Title VII requirements may promote financial stability and increase market participants' confidence in entering into security-based swap transactions.

(b) Global Nature and Interconnectedness of the Security-Based Swap Market

In considering the proposed approach to the application of the Title VII requirements, the Commission has been informed by the analysis of current market activity described in this release,⁹⁹ including the extent of cross-border trading activity in the security-based swap

⁹⁹ See Section II.A, supra, and Section XV.B.2, infra.

market.¹⁰⁰ The security-based swap transactions between U.S.- and non-U.S. domiciled market participants provide conduits of risk into the U.S. financial system, which could affect the safety and soundness of the U.S. financial system. Similarly, such transactions also provide conduits for liquidity into the U.S. financial system. As a consequence, changes to incentives or costs that result from the application of U.S. regulatory requirements may have effects on the liquidity of the global market, as well as its efficiency and competitive dynamics.

With respect to conduits of risk, one area of particular concern in the current security-based swap market is the risks that arise when a large market participant becomes financially distressed, including the potential for sequential counterparty failure. A default by one or more security-based swap dealers or major security-based swap participants could produce spillovers or contagion by reducing the willingness and/or ability of market participants to extend credit to each other, and thus could substantially reduce liquidity and valuations for particular types of financial instruments.¹⁰¹

The experience of American International Group, Inc. (“AIG”), a Delaware corporation based in New York, and its subsidiary, AIG Financial Products Corp. (“AIG FP”), a Delaware corporation based in Connecticut, during and after the 2008 financial crisis both illustrates spillovers and contagion arising from security-based swap transactions and demonstrates how

¹⁰⁰ For example, review of the DTCC-TIW single-name CDS transactions executed in 2011 reveals that approximately 49% of the U.S. single-name CDS transactions were between one U.S.-domiciled counterparty and one foreign-domiciled counterparty, and 44% of such transactions were between two foreign-domiciled counterparties. See Section II.A.1, *supra*, and Section XV.B.2(d), *infra*.

¹⁰¹ See, e.g., Markus K. Brunnermeier and Lasse Heje Pedersen, “Market Liquidity and Funding Liquidity,” *Rev. Financ. Stud.* (2009); Denis Gromb and Dimitri Vayanos, “A Model of Financial Market Liquidity,” *Journal of the European Economic Association* (2010).

cross-border transactions could contribute to the destabilization of the U.S. financial system if the security-based swap market were not adequately regulated.¹⁰² AIG FP sold extensive amounts of credit protection in the form of CDS in the years leading up to the crisis,¹⁰³ largely on the strength of AIG's AAA rating; AIG FP's obligations were guaranteed by its parent AIG.¹⁰⁴ AIG FP's CDS business reflected the global nature of the security-based swap market because, although both AIG and AIG FP were headquartered in the United States, much of AIG FP's CDS business was run out of its London office,¹⁰⁵ and AIG FP sold credit protection to counterparties both within the United States and around the world.¹⁰⁶

¹⁰² More generally, the Lehman Brothers Holding Inc. bankruptcy offers an example of how risk can spread across affiliated entities of multinational financial institutions. See Lehman Brothers International (Europe) in Administration, Joint Administrators' Progress Report for the Period 15 September 2008 to 14 March 2009 (Apr. 14, 2009), available at: <http://www.pwc.co.uk/assets/pdf/lbie-progress-report-140409.pdf> ("The global nature of the Lehman business with highly integrated, trading and non-trading relationships across the group led to a complex series of inter-company positions being outstanding at the date of Administration. There are over 300 debtor and creditor balances between LBIE and its affiliates representing \$10.5B of receivables and \$11.0B of payables as at 15 September 2008.").

¹⁰³ In 2007, AIG FP's CDS portfolio reached a peak of \$527 billion. Congressional Oversight Panel, June Oversight Report, "The AIG Rescue, Its Impact on Markets, and the Government's Exit Strategy," June 2010, at 23, available at: <http://www.gpo.gov/fdsys/pkg/CPRT-111JPRT56698/pdf/CPRT-111JPRT56698.pdf> ("AIG Report").

¹⁰⁴ See Intermediary Definitions Adopting Release, 77 FR at 30689 n.1133 ("AIGFP's obligations were guaranteed by its highly-rated parent company . . . an arrangement that facilitated easy money via much lower interest rates from the public markets, but ultimately made it difficult to isolate AIGFP from its parent, with disastrous consequences") (quoting AIG Report at 20).

¹⁰⁵ See AIG Report at 18.

¹⁰⁶ See Office of the Special Inspector General for the Troubled Asset Relief Program, Factors Affecting Efforts to Limit Payments to AIG Counterparties, at 20 (Nov. 17, 2009) (listing AIG FP's CDS counterparties, including a variety of U.S. and foreign financial institutions), available at:

As the subprime mortgage market in the United States collapsed, the ongoing obligations borne by AIG FP and, through its guarantees, its parent AIG, arising from AIG FP's CDS transactions produced losses that threatened to overwhelm both AIG FP and AIG. The Federal Reserve Bank of New York established a credit facility to prevent AIG from collapsing. These funds were later supplemented by financial support from the U.S. Treasury and the Federal Reserve, resulting in over \$180 billion in financial assistance.¹⁰⁷

As we discuss in more detail below, security-based swap market regulators need to take into account the spillover and contagion effect of security-based swap risk to avoid overburdening the financial system. One way to mitigate the spillover effect of a firm failure is to impose capital standards that take into account the security-based swap risk the firm undertakes while allowing flexibility in how it conducts security-based swap business.¹⁰⁸ At the same time, the Commission is mindful that the application of Title VII prudential requirements such as capital and margin impose costs on market participants that could provide economic incentives to restructure or separate their security-based swap activity according to geographical or jurisdictional regions, or to engage in less security-based swap activity, which may reduce the liquidity or efficiency of the overall market.¹⁰⁹

There are circumstances where risk generated by security-based swaps may reside in the United States while conduits of such risk (e.g., security-based swap transactions or persons engaged in security-based swap transactions) could take place or reside outside the United States

http://www.sig tarp.gov/Audit%20Reports/Factors_Affecting_Efforts_to_Limit_Payments_to_AIG_Counterparties.pdf

¹⁰⁷ See AIG Report at 2.

¹⁰⁸ See Capital, Margin, and Segregation Proposing Release, 77 FR at 70218.

¹⁰⁹ See *id.* at 70303-06.

or outside the scope of application of the Title VII requirements. In these instances, the Commission has considered the nature of the risk, the magnitude of the risk, and the existence of other financial regulations, such as regulation of systemically important financial institutions in Title I and Title II of the Dodd Frank Act and banking regulations.

The Commission is mindful that the same interconnectedness in the security-based swap market that may provide conduits for risk also may mean that changes to incentives or costs caused by the application of U.S. regulatory requirements may have effects on the liquidity of the global market, as well as its efficiency and competitive dynamics. As described below in Section XV.C, there are a myriad of paths for liquidity as well as risk to move throughout the financial system in this interconnected market. In addition, differences in regulatory requirements between the United States and non-U.S. jurisdictions may also impact markets by changing the competitive dynamics currently at play in the interconnected global market. For example, as articulated in Section XV.C, some potential responses by market participants to the proposed rules and interpretations in this release may result in lessened competition in the security-based swap market within the United States. Among other considerations, some entities may determine that the compliance costs arising from the requirements of Title VII warrant exiting the security-based swap market in the United States and not transacting with U.S. persons. These exits could result in higher spreads and affect the ability and willingness of end users to engage in security-based swaps.

(c) Central Clearing

Many of the bilateral counterparty credit risks associated with security-based swaps can be mitigated by central clearing. Central clearing of security-based swaps provides a mechanism for market participants to engage in security-based swap activity without having to assess the

creditworthiness of each counterparty. Clearing of security-based swaps shifts the counterparty risk from individual counterparties to CCPs whose members collectively share the default risk of all members.¹¹⁰ Central clearing also requires consistent application of mark-to-market pricing and margin requirements, which standardizes the settling of payment or collateral delivery resulting from market movements and minimizes the risk of clearing member defaults.¹¹¹

However, central clearing may also pose risk to financial systems. Because a CCP necessarily concentrates a large number of otherwise bilateral contracts into a single location, a CCP could itself become systemically important.¹¹² While a loss by any single member in excess of its margin posted with the CCP is likely to be absorbed by the CCP's risk capital structure, correlated losses among many members, such as those which occurred among many asset classes during the 2008 financial crisis, could diminish the effectiveness of the risk

¹¹⁰ See, e.g., Darrell Duffie and Haoxiang Zhu, "Does a Central Clearing Counterparty Reduce Counterparty Risk?" Stanford University, Working Paper (2010), available at: <http://www.stanford.edu/~duffie/DuffieZhu.pdf>; Nout Wellink, "Mitigating systemic risk in OTC derivatives markets," Banque de France, Financial Stability Review, No. 14 – Derivatives – Financial innovation and stability (July 2010), available at: http://www.banque-france.fr/fileadmin/user_upload/banque_de_france/publications/Revue_de_la_stabilite_financiere/etude15_rsf_1007.pdf.

¹¹¹ See Christopher Culp, "OTC-Cleared Derivative: Benefits, Costs, and Implications of the Dodd-Frank Wall Street Reform and Consumer Protection Act," Journal of Applied Finance No. 2 (2010), available at: <http://www.rmesinc.com/articles/OTCCleared.pdf>.

¹¹² The Financial Stability Oversight Council ("FSOC") can designate a CCP as systemically important under Section 804 of the Dodd-Frank Act. See, e.g., Craig Pirrong, "Mutualization of Default Risk, Fungibility, and Moral Hazard: The Economics of Default Risk Sharing in Cleared and Bilateral Markets," University of Houston, Working Paper (2010), available at: http://business.nd.edu/uploadedFiles/Academic_Centers/Study_of_Financial_Regulation/pdf_and_documents/clearing_moral_hazard_1.pdf ("[c]learing of OTC derivatives has been touted as an essential component of reforms designed to prevent a repeat of the financial crisis. A back-to-basics analysis of the economics of clearing suggests that such claims are overstated, and that traditional OTC mechanisms may be more efficient for some instruments and some counterparties.").

mutualization structure of a CCP. Its failure could create financial instability through its members if the members, as residual obligors to the default related losses are unable to absorb the resulting financial impact. Such an outcome could lead to failure among CCP member counterparties, particularly when obligations are sizable, which may be the case if the members are themselves systemically important.

Certain aspects of Title VII are intended to reduce the risk of CCP failure by promoting sound risk management practices among registered clearing agencies, while also providing open access to market participants.¹¹³ Sound risk management practices are important among both domestic and foreign CCPs, given the global nature of CCP membership.¹¹⁴ When a CCP in the United States has significant number of foreign members, the CCP and its U.S.-domiciled members would be exposed to the foreign members. Similarly, when U.S.-domiciled entities are members of foreign domiciled CCPs, U.S. exposure to a foreign institution is created that may be systemically important.

(d) Security-Based Swap Data Reporting

Certain Title VII requirements are designed to increase market transparency for regulators and among security-based swap market participants. Requirements of regulatory reporting are designed to provide regulators with a broad view of the market and help monitor pockets of risk that might not otherwise be observed by market participants with an incomplete view of the market. Separately, requirements of post-trade reporting of prices in real-time are

¹¹³ See, e.g., Clearing Agency Standards Adopting Release, 77 FR 66220.

¹¹⁴ Based on the analysis of the member positions at ICE Clear Credit in the United States by the staff in the Division of Risk, Strategy and Financial Innovation, approximately half of the positions at ICE Clear Credit in the United States are held by foreign-domiciled dealing entities. See Section XV.B.2(e), *infra*.

intended to promote price discovery and lower the trading costs by lessening the information advantage afforded certain OTC market participants with the largest order flow. Allowing all market participants access to more information about transactions' prices and sizes should create a more level playing field and may promote the efficiency of exchange or SEF trading of security-based swaps. In particular, as in other security markets, quoted bids and offers should form and adjust according to the reporting of executed trades. At the same time, however, we recognize that increased post-trade transparency also could impact the liquidity of, and competition in, the security-based swap market.¹¹⁵ For example, market participants may be less willing to provide liquidity for large, potentially market-moving trades if the implementation of the Title VII public dissemination requirements reveals private information about future hedging and inventory needs.

The increased transparency caused by the Title VII reporting requirements could be diminished if consistent reporting requirements are not applied to transactions across various jurisdictions and information regarding security-based swaps taking place in the global market is not shared among jurisdictions. For instance, the aggregate exposures created by a particular security-based swap or class of security-based swaps may only be partially observed if security-based swap transactions span multiple jurisdictions. As a result any single regulator may not have a complete view of the security-based swap risks and may underestimate such risks. Separately, if some regulatory regimes do not require, or provide for less informative, post-trade reporting rules, then certain transactions may gravitate to these jurisdictions so that market

¹¹⁵ See Section XV.C, *infra* (discussing the effects of our proposed cross-border approach on competition, efficiency, and capital formation).

participants can escape reporting their transaction prices. In both instances the increased transparency contemplated by the Title VII reporting requirements may be diluted.

B. Scope of Title VII's Application to Cross-Border Security-Based Swap Activity

Congress has given the Commission authority in Title VII to implement a security-based swap regulatory framework. In the statutory definitions and registration requirements for market intermediaries and participants (i.e., security-based swap dealers and major security-based swap participants) and security-based swap infrastructures (i.e., SDRs, security-based swap clearing agencies, and SB SEFs), Congress has identified the types of security-based swap activity that triggers Title VII registration and regulatory requirements relevant to such persons or the application of Title VII transaction-level requirements.

We recognize that applying Title VII to persons and transactions that fall within the statutory definitions or requirements may subject some persons based outside the United States, or some transactions arising from activity that occurs in part inside and in part outside the United States, to the various provisions of Title VII. At the same time, however, the global nature of the security-based swap market and the characteristics of the risk associated with security-based swap activity suggest that applying Title VII only to the conduct of persons located within the United States or to security-based swap activity occurring entirely within the United States would exclude from regulation a significant proportion of security-based swap activity that occurs in part inside and in part outside the United States.¹¹⁶ Our proposed approach is intended to strike a reasonable balance in light of the authority provided by Congress, the structure of the

¹¹⁶ See Section II.A, supra. We preliminarily believe that many of the circumstances of concern also would create the opportunity for evasion of the Dodd-Frank Act's regulatory regime. See, e.g., note 558, infra.

security-based swap market, and the transfer of risk within that market. Accordingly, among other things, our proposed approach does not impose Title VII requirements on persons whose relevant security-based swap activity occurs entirely outside the United States and thus likely does not raise the types of concerns in the U.S. financial system that would warrant application of Title VII.

Commenters have raised concerns about the application of Title VII to security-based swap activity in the cross-border context and specifically about the possibility that the Commission may apply our security-based swap regulations to “extraterritorial” conduct. In this subsection, we discuss commenters’ views regarding the applicability of Title VII to cross-border security-based swap activity, explain our proposed approach to determining whether the relevant security-based swap activity takes place, in whole or in part, within the United States, and interpret what it means for a person to “transact a business in security-based swaps without the jurisdiction of the United States” as set forth in Section 30(c) of the Exchange Act (“Section 30(c)").¹¹⁷ In subsequent sections of the release, we discuss in more detail our proposed application of Title VII to cross-border security-based swap activity.

1. Commenters’ Views

Commenters generally expressed the view that Section 30(c) restricts the Commission’s authority to apply Title VII to “extraterritorial” conduct and thus, that the Commission follow a territorial approach in applying Title VII to cross-border security-based swap activity. One commenter interpreted Section 30(c) as prescribing a strictly territorial approach to the application of Title VII, arguing that this section codifies the territorial approach that we have

¹¹⁷ 15 U.S.C. 78dd(c).

historically taken in our existing securities regulations.¹¹⁸ Several commenters argued that a narrow interpretation of the “extraterritorial” reach of Title VII was consistent with both Commission precedent¹¹⁹ and the Supreme Court’s decision in Morrison v. National Australia Bank.¹²⁰

Based on this interpretation of Section 30(c), commenters generally argued that Title VII does not give the Commission authority to regulate entities that transact a business in security-based swaps outside the United States.¹²¹ Some commenters suggested that non-U.S. entities (including affiliates of U.S. persons) that conduct business entirely with counterparties outside the United States should not be required to register as swap or security-based swap dealers or comply with Title VII.¹²² Some of these commenters also urged the Commission not to subject foreign branches and affiliates of U.S. banks to Title VII registration requirements to the extent

¹¹⁸ See Cleary Letter IV at 33-36; see also SIFMA Letter I at 5, 22; Sullivan & Cromwell Letter at 6 (suggesting that Section 30(c) permits “extraterritorial” application of Title VII only to prevent “efforts to evade” statutory requirements).

¹¹⁹ See, e.g., Sullivan & Cromwell Letter at 11 (stating that the Commission has “plainly stated that it uses a territorial approach in applying the broker-dealer requirements to international operations”).

¹²⁰ 130 S.Ct. 2869 (2010). See, e.g., Jones Day Letter at 7-8 (suggesting that the jurisdictional limits of Dodd-Frank Act Sections 722 and 772 be interpreted narrowly in a manner consistent with the Morrison decision); Cleary Letter IV at 33-6 (arguing against an extraterritorial application of Title VII); SIFMA Letter I at 5-6; ISDA Letter I at 11.

¹²¹ See, e.g., Jones Day Letter at 7-8; Cleary Letter IV at 33-6; Sullivan & Cromwell Letter at 10-11; SIFMA Letter I at 5-6; ISDA Letter I at 11.

¹²² See SIFMA Letter I at 4; see also ISDA Letter I at 11 (recommending that designation as a dealer should not be triggered by transactions entered into with foreign affiliates or branches of a U.S. bank or with foreign entities whose obligations are guaranteed by a U.S. person, or by legacy positions with U.S. counterparties); Davis Polk Letter II at 5-6 (stating that a foreign entity engaged in swaps exclusively with foreign counterparties is “without the jurisdiction of the United States”). Similarly, one commenter recommended that transactions between two foreign entities should be excluded from calculations of substantial position for purposes of the major participant definition. Canadian MAVs Letter at 7-8.

that they transact solely with foreign persons.¹²³ Some commenters urged that, even within a single entity, only those branches, departments, or divisions that engage in business within the United States should be required to register.¹²⁴

Commenters generally took the view that Section 30(c) does not permit the Commission to apply Title VII to transactions occurring outside the United States. Accordingly, commenters suggested that Section 30(c) restricts the Commission's ability to apply Title VII requirements to the foreign business of entities that are required to register with the Commission.¹²⁵ For example, one commenter interpreted Section 30(c) to prohibit application of Title VII to any of a person's "activity" or "business" outside the United States, even if that person otherwise transacts a business in security-based swaps within the jurisdiction of the United States.¹²⁶

Similarly, some commenters suggested that Section 30(c) prohibits the application of Title VII to transactions involving the foreign affiliates of U.S. persons, on the basis that such transactions occur "without the jurisdiction of the United States" when no U.S. person is a

¹²³ See, e.g., Sullivan & Cromwell Letter at 7 (stating that a territorial interpretation of Section 30(c) prevented the Commission from imposing Title VII requirements on the U.S. banks' "Non-U.S. Operations," defined to include both foreign affiliates or subsidiaries and foreign branches of these banks).

¹²⁴ See, e.g., Cleary Letter IV at 12; see also *id.* at 26 (arguing that a non-U.S. branch or affiliate of a U.S. entity should not be required to register as a dealer by virtue of its transactions with a non-U.S. person counterparty); ISDA Letter I at 11 (stating that a "branch, division or office of an entity should be able to be designated as a Dealer without subjecting the whole entity to regulation").

¹²⁵ See Cleary Letter IV at 11; see also SIFMA Letter I at 14 (suggesting that Section 30(c) "provide[s] strong support" for not applying Title VII to transactions between a registered foreign swap dealer and non-U.S. persons); ISDA Letter I at 11 (recommending that no Title VII requirements should apply to transactions between a non-U.S. entity registered as a dealer and its non-U.S. person counterparties).

¹²⁶ See Cleary Letter IV at 12.

counterparty to the trade.¹²⁷ One commenter explained that, because such transactions involve parties outside the United States and occur outside the United States, they are “removed from the stream of U.S. commerce.”¹²⁸

Commenters also generally recommended a narrower interpretation of the language in Section 30(c) permitting the application of Title VII regulations to persons transacting a business in security-based swaps without the jurisdiction of the United States to the extent that they are doing so in contravention of rules the Commission has prescribed as “necessary or appropriate to prevent the evasion of any provision of [the Exchange Act that was added by the Dodd-Frank Act].” Under this view, Section 30(c) permits “extraterritorial” application of Title VII only to entities that have themselves engaged in willful or intentional evasion.¹²⁹ These commenters argued that the longstanding use of foreign branches and affiliates by security-based swap market entities demonstrates that these types of business structures are not evasive and, therefore, do not fall within the exception to the limits on the applicability of Title VII as set forth in Section 30(c).¹³⁰

2. Scope of Application of Title VII in the Cross-Border Context

(a) Overview and General Approach

Section 772(b) of the Dodd-Frank Act amends Section 30 of the Exchange Act to provide that “[n]o provision of [Title VII] . . . shall apply to any person insofar as such person transacts a

¹²⁷ See SIFMA Letter I at 5-6; see also ISDA Letter I at 11 (suggesting that dealer-related requirements of Title VII should not apply to business with non-U.S. person counterparties, including foreign affiliates and branches of U.S. persons).

¹²⁸ See Sullivan & Cromwell Letter at 9.

¹²⁹ See, e.g., id. at 9-10 (suggesting that “extraterritorial” application of Title VII requires an “intent to evade” Title VII).

¹³⁰ See Cleary Letter IV at 7.

business in security-based swaps without the jurisdiction of the United States,” unless that business is transacted in contravention of rules prescribed to prevent evasion of Title VII.¹³¹ In so amending Section 30 of the Exchange Act, Congress directly appropriated nearly identical language defining the scope of the Exchange Act’s application that appears in subsection (b) of Section 30 of the Exchange Act,¹³² indicating that Congress intended the territorial application of Title VII to entities and transactions in the security-based swap market to follow similar principles to those applicable to the securities market under the Exchange Act.¹³³

In light of this similar language, commenters have urged us to follow a territorial approach in applying Title VII to cross-border security-based swap activity.¹³⁴ We preliminarily agree that a territorial approach, if properly tailored to the characteristics of the security-based swap market, should help ensure that our regulatory framework focuses on security-based swap activity that is most likely to raise the concerns that Congress intended to address in Title VII, including the effects of security-based swap activity on the financial stability of the United States, on the transparency of the U.S. financial system, and on the protection of counterparties.

¹³¹ See Section 30(c) of the Exchange Act, 15 U.S.C. 78dd(c), added by Section 772(b) of the Dodd-Frank Act.

¹³² Section 30(b) of the Exchange Act, 15 U.S.C. 78dd(b), provides that the Exchange Act and related rules “shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States,” unless that business is transacted in contravention of rules prescribed as necessary or appropriate to prevent evasion of the Exchange Act.

¹³³ See, e.g., Commodity Futures Trading Comm’n v. Schor, 478 U.S. 833, 846 (1986) (holding that “when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the ‘congressional failure to revise or repeal the agency’s interpretation is persuasive evidence that the interpretation is the one intended by Congress’”).

¹³⁴ See, e.g., Cleary Letter IV at 33-37.

We differ from commenters, however, in our understanding of what a territorial approach means in the context of a global security-based swap market. As noted above, some commenters suggested that the security-based swap activity of foreign branches and affiliates of U.S. persons with non-U.S. persons occurs outside the United States and has only an indirect connection with the United States and that, therefore, subjecting transactions resulting from that activity to Title VII would involve extraterritorial application of the statute.¹³⁵ Although we recognize that some of the security-based swap activity involving these foreign branches and affiliates occur outside the United States, we believe that a properly tailored territorial approach should look to both the full range of activities described in the statutory text as well as to the concerns that Congress intended Title VII to address in determining whether the relevant activity, considered in its entirety, occurs at least in part within the United States.¹³⁶

As noted above, security-based swap transactions differ from most traditional securities transactions in that they give rise to an ongoing obligation between the counterparties to the trade: the counterparties bear the risks that result from those transactions for the duration of the transactions.¹³⁷ The Dodd-Frank Act was enacted, in part, to address the risks to the financial stability of the United States posed by entities bearing such risks, and a territorial approach to the application of Title VII should be consistent with achieving these statutory purposes. A territorial approach to the application of Title VII that excluded from the application of Title VII any activity conducted by the foreign operations of a U.S. person where they do business only

¹³⁵ See, e.g., Cleary Letter IV at 35; ISDA Letter I at 11; SIFMA Letter I at 5-6; Sullivan & Cromwell Letter at 11-13.

¹³⁶ See Morrison, 130 S. Ct. at 2884 (looking to the “focus” of the relevant statutory provision in determining whether the statute was being applied to domestic conduct).

¹³⁷ See Section II.A, infra.

with non-U.S. counterparties located outside the United States would likely fail to achieve the financial stability goals of Title VII, as such an approach would not account for the security-based swap risks that may be borne by entities located within the United States whose foreign operations solicit, negotiate, or execute transactions outside the United States. In addition, it is not clear that a different territorial approach that focused solely on the location of the entity bearing the risk (and disregarded whether certain relevant activity, including execution of the transaction, occurred within the United States) would adequately address the Dodd-Frank Act's concern with promoting transparency in the U.S. financial system and protecting counterparties, concerns that are likely to be raised by the solicitation, negotiation, or execution within the United States, even if the risk arising from those security-based swaps transactions is borne by entities outside the United States. For example, some transactions characterized by commenters as occurring outside the United States, even with non-U.S. persons, are entered into by persons located within the United States and would appear to raise the same types of risk concerns as transactions occurring wholly within the United States.

Similarly, the Commission preliminarily believes that a territorial approach should be informed by the text of the statutory provision that imposes the registration or other regulatory requirement.¹³⁸ Some commenters suggested, for instance, that a territorial approach would necessarily exclude certain foreign operations of U.S. persons from registration as security-based swap dealers so long as they did not enter into security-based swap transactions with counterparties located within the United States.¹³⁹ However, in this instance, these commenters

¹³⁸ See Morrison, 130 S. Ct. at 2884 (performing a textual analysis of Section 10(b) of the Exchange Act to determine what conduct was relevant in determining whether the statute was being applied to domestic conduct).

¹³⁹ See, e.g., Sullivan & Cromwell Letter at 11.

did not show how their suggested approach relates to the statutory definition of security-based swap dealer or to the rules and interpretation adopted by the Commission and the CFTC to further define “security-based swap dealer” in the Intermediary Definitions Adopting Release, including our discussion of conduct that is indicative of dealing activity.¹⁴⁰ In our preliminary view, we should identify the activity that the statutory provision regulates before reaching a determination of whether relevant activity is occurring within the United States.¹⁴¹ Only after we identify the activity that the statutory provision regulates would we then be able to determine whether the conduct at issue involves activity that the statutory provision regulates and whether this conduct occurs within the United States. To the extent that conduct involving activity that the statutory provision regulates occurs within the United States, application of Title VII to that conduct would be consistent with a territorial approach.

(b) Territorial Approach to Application of Title VII Security-Based Swap Dealer Registration Requirements

We discuss our application of this approach with respect to each of the major Title VII registration categories and requirements in connection with reporting, public dissemination, clearing, and trade execution for security-based swaps in further detail in the sections below,¹⁴² but for sake of illustration, we provide a brief overview of our territorial approach as it applies to the security-based swap dealer definition.

¹⁴⁰ See note 135, *supra*; see also Intermediary Definitions Adopting Release, 77 FR at 30616-19.

¹⁴¹ See *Morrison*, 130 S. Ct. at 2884.

¹⁴² See Sections III - VII, *infra* (discussing each major registration category), and Sections VIII - IX.A, *infra* (discussing certain requirements in connection with reporting and dissemination, clearing, and trade execution for security-based swaps).

Section 3(a)(71) of the Exchange Act¹⁴³ defines security-based swap dealer as a person that engages in any of the following types of activity:

- (i) holding oneself out as a dealer in security-based swaps,
- (ii) making a market in security-based swaps,
- (iii) regularly entering into security-based swaps with counterparties as an ordinary course of business for one's own account,
- (iv) engaging in any activity causing oneself to be commonly known in the trade as a dealer in security-based swaps.¹⁴⁴

We have further interpreted this definition by jointly adopting interpretive guidance with the CFTC that identifies the types of activity that is relevant in determining whether a person is a security-based swap dealer.¹⁴⁵ In this interpretive guidance, we have identified indicia of security-based swap dealing activity to include the following activities:

- providing liquidity to market professionals or other persons in connection with security-based swaps,
- seeking to profit by providing liquidity in connection with security-based swaps,
- providing advice in connection with security-based swaps or structuring security-based swaps,
- having a regular clientele and actively soliciting clients,
- using inter-dealer brokers, and

¹⁴³ 15 U.S.C. 78c(a)(71).

¹⁴⁴ Section 3(a)(71)(A) of the Exchange Act, 15 U.S.C. 78c(a)(71)(A).

¹⁴⁵ See Intermediary Definitions Adopting Release, 77 FR at 30617-18.

- acting as a market maker on an organized security-based swap exchange or trading system.¹⁴⁶

As the foregoing list of relevant activities illustrates, both the statutory text and our interpretation of that text include within the security-based swap dealer definition a range of activities. The broad scope of activities listed above identifies various characteristics of dealing activity. Given the risks associated with dealing activity that the dealer definition and associated regulatory framework in Title VII are intended to address, we preliminarily believe that a territorial approach consistent with these statutory purposes should consider whether the entity performs any of these indicia of dealing activity within the United States (even if some of these indicia also arise in activity conducted outside the United States). This type of analysis appears to us more consistent with the statutory text and with the Supreme Court's approach to statutory analysis in its decision in Morrison than an approach that excludes from jurisdiction certain foreign operations of U.S. persons transacting with foreign counterparties. We also believe that our proposed approach would better help ensure that our regulatory framework achieves the various purposes of security-based swap dealer regulation under Title VII, while avoiding application of security-based swap dealer registration to persons whose dealing activity is unlikely to raise the types of dealer-specific risks that Title VII dealer registration was intended to address because it occurs entirely outside the United States.¹⁴⁷

¹⁴⁶ Id.

¹⁴⁷ Under our proposed approach to the application of the de minimis threshold in the cross-border context, non-U.S. persons that engage in dealing activity with U.S. persons or otherwise within the United States at levels below the de minimis threshold generally would also not be required to register as security-based swap dealers. Such entities are engaged in dealing activity within the United States, and their dealing activity within the United States may raise certain concerns addressed by Title VII. However, we preliminarily believe that, to the extent that this dealing activity remains at levels below

Under our proposed territorial approach to the security-based swap dealer definition, as explained further below, we would require persons resident or organized in the United States, or with their principal place of business in the United States, to count all of their dealing transactions toward their de minimis threshold, including transactions that arise from dealing activity that occurs in part outside the United States (for example, because it is negotiated and executed through that person's foreign branch or office).¹⁴⁸

An interpretation of Section 30(c) that advances the view that security-based swap activity conducted by a U.S. person through a foreign branch constitutes activity "without the jurisdiction of the United States" or that a transaction arising from such activity constitutes "transacting a business in security-based swaps without the jurisdiction of the United States" for purposes of Section 30(c) may not fully account for the statutory definition of "security-based swap dealer," the purposes of Title VII, or the global nature of the security-based swap market. It does not account for the entire range of activities performed by entities active in the security-based swap market, including security-based swap dealers, and the relevance of such activities to the statutory definitions and requirements, given the purposes of Title VII, and it would leave

the de minimis threshold, they should be treated similarly to a U.S. person that engages in dealing activity at levels below the de minimis threshold. See Section III.B.4, *infra*. Like U.S. entities engaged in dealing activity, they may be required to register under the aggregation requirements the Commission and the CFTC adopted in the Intermediary Definitions Adopting Release. See Intermediary Definitions Adopting Release, 77 FR at 30631; 17 CFR § 240.3a71-2(a)(1). Under the aggregation requirements we propose below, even entities with security-based swap dealing activity at levels below the de minimis threshold may be required to register if the total security-based swap dealing activity of affiliates under common control (excluding the activity of any registered affiliates that have independent operations) exceeds the de minimis threshold. See Section III.B.8, *infra*.

¹⁴⁸

See Section III.B.4, *infra*.

unaddressed significant levels of activity that poses precisely the sorts of risks that Title VII was intended to address.

In our preliminary view, to the extent that a U.S. person engages in dealing activity through a foreign operation that is part of the U.S. legal person (such as a foreign branch or office), relevant activity for purposes of the security-based swap dealer definition occurs, at least in part, within the United States because we believe it is the U.S. entity as a whole, and not just the foreign branch or office, that is holding itself out as a dealer and making a market in security-based swaps. Moreover, it is necessarily the U.S. person as a whole that is seeking to profit by providing liquidity and engaging in market-making in security-based swaps, and it is the financial resources of the entire entity that enable it to provide liquidity and engage in market-making in connection with security-based swaps. Its dealing counterparties will look to the entire U.S. person, and not just the foreign branch or office, for performance on the transaction. The entire U.S. person assumes, and stands behind, the obligations arising from the resulting agreement. For these reasons, to the extent that a dealer resides or is organized, or has its principal place of business, within the United States, we believe that it cannot hold itself out as a security-based swap dealer, even through a foreign branch, as anything other than a single person, given that it generally could not operate as a dealer absent the financial and other resources of the entire U.S. person. Its dealing activity with all of its counterparties, including dealing activity conducted through its foreign branch or office, is best characterized as occurring, at least in part, within the United States and should therefore be counted toward the entity's de minimis threshold.

More generally, we preliminarily believe that transactions that create ongoing obligations that are borne by a U.S. person are properly described as directly occurring within the United

States, particularly given Title VII's focus on, among other things, addressing risks to the financial stability of the United States.¹⁴⁹ Indeed, the history of AIG FP confirms that such transactions of U.S. persons can pose risks to the U.S. financial system even if they are conducted through foreign operations. The nature of such risks, and their role in the financial crisis and in the enactment of Title VII, suggest that the statutory framework established by Congress and the objectives of Title VII may require a broader analysis than excluding transactions involving U.S. persons from the application of Title VII solely because they are conducted through operations outside the United States, while others by the same U.S. persons occur within the United States.¹⁵⁰

However, we preliminarily believe that non-U.S. persons engaged in dealing activity would be required to count toward their de minimis thresholds only transactions arising from their dealing activity with U.S. persons¹⁵¹ or dealing activity otherwise conducted within the United States. In addition, to the extent that a non-U.S. person engages in security-based swap dealing activity within the United States, we preliminarily believe that such dealing activity should be counted toward the non-U.S. person's de minimis threshold regardless of whether its counterparties are U.S. persons.¹⁵² This view is consistent with the fact that such security-based swap activity raises the types of concerns that the Dodd-Frank Act was intended to address.

¹⁴⁹ As we discuss below, such activity would include providing guarantees for a foreign entity's security-based swap transactions. See Section II.B.2(d), infra.

¹⁵⁰ However, for reasons explained below, the Commission is not proposing to subject the foreign operations of U.S. persons to certain of the requirements in Title VII. See, e.g., Sections III.B.7, III.B.9, VIII.C, IX.C.3(a), and X.B.3(a), infra.

¹⁵¹ However, for reasons explained below, the Commission is not proposing to require non-U.S. persons to include transactions with the foreign branches of U.S. banks in their de minimis calculations. See Section III.B.7, infra.

¹⁵² See Intermediary Definitions Adopting Release, 77 FR at 30617-18.

We preliminarily believe that a non-U.S. person not engaged in any security-based swap activity within the United States (or engaged only at levels below the de minimis threshold) is unlikely to pose the types of concerns within the U.S. financial system that Title VII dealer regulation was intended to address.¹⁵³ Thus, under our proposed approach, a non-U.S. person that engages in dealing activity entirely outside the United States (i.e., does not enter into transactions with a U.S. person or otherwise conduct any part of its dealing activity within the United States) would not be required to register as a security-based swap dealer.¹⁵⁴

(c) Application of Other Title VII Requirements to Registered Entities

We are proposing to apply the Title VII requirements associated with registration (including, among others, capital and margin requirements and external business conduct requirements¹⁵⁵) to the activities of registered entities to the extent we have determined that doing so advances the purposes of Title VII.¹⁵⁶ Although some commenters suggested that a territorial approach would prohibit the Commission from applying Title VII to the foreign security-based swap activities of even registered entities, such an interpretation of the application of Title VII to registered entities is difficult to reconcile with the statutory language describing

¹⁵³ Proposed Rule 3a71-3(b) under the Exchange Act, as discussed in Section III.B.4, infra. Of course, the transactions of an entity engaged in security-based swap dealing activity within the United States at levels below the de minimis threshold or in security-based swap activity within the United States that is not dealing activity may be subject to other Title VII requirements, as discussed below, or other provisions of the federal securities laws.

¹⁵⁴ This proposed approach to the application of Title VII security-based swap dealer registration requirements is not intended to limit or address the cross-border reach or extraterritorial application of the antifraud or other provisions of the federal securities laws.

¹⁵⁵ See Section 15F of the Exchange Act, 15 U.S.C. 78o-10.

¹⁵⁶ See, e.g., Sections III.C.3 and 4, infra (discussing requirements applicable to security-based swap dealers).

the requirements applicable to registered security-based swap dealers, with the text of Section 30(c),¹⁵⁷ or with the purposes of Title VII and the nature of risks in the security-based swap market as described above. We have long taken the view that an entity that has registered with the Commission subjects itself to the entire regulatory system governing such registered entities.¹⁵⁸

(d) Application of Title VII Regulatory Requirements to Transactions of Foreign Entities Receiving Guarantees from U.S. Persons

We also are proposing to apply certain Title VII transaction-level requirements (e.g., mandatory clearing, reporting and dissemination, and mandatory trade execution of security-based swaps) to certain transactions involving one or more non-U.S. persons whose performance under the security-based swaps is guaranteed by a U.S. person. We discuss the statutory basis

¹⁵⁷ Section 30(c) prohibits the application of the Exchange Act only with respect to those persons that “transact[] a business in security-based swaps without the jurisdiction of the United States.” Because only security-based swap entities that transact a business in security-based swaps within the United States would be required to register under the approach proposed in this release, registered entities are not persons that “transact[] a business in security-based swaps without the jurisdiction of the United States.”

¹⁵⁸ See Registration Requirements for Foreign Broker-Dealers, Exchange Act Release No. 27017 (July 11, 1989), 54 FR 30013, 30016-17 (July 18, 1989) (“Rule 15a-6 Adopting Release”) (noting that a foreign registrant is subject to the regulatory system applicable to such entities); Revision of Form BD, Exchange Act Release No. 25285 (Jan. 22, 1988) (“It is the Commission’s view that a broker-dealer submits to the Commission’s jurisdiction when it registers with the Commission.”); In re International Paper and Power Co., 4 SEC 873, 876 (1939) (registration with the Commission makes registrant “subject to the complete jurisdiction of the Commission”). See also Exemption of Certain Foreign Brokers or Dealers, Exchange Act Release No. 58047 (June 27, 2008), 73 FR 39182 (July 8, 2008) (“Proposed Amendments to Rule 15a-6”), at 39182 (describing registration requirements as applying to the entire foreign entity); In re Ira William Scott, 53 SEC 862, 866 (1998) (holding that investment adviser that registers with the Commission has “submitted himself to [the Commission’s] jurisdiction pursuant to the Advisers Act”). Cf. In re United Corp., 232 F.2d 601, 606 (1956) (stating that, upon registration as a holding company, an entity comes within “the jurisdiction of the Commission and [is] subject to all requirements applicable to a registered holding company”).

for applying specific Title VII requirements to such transactions in the relevant substantive discussions below.¹⁵⁹ In this subsection, we briefly explain why we believe that a territorial approach that is consistent with the purposes and text of the Dodd-Frank Act supports the application of Title VII to such transactions.

In a security-based swap transaction between two non-U.S. persons where the performance of at least one side of the transaction is guaranteed by a U.S. person, the guarantee gives the guaranteed entity's counterparty direct recourse to the U.S. person for performance of obligations owed by the guaranteed entity under the security-based swap,¹⁶⁰ and the U.S. guarantor exposes itself to the security-based swap risk as if it were a direct counterparty to the security-based swap through the security-based swap activity engaged in by the guaranteed entity. As a result, the guarantee creates risk to the U.S. financial system and counterparties (including U.S. guarantors) to the same degree as if the transaction were entered into directly by a U.S. person. In addition, in many cases, the counterparty would not enter into the transaction (or would not do so on the same terms) with the guaranteed entity, and the guaranteed entity would not be able to engage in any security-based swaps, absent the presence of the guarantee. Given that the guarantee is provided by a U.S. person and poses risks to the U.S. financial

¹⁵⁹ See Sections VIII - XI, *infra*.

¹⁶⁰ In discussing the application of the major participant tests to guaranteed positions in the Intermediary Definitions Adopting Release, the Commission and the CFTC noted that an entity's security-based swap positions are attributed to a parent, other affiliate, or guarantor for purposes of the major participant analysis to the extent that the counterparties to those positions have recourse to that parent, other affiliate, or guarantor in connection with the position. Positions are not attributed in the absence of recourse. See Intermediary Definitions Adopting Release, 77 FR at 30689. As a result, the term "guarantee" as used in this release refers to a contractual agreement pursuant to which one party to a security-based swap transaction has recourse to its counterparty's parent, other affiliate, or guarantor with respect to the counterparty's obligations owed under the transaction.

system, and considering the reliance by both the guaranteed entity and its counterparty on the creditworthiness of the guarantor in the course of engaging in security-based swap transactions and for the duration of the security-based swap, we preliminarily believe that a transaction entered into by a non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person is within the United States by virtue of the involvement of the U.S. guarantor in the security-based swap. Therefore, we preliminarily believe that subjecting such transactions to Title VII is consistent with our territorial approach.

(e) Regulations Necessary or Appropriate to Prevent Evasion of Title VII

As noted above, several commenters expressed the view that Section 30(c) of the Exchange Act restricts the Commission's authority to apply amendments made to the Exchange Act by Title VII to "extraterritorial" conduct. Section 30(c) provides the Commission with the express authority to prescribe rules and regulations for persons that transact a business in security-based swaps without the jurisdiction of the United States to the extent the Commission determines that doing so is necessary or appropriate to prevent evasion. Some commenters have expressed the view that this authority extends to "extraterritorial" activity only when such activity is intended to evade Title VII or to conceal a domestic violation of Title VII, suggesting that Section 30(c) prohibits application of Title VII to transactions by foreign affiliates or operations established for a legitimate business purpose, as the existence of such a purpose is evidence that the conduct is not intended to be evasive.¹⁶¹

While recognizing the concerns expressed by commenters, the Commission preliminarily believes that Section 30(c) does not require the Commission to find actual evasion in order to invoke our authority to reach activity "without the jurisdiction of the United States." Section

¹⁶¹ See, e.g., Cleary Letter IV at 5-6, 7, 18; Sullivan & Cromwell Letter at 6-7.

30(c) also does not require that every particular application of Title VII to security-based swap activity “without the jurisdiction of the United States” address only business that is transacted in a way that evades Title VII. Section 30(c) authorizes the Commission to apply Title VII to persons transacting a business “without the jurisdiction of the United States” if they violate rules that the Commission has prescribed as “necessary or appropriate to prevent the evasion of any provision” of Title VII. The focus of this provision is not whether such rules impose Title VII requirements only on entities engaged in evasive activity but whether the rules are generally “necessary or appropriate” to prevent evasion of Title VII. In other words, Section 30(c) permits the Commission to impose prophylactic rules intended to prevent possible evasion, even if they affect both evasive and non-evasive conduct. Thus, under our preliminary proposed interpretation of Section 30(c), the statute permits us to prescribe such rules to conduct without the jurisdiction of the United States, even if those rules would also apply to a market participant that has been transacting business through a pre-existing market structure such as a foreign branch or guaranteed foreign affiliate established for valid business purposes, provided the proposed rule or interpretation is designed to prevent possible evasive conduct.¹⁶²

C. Principles Guiding Proposed Approach to Applying Title VII in the Cross-Border Context

In considering how to apply Title VII in the cross-border context, the Commission has been mindful of the global nature of the security-based swap market and the types of risks

¹⁶² We preliminarily believe that the proposed rules or interpretations set forth in this release are not being applied to persons who are “transact[ing] a business in security-based swaps without the jurisdiction of the United States,” within the meaning of Section 30(c). See Section II.B.2(a), supra. However, as noted below, the Commission also preliminarily believes that the proposed rules or interpretations are necessary or appropriate to help prevent the evasion of the provisions of the Exchange Act that were added by the Dodd-Frank Act and prophylactically will help ensure that the particular purposes of the Dodd-Frank Act addressed by the rule or interpretation are not undermined. See, e.g., note 558, infra.

created by security-based swap activity to the U.S. financial system and market participants, as well as the needs of a well-functioning security-based swap market.¹⁶³ We also have been guided by the purpose of the Dodd-Frank Act¹⁶⁴ and the applicable requirements of the Exchange Act, including the following:

- Risk to the U.S. Financial System—The Dodd-Frank Act was intended to promote, among other things, the financial stability of the United States by limiting/mitigating risks to the financial system.¹⁶⁵
- Transparency—The Dodd-Frank Act was intended to promote transparency in the U.S. financial system.¹⁶⁶
- Counterparty Protection—The Dodd-Frank Act adds provisions to the Exchange Act relating to counterparty protection, particularly with respect to “special entities.”¹⁶⁷
- Economic Impacts—The Exchange Act requires the Commission to consider the impact of our rulemakings on efficiency, competition, and capital formation.¹⁶⁸

¹⁶³ See Sections II.A.1 - II.A.3, *supra*.

¹⁶⁴ See note 4, *supra*.

¹⁶⁵ See *id.*

¹⁶⁶ See *id.*

¹⁶⁷ See Section 15F(h) of the Exchange Act, as added by Section 764(a) of the Dodd-Frank Act, in particular.

¹⁶⁸ Specifically, Section 3(f) of the Exchange Act provides: “Whenever pursuant to this title the Commission is engaged in rulemaking, . . . , and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.” Section 23(a)(2) of the Exchange Act also provides: “The Commission . . . , in making rules and regulations pursuant to any provisions of this title, shall consider among other matters the impact any such rule or regulation would have on competition. The Commission . . . shall not adopt any such rule or regulation which would impose a burden on competition not necessary or appropriate in furtherance of the purposes of [the Exchange Act].”

- Harmonization with Other U.S. Regulators—In connection with implementation of Title VII, the Dodd Frank Act requires the Commission to consult and coordinate with the CFTC and prudential regulators to ensure “regulatory consistency and comparability, to the extent possible.”¹⁶⁹
- Consistent International Standards—To promote effective and consistent global regulation of swaps and security-based swaps, the Dodd-Frank Act requires the Commission and the CFTC to consult and coordinate with foreign regulatory authorities on the “establishment of consistent international standards” with respect to the regulation of swaps and security-based swaps.¹⁷⁰ In this regard, the Commission recognizes that regulators in other jurisdictions are currently engaged in implementing their own regulatory reforms of the OTC derivatives markets and that our proposed application of Title VII to cross-border activities may affect the policy decisions of these other regulators as they seek to address potential conflicts or duplication in the regulatory requirements that apply to market participants under their authority.¹⁷¹
- Anti-Evasion—The Dodd-Frank Act amends the Exchange Act to provide the Commission with authority to prescribe rules and regulations as necessary or

¹⁶⁹ See Section 712(a)(2) of the Dodd-Frank Act.

¹⁷⁰ See Section 752(a) of the Dodd-Frank Act. In this regard, some commenters have encouraged the Commission to consider international comity when applying Title VII in the cross-border context. See note 225, *infra*.

¹⁷¹ For example, subjecting non-U.S. persons to Title VII may prompt a foreign jurisdiction to respond by subjecting U.S. persons to the foreign jurisdiction’s regulatory regime. However, substituted compliance of the type proposed in this release or other mechanisms may address potential conflicts or duplication arising from overlapping regulatory requirements.

appropriate to prevent the evasion of any provision of the Exchange Act that was added by the Dodd-Frank Act.¹⁷²

At times these principles reinforce one another; at other times they compete with each other. For instance, attempts to regulate risk posed to the United States may, depending on what is proposed, make it more costly for U.S.-based firms to conduct security-based swap business, particularly in foreign markets, compared to foreign firms, or could make foreign firms less willing to deal with U.S. persons. On the other hand, attempts to provide U.S. persons greater access to foreign security-based swap markets may, depending on what is proposed, fail to appropriately address the risk posed to the United States from transactions conducted outside the United States or create opportunities for market participants to evade the application of Title VII, particularly until such time as global initiatives to regulate the derivatives markets are fully enacted and implemented.

Balancing these sometimes competing principles is complicated by the fact that Title VII imposes a new regulatory regime on a marketplace that already exists as a functioning, global market. Title VII establishes reforms that will have implications for entities that compete internationally in the global security-based swap market. As we have formulated our proposal, we have generally sought, in accordance with the statutory factors described above, to avoid creating opportunities for regulatory arbitrage or evasion or the potential for duplicative or conflicting regulations. We also have considered the needs for a well-functioning security-based swap market and for avoiding disruption that may reduce liquidity, competition, efficiency, transparency, or stability in the security-based swap market.

¹⁷² See Section 30(c) of the Exchange Act, 15 U.S.C. 78dd(c), as discussed in Section II.B, supra.

D. Conclusion

Consistent with the principles and requirements outlined above, we are proposing to structure our implementation of Title VII around an approach that focuses on identifying market participants whose presence or activity within the United States or activity involving market participants within the United States may give rise to the types of risk to the U.S. financial system and counterparties that Title VII seeks to address, as described more fully below in the subsequent sections of the release.

Request for Comment

The Commission requests comment on all aspects of the discussion and analysis above, including the following:

- Is our understanding of the global nature of the security-based swap market accurate? If not, why not? Please elaborate.
- Is our understanding of the dealing structures used by U.S. and non-U.S. persons accurate? If not, why not? Are there other dealing structures used by market participants? If so, please elaborate.
- Is our understanding of clearing, reporting, and trade execution practices accurate? If not, why not? Please elaborate.
- As discussed above in Section II.B.1, some commenters recommend a narrower approach to the cross-border application of Title VII than this proposal sets forth. We request further comment on these and any other potential alternative approaches to determining the extent to which Title VII should be applied to cross-border transactions, non-U.S. persons, and registered entities.

III. Security-Based Swap Dealers

A. Introduction

Among the market participants subject to regulation under Title VII as a result of their security-based swap activities are security-based swap dealers.¹⁷³ As discussed above, a “security-based swap dealer” generally is defined as any person that (i) holds itself out as a dealer in security-based swaps; (ii) makes a market in security-based swaps; (iii) regularly enters into security-based swaps with counterparties as an ordinary course of business for its own account; or (iv) engages in any activity causing the person to be commonly known in the trade as a dealer or market maker in security-based swaps.¹⁷⁴ The Commission, jointly with the CFTC, issued final rules and interpretive guidance to further define the term security-based swap dealer,¹⁷⁵ including rules implementing the de minimis exception.¹⁷⁶ As part of these final rules and interpretive guidance, the Commission stated that the relevant statutory provisions suggest that, rather than focusing solely on the risk these entities pose to the financial markets, we should interpret the “security-based swap dealer definition in a way that identifies those persons for

¹⁷³ See Section 764(a) of the Dodd-Frank Act, codified as Section 15F of the Exchange Act, 15 U.S.C. 78o-10. See also Section IV, infra (discussing major security-based swap participants).

¹⁷⁴ See Section 3(a)(71) of the Exchange Act, 15 U.S.C. 78c(a)(71), as added by Section 761(a) of the Dodd-Frank Act; see also Section II.B.2(b), supra.

¹⁷⁵ See Intermediary Definitions Adopting Release, 77 FR at 30596; 17 CFR § 240.3a71-1.

¹⁷⁶ Section 3(a)(71)(D) of the Exchange Act, 15 U.S.C. 78c(a)(71)(D), provides that “[t]he Commission shall exempt from designation as a security-based swap dealer an entity that engages in a de minimis quantity of security-based swap dealing in connection with transactions with or on behalf of its customers. The Commission shall promulgate regulations to establish factors with respect to the making of this determination to exempt.” This provision is implemented in Rule 3a71-2 under the Exchange Act (17 CFR § 240.3a71-2), as discussed in the Intermediary Definitions Adopting Release, 77 FR at 30626-43.

which regulation is warranted either: (i) [d]ue to the nature of their interactions with counterparties; or (ii) to promote market stability and transparency, in light of the role those persons occupy within the security-based swap markets.”¹⁷⁷ Security-based swap dealers are subject to a comprehensive regulatory regime under Title VII. The statutory provisions added to the Exchange Act by Title VII are intended to provide for financial responsibility associated with security-based swap dealers’ activities (e.g., the ability to satisfy obligations and the protection of counterparties’ funds and assets), and other counterparty protections, as well as market stability and transparency.¹⁷⁸

By its terms, application of the security-based swap dealer definition set forth in Section 3(a)(71) of the Exchange Act¹⁷⁹ does not depend on whether a security-based swap dealer or its counterparty is a U.S. person.¹⁸⁰ Rather, the security-based swap dealer definition encompasses persons engaged in security-based swap dealing activities without regard to the geographic location or legal residence of either the dealing person or such person’s counterparties. The Commission did not provide guidance on the application of the security-based swap dealer definition to non-U.S. persons or to U.S. persons that conduct dealing activities in the cross-border context in either our proposed or final rules.¹⁸¹ As discussed

¹⁷⁷ Intermediary Definitions Adopting Release, 77 FR at 30617.

¹⁷⁸ See Intermediary Definitions Adopting Release, 77 FR at 30608; see also Section III.C.1, infra (discussing substantive requirements applicable to security-based swap dealers).

¹⁷⁹ 15 U.S.C. 78c(a)(71).

¹⁸⁰ See Section 3(a)(71) of the Exchange Act, 15 U.S.C. 78c(a)(71); 17 CFR § 240.3a71-1.

¹⁸¹ See Intermediary Definitions Adopting Release, 77 FR at 30596; Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant,” Exchange Act Release No. 63452 (Dec. 7, 2010), 75 FR 80174 (Dec. 21, 2010) (“Intermediary Definitions Proposing Release”).

above¹⁸² and as further discussed below, market participants, foreign regulators, and other interested parties have raised concerns regarding, among other things, the application of Title VII to non-U.S. persons that engage in security-based swap dealing activity and U.S. persons who conduct dealing activities “outside the United States.”¹⁸³

The rules and interpretations described below represent the Commission’s proposed approach to applying the security-based swap dealer definition to non-U.S. persons and to U.S. persons who conduct dealing activities in the cross-border context in light of the principles discussed above.¹⁸⁴ Our proposal reflects a particular balancing of these principles, informed by, among other things, the particular nature of the security-based swap market,¹⁸⁵ the structure of security-based swap dealing activity,¹⁸⁶ and our experience in applying the federal securities laws in the cross-border context in the past.¹⁸⁷ We recognize that other approaches are possible to achieve the goals of the Dodd-Frank Act, in whole or in part. Accordingly, we invite comment regarding all aspects of the proposal described below, and each proposed rule and interpretation contained therein, including potential alternative approaches. Data and comment from market participants and other interested parties regarding the likely effect of each proposed rule and interpretation and potential alternative approaches will be particularly useful to the Commission in evaluating possible modifications to the proposal.

¹⁸² See Section II.B, supra.

¹⁸³ See Section III.B.3, infra.

¹⁸⁴ See Section II.C, supra.

¹⁸⁵ See Section II.A, supra.

¹⁸⁶ See Section II.A.2, supra.

¹⁸⁷ See Section III.B.2, infra.

B. Registration Requirement

1. Introduction

In the Intermediary Definitions Adopting Release, which was adopted jointly with the CFTC, the Commission set forth a de minimis threshold of security-based swap dealing that takes into account the notional amount of security-based swap positions connected with a person's security-based swap dealing activity over the prior 12 months.¹⁸⁸ When a person engages in security-based swap dealing in connection with transactions above that threshold, such person meets the definition of a security-based swap dealer under Section 3(a)(71) of the Exchange Act,¹⁸⁹ and the rules and regulations thereunder,¹⁹⁰ and is required to register as a security-based swap dealer with the Commission pursuant to Section 15F(a)(1) of the Exchange Act.¹⁹¹

¹⁸⁸ See Intermediary Definitions Adopting Release, 77 FR at 30626-43. The de minimis threshold was adopted by the Commission in the Intermediary Definitions Adopting Release to implement a statutory exclusion from the security-based swap dealer definition found in Section 3(a)(71)(D) of the Exchange Act. See note 176, *supra*. The de minimis threshold is defined in terms of a notional amount of security-based swap positions connected with dealing activity in which a person engages over the course of the immediately preceding 12 months. An entity engaged in security-based swap dealing activity in connection with security-based swap transactions with or on behalf of its customers below the de minimis threshold amount is exempt from designation as a security-based swap dealer. See Intermediary Definitions Adopting Release, 77 FR at 30626.

¹⁸⁹ 15 U.S.C. 78c(3)(a)(71).

¹⁹⁰ 17 CFR §§ 240.3a71-1 and 240.3a71-2.

¹⁹¹ Section 15F(a)(1) of the Exchange Act provides that “[i]t shall be unlawful for any person to act as a security-based swap dealer unless the person is registered as a security-based swap dealer with the Commission.” 15 U.S.C. 78o-10(a)(1). A person that engages in security-based swap dealing activity in connection with transactions with or on behalf of customers in excess of the de minimis threshold falls within the security-based swap dealer definition, and such person must register as a security-based swap dealer pursuant to Section 15F(a)(1). By contrast, persons that fall within the statutory definitions of a broker and dealer in Sections 3(a)(4) and (5) of the Exchange Act, 15

The de minimis exception in Section 3(a)(71) of the Exchange Act is silent on its application to the cross-border security-based swap dealing activity of U.S. persons and non-U.S. persons, and the Commission did not address this issue in the Intermediary Definitions Adopting Release.¹⁹² Without additional Commission guidance, it would be unclear how persons would be required to calculate the notional amount of their security-based swaps for purposes of the de minimis exception based on their global book of security-based swap dealing activity. In addition, as discussed below, commenters have raised questions regarding how the de minimis threshold should be applied in the cross-border context, expressing concern that, among other things, if a non-U.S. person were required to register as a security-based swap dealer with the Commission because its security-based swap dealing activity exceeded the de minimis threshold, it might be subject to duplicative and potentially conflicting requirements by the Commission and a foreign jurisdiction.¹⁹³

Under the Commission's proposal, as described more fully in the following subsections of this release, a non-U.S. person¹⁹⁴ would be required to register as a security-based swap dealer with the Commission pursuant to Section 15F(a)(1) of the Exchange Act¹⁹⁵ if the notional amount of security-based swap positions connected with its security-based swap dealing

U.S.C. 78c(a)(4) and (a)(5), are required to register with the Commission only if they make use of the "mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security...." Section 15(a)(1) of the Exchange Act, 15 U.S.C. 78o(a)(1).

¹⁹² See Intermediary Definitions Adopting Release, 77 FR at 30628 n.407 (indicating that the Commission and the CFTC intended to address the application of the Title VII dealer regime to non-U.S. persons in separate releases).

¹⁹³ See Section III.B.2, infra.

¹⁹⁴ Proposed Rule 3a71-3(a)(7) under the Exchange Act (defining "U.S. person"), as discussed in Section III.B.5, infra.

¹⁹⁵ 15 U.S.C. 78o-10(a)(1).

activity¹⁹⁶ with U.S. persons (other than with foreign branches of U.S. banks)¹⁹⁷ or otherwise conducted within the United States¹⁹⁸ exceeds the de minimis threshold in the security-based swap dealer definition.¹⁹⁹ Thus, a non-U.S. person with a global security-based swap dealing business, but whose positions connected with its security-based swap dealing activity with U.S. persons (other than with foreign branches of U.S. banks) or otherwise conducted within the United States fall below the de minimis threshold, would not be required to register with the Commission as a security-based swap dealer.²⁰⁰ A U.S. person, by contrast, would be required to count all of its security-based swap transactions (including transactions conducted through a foreign branch),²⁰¹ conducted in a dealing capacity, toward the de minimis threshold to determine whether it would be required to register as a security-based swap dealer with the Commission pursuant to Section 15F(a)(1) of the Exchange Act.²⁰²

¹⁹⁶ See note 188, supra.

¹⁹⁷ Proposed Rule 3a71-3(a)(1) under the Exchange Act (defining “foreign branch”), as discussed in Section III.B.7, infra.

¹⁹⁸ Proposed Rule 3a71-3(a)(5) under the Exchange Act (defining “transaction conducted within the United States”), as discussed in Section III.B.6, infra. This provision would capture dealing activity undertaken by non-U.S. persons that are physically located within the United States, such as through a U.S. branch of a foreign bank, or through an agent, such as non-U.S. person’s U.S. subsidiary or an unaffiliated third party acting on the non-U.S. person’s behalf. As discussed elsewhere in the release, foreign security-based swap dealers utilize these organizational models as part of their global security-based swap dealing businesses. See Section II.A.2, supra (discussing dealing structures), and Section III.D, infra (discussing intermediation).

¹⁹⁹ Proposed Rule 3a71-3(b)(1)(ii) under the Exchange Act.

²⁰⁰ But see Section III.B.9, infra (discussing the aggregation of affiliate positions).

²⁰¹ Proposed Rule 3a71-3(a)(4) under the Exchange Act (defining “transaction conducted through a foreign branch”), as discussed in Section III.C.4, infra.

²⁰² Proposed Rule 3a71-3(b)(1)(i) under the Exchange Act.

As further discussed below, however, we are not proposing to require a non-U.S. person engaged in security-based swap dealing activity to count a transaction with a non-U.S. person conducted outside the United States toward its de minimis threshold, even if its performance (or the performance of its counterparty) on the security-based swap is guaranteed by a U.S. person.²⁰³ In addition, in conformity with the position that the Commissions took in the Intermediary Definitions Adopting Release,²⁰⁴ we are not proposing to require cross-border security-based swap transactions between majority-owned affiliates to be considered when determining whether a person is a security-based swap dealer.²⁰⁵

In the following subsections, we first briefly discuss the Commission's approach to the registration of foreign brokers and dealers, as background, and the views of commenters on the application of Title VII to cross-border activities, particularly as such views relate to security-based swap dealing activity. Then we propose a rule regarding the application of the de minimis exception to cross-border security-based swap dealing activity.²⁰⁶ In order to give further definition to this proposed rule, we are proposing rules defining a number of relevant terms,

²⁰³ See Section III.B.8, infra. However, such U.S. guarantor may become a major security-based swap participant by virtue of the guarantee it extends on the performance of the obligations under the transaction. See Section IV.C.2, infra. In addition, a security-based swap entered into by a non-U.S. person whose performance under such security-based swap is guaranteed by a U.S. person would be required to be reported and, in certain cases, publicly disseminated, under re-proposed Regulation SBSR. See Section VIII.C, infra. Such security-based swap also may be subject to the clearing and trade execution requirements in Title VII. See Sections IX and X, infra.

²⁰⁴ See Intermediary Definitions Adopting Release, 77 FR at 30624-25.

²⁰⁵ See Section III.B.8, infra.

²⁰⁶ Proposed Rule 3a71-3(b) under the Exchange Act, as discussed in Section III.B.4, infra.

including “U.S. person”²⁰⁷ and “transaction conducted within the United States.”²⁰⁸ We also are proposing a rule excluding from a non-U.S. person’s de minimis calculation security-based swap transactions entered into, in a dealing capacity, with a foreign branch of a U.S. bank.²⁰⁹ In addition, we are proposing a rule providing an exception from the aggregation requirement, in the context of the security-based swap dealer definition, for affiliated groups with a registered security-based swap dealer.²¹⁰ Finally, we are proposing interpretive guidance regarding and requesting comment on the treatment of inter-affiliate and guaranteed transactions in the cross-border context for purposes of the de minimis threshold.²¹¹

2. Background Discussion Regarding the Registration of Foreign Brokers and Dealers

Under the Commission’s traditional approach to the registration of brokers and dealers under the Exchange Act, registration and other requirements generally are triggered by a broker or dealer physically operating in the United States, even if such activities are directed only to

²⁰⁷ Proposed Rule 3a71-3(a)(7) under the Exchange Act, as discussed in Section III.B.5, infra. The proposed definition of U.S. person is used not only in the proposed rule regarding the application of the de minimis threshold in the cross-border context, but also in proposed rules discussed in subsequent sections of the release.

²⁰⁸ Proposed Rule 3a71-3(a)(5) under the Exchange Act, as discussed in Section III.B.6, infra. Like the proposed definition of U.S. person, the definition of “transaction conducted within the United States” is used not only in the proposed rule regarding the application of the de minimis threshold in the cross-border context, but also in proposed rules discussed in subsequent sections of the release. In general, under the Commission’s proposal, transactions conducted within the United States, as defined in the proposed rule, would trigger certain transaction-level requirements in Title VII. See Sections VIII - X, infra.

²⁰⁹ Proposed Rule 3a71-3(b)(1)(ii) under the Exchange Act; see also proposed Rule 3a71-3(a)(1) under the Exchange Act (defining “foreign branch”), as discussed in Section III.B.7, infra.

²¹⁰ Proposed Rule 3a71-4 under the Exchange Act, as discussed in Section III.B.8, infra.

²¹¹ See Section III.B.8, infra.

non-U.S. persons outside the United States.²¹² The Commission's territorial approach also generally requires broker-dealer registration by foreign brokers or dealers that, from outside the United States, induce or attempt to induce securities transactions by persons within the United States.²¹³ By contrast, the Commission has not required foreign entities to register as broker-dealers if they conduct their "sales activities" entirely outside the United States.²¹⁴

In addition to our territorial approach to registration of broker-dealers under the Exchange Act, the Commission traditionally has taken an "entity" approach to the application of regulation to registered broker-dealers.²¹⁵ Pursuant to this approach, we have not limited the

²¹² See Rule 15a-6 Adopting Release, 54 FR at 30016-17 ("As a policy matter, the Commission now uses a territorial approach in applying the broker-dealer registration requirements to the international operations of broker-dealers. Under this approach, all broker-dealers physically operating within the United States that effect, induce, or attempt to induce any securities transactions would be required to register as broker-dealers with the Commission, even if these activities were directed only to foreign investors outside the United States."); see also Proposed Amendments to Rule 15a-6, 73 FR at 39182 ("Under this [territorial] approach, broker-dealers located outside the United States that induce or attempt to induce securities transactions with persons in the United States are required to register with the Commission, unless an exemption applies").

²¹³ See Rule 15a-6 Adopting Release, 54 FR at 30016 ("[E]ven if section 30(b) [of the Exchange Act] were read to incorporate a territorial approach, the Commission does not believe that section 30(b) would exempt from broker-dealer registration the activities suggested by the commenters. In particular, directed selling efforts to U.S. investors in the United States hardly could be considered activities not traversing the U.S. territorial limits. A broker-dealer operating outside the physical boundaries of the United States, but using the U.S. mails, wires, or telephone lines to trade securities with U.S. persons located in this country, would not be, in the words of section 30(b), 'transact[ing] a business in securities without the jurisdiction of the United States.'").

²¹⁴ See Rule 15a-6 Adopting Release, 54 FR at 30016 (citing Exchange Act Release No. 25801, 53 FR at 23646 n.9, and accompanying text).

²¹⁵ See Rule 15a-6 Adopting Release, 54 FR at 30017 ("Also, the Commission uses an entity approach with respect to registered broker-dealers"); see also Proposed Amendments to Rule 15a-6, 73 FR at 39182 ("Because this territorial approach applies on an entity level, not a branch level, if a foreign broker-dealer establishes a branch in the United States, broker-dealer registration requirements would extend to the entire foreign broker-dealer entity.").

application of the Exchange Act, and rules and regulations thereunder, solely to the transactions of such entities that result in the registration requirement. Instead, we have taken the position that a registered broker-dealer is generally subject to registration and consequent substantive requirements with respect to all of its securities activity, including the activity of its branches and offices, regardless of whether the activity occurs in the United States or with U.S. persons.²¹⁶ For instance, under this approach, if a foreign broker-dealer is required to register with the Commission as a result of conducting securities activity through a branch in the United States, the registration requirements and the regulatory system governing U.S. broker-dealers, including capital, margin, and recordkeeping requirements, would apply to the entire foreign broker-dealer entity, including its head office, not just the U.S. branch.²¹⁷ By contrast, the Commission traditionally has not extended our regulatory oversight of broker-dealers to the activities of their corporate parents, subsidiaries, or other affiliates.²¹⁸

The Commission's approach to registration and regulation of foreign broker-dealers thus extends Commission oversight to the global activities of non-U.S.-based securities market intermediaries that are registered broker-dealers because of their securities activities with U.S. persons or that physically operate within the United States.²¹⁹ In recognition of the

²¹⁶ As noted above, this is consistent with the approach we have taken in other contexts under the federal securities laws. See note 158, *supra*.

²¹⁷ See Rule 15a-6 Adopting Release, 54 FR at 30017.

²¹⁸ See id. ("If the foreign broker-dealer establishes an affiliate in the United States, however, only the affiliate must be registered as a broker-dealer; the foreign broker-dealer parent would not be required to register."); see also Proposed Amendments to Rule 15a-6, 73 FR at 39182. As discussed in Section III.B.89, *infra*, this is consistent with the approach that the Commission is proposing to take in the context of security-based swap dealer registration.

²¹⁹ See Rule 15a-6 Adopting Release, 54 FR at 30017.

internationalization of securities markets, however, the Commission has used available exemptive authority to tailor rules and regulations to the specific circumstances of foreign markets and market participants. For example, we used our exemptive authority under Section 15(a)(2) of the Exchange Act to adopt Rule 15a-6 under the Exchange Act (“Rule 15a-6”),²²⁰ which provides limited exemptions from registration to foreign brokers or dealers engaging in securities transactions, or offering to engage in securities transactions, within the United States or with U.S. persons, subject to certain conditions.²²¹

3. Comment Summary

(a) Market Participants

As noted above, various commenters expressed concerns about the “extraterritorial” application of Title VII, and many of these commenters expressed particular concerns about the possible extraterritorial application of security-based swap dealer regulation and registration requirements.²²² In addition to concerns described above regarding the application of Title VII to cross-border security-based swap activity,²²³ commenters noted that the derivatives industry functions in a global market and that new regulations pose the potential to disrupt this market if they do not take into account the nature of the industry and the appropriate extraterritorial reach

²²⁰ 17 CFR § 240.15a-6.

²²¹ See Rule 15a-6 Adopting Release, 54 FR 30013. As discussed below, some commenters have suggested that the Commission use an approach that would be modeled after the approach the Commission has applied to foreign broker-dealers in Rule 15a-6 to address issues related to cross-border security-based swap transactions and foreign security-based swap dealers.

²²² See e.g., ACP/AMF Letter, BaFin Letter, Cleary Letter IV, Davis Polk Letter I, Davis Polk Letter II, IIB Letter, ISDA Letter I, Japanese Banks Letter, JFSA Letter I, Newedge Letter, Rabobank Letter, Société Générale Letter I, SIFMA Letter, Société Générale Letter II, Sullivan & Cromwell Letter, and TCX Letter.

²²³ See Section II.B, *supra*.

of the regulations.²²⁴ A consistent theme in many of these comment letters was the importance of taking into account the principles of international comity in limiting the extraterritorial reach of the proposed rules, including entering into coordination agreements with our foreign regulatory counterparts on the jurisdictional reach of U.S. and foreign derivatives rules.²²⁵

For example, a number of commenters recommended that the Commission take a territorial approach in determining when a person engaging in security-based swap dealing activity would be required to register with the Commission as a security-based swap dealer, generally recommending registration of an entity for its security-based swaps dealing activity from within the United States or with regard to its dealings with U.S. counterparties.²²⁶ Several

²²⁴ See Section II.B, *supra*; see also ISDA Letter I at 17 (urging that the new regulations be implemented so as to not distort the current global derivatives market that functions “within a relatively level international playing field,” and noting that to address concerns related to competition and conflicts between various regulators and regulations “[i]t is imperative that U.S. and non-U.S. regulators must coordinate requirements to avoid unintended impediments to, and fragmentation of, the derivatives markets”).

²²⁵ See, e.g., Davis Polk Letter II at 12 (recommending that in implementing Title VII regulations, “the Commissions and the Federal Reserve should also give effect to the general jurisdictional limits specified in Sections 722 and 772 of the Dodd-Frank Act in a manner that is consistent with the principle of international comity evident in the statute and general legal principles governing statutory construction pertaining to extraterritorial and international matters”); Société Générale Letter I at 8, 11 (recommending U.S. and foreign counterparts to work toward a memorandum of understanding on the jurisdictional reach of U.S. and EU derivatives rules and warning that without cooperation between the U.S. and foreign regulators the result could be “regulatory retaliation” whereby “the [s]waps market could devolve into regulatory chaos, thereby increasing systemic risk”); Newedge Letter at 10-12 (expressing concern that requiring foreign firms to register as swaps dealers or major swap participants in the U.S. “could result in foreign regulators taking retaliatory action against U.S. firms engaging in swap activities with non-U.S. persons domiciled within their physical borders” and that any regulation of foreign firms not physically present in the United States that are already subject to foreign regulations is unnecessary and would violate principles of international comity).

²²⁶ See, e.g., Sullivan & Cromwell Letter at 11 (“The SEC has, in the past, plainly stated that it uses a territorial approach in applying broker-dealer registration requirements to

commenters further suggested that a non-U.S. person's de minimis amount of swap activities with U.S. persons should not trigger security-based swap dealer registration.²²⁷ Some commenters expressed the view that the Commission's cross-border framework should seek to avoid imposing duplicative regulation and unnecessary cost on entities that are already regulated in a foreign jurisdiction.²²⁸ Some commenters have suggested that the Commission use an

international operations. Only those broker-dealers who induce, or attempt to induce, securities transactions with persons in the United States would be required to register.”); MFA Letter II at 15-16 (commenting that the proposed security-based swap dealer and major security-based swap participant rules do not appear to encompass trading outside of the U.S. between non-U.S. entities or non-U.S. affiliates of U.S. entities, and adding that the rules also should not capture the non-U.S. affiliates of U.S. investment managers that advise offshore funds, or non-U.S.-domiciled funds that have U.S. investment managers but trade in swaps referencing non-U.S. securities or on a non-U.S. market, considering that foreign regulators will have jurisdiction over the non-U.S. activities of U.S. entities); IIB Letter at 9 (urging the Commission to adopt an interpretation that a “reference to a U.S. underlier or reference entity in a swap conducted outside the U.S. [is not] a sufficient connection to the U.S. to subject either counterparty to U.S. Swap Dealer registration requirements”); Newedge Letter at 2 (suggesting that foreign entities engaging in swaps transactions “with US persons should not be required to register as swaps dealers or major swaps participants in the US to the extent they are not physically located in the US and are subject to a comparable regulatory regime”).

²²⁷ See, e.g., Sullivan & Cromwell Letter at 2, 8 (acknowledging that a foreign entity's swaps transactions with U.S. persons in excess of the de minimis amount, “if otherwise covered by the definitions, [should] be required to register” as a swaps entity, but suggesting that swaps activities with U.S. persons within “any de minimis amount authorized by the final rules and in transactions with their U.S. affiliates for purposes of risk management” should not trigger swaps entity registration); TCX Letter at 6 (“We are concerned that, should TCX become subject to swap dealer registration notwithstanding the arguments presented above, the de minimis exception as proposed in the [Intermediary Definitions Proposing Release] has been drafted too narrowly to be of any practical use to TCXIM or to any other similarly-situated offshore entity with limited US swaps business. In particular, we urge the Commission to clarify that an offshore entity's swaps with US counterparties, excluding non-US subsidiaries of US entities, must be counted when determining if the de minimis exemption is available.”).

²²⁸ See, e.g., IIB Letter at 7 (suggesting that the “Commissions should establish a framework for cross-border swap activities that preserves and leverages the strengths of existing market practices and home country supervision and regulation” and “avoid a framework that is duplicative, inefficient (for supervisors and market participants) and would result

approach that would be modeled after the approach the Commission has applied to foreign broker-dealers in Rule 15a-6 to address issues related to cross-border security-based swap transactions and foreign security-based swap dealers.²²⁹

For purposes of analyzing the appropriate definition of U.S. person in the security-based swap dealer context, several commenters suggested that the Commission look to rules adopted under the Securities Act and adopt a definition of U.S. person based on Regulation S under the Securities Act (“Regulation S”).²³⁰ Some commenters stated the view that under Regulation S, only affiliates or branches located within the United States would be considered U.S. persons.²³¹ Some commenters argued that a foreign affiliate of a U.S. person and non-U.S. branches of a U.S. bank should be treated as non-U.S. persons and, depending on their dealing activity, not be required to register as security-based swap dealers because such entities may not have direct and

in unrealistic extraterritorial supervisory responsibilities for the Commissions and potential fragmentation of the derivatives markets”).

²²⁹ See, e.g., Davis Polk Letter I at 11 n.17 (“This model is similar to the mode of operation permitted by Rule 15a-6 under the Securities Exchange Act of 1934, pursuant to which foreign broker-dealers interface with U.S. customers under arrangements with affiliated or non-affiliated broker-dealers without themselves registering as broker-dealers in the U.S.”); Cleary Letter IV at 22 (“Accordingly, as one alternative, we suggest that the Commissions adopt an approach that is modeled on the Commissions’ existing regimes, permitting non-U.S. swap dealers to transact with U.S. persons without registering in the U.S. if those transactions are intermediated by a U.S.-registered swap dealer. This would be consistent with the approach adopted by the SEC under Rule 15a-6 and prior interpretative precedents with respect to non-U.S. securities dealers.”).

²³⁰ See 17 CFR § 230.901(k). See, e.g., Cleary Letter IV at 2, 6-9; Davis Polk Letter I at note 6.

²³¹ See, e.g., Cleary Letter IV at 7 (stating that “Regulation S does not include as a ‘U.S. person’ the non-U.S. branch or affiliate of a U.S. or non-U.S. person; only affiliates or branches located in the U.S. are covered”); SIFMA Letter at 5 (stating that (“It is noteworthy that the Regulation S definition of U.S. person does not include non-U.S. affiliates of U.S. persons or non-U.S. branches of a U.S. bank....”).

significant connection with, or effect on, U.S. commerce.²³² One commenter further argued that a non-U.S. affiliate of a U.S. person, in its insolvency, is subject to separate resolution from its parent, and thus should be treated as a non-U.S. entity.²³³

Several commenters stated that a foreign branch or office of a U.S. person also should be treated as a non-U.S. person, despite the fact that, as a few commenters acknowledged, foreign branches of U.S. banks are not separate legal entities from their U.S. head office and typically are not separately capitalized, although in some cases they may be subject to certain local capital or reserve maintenance requirements.²³⁴ Several commenters suggested that broker-dealer registration, not security-based swap dealer registration, may be more appropriate for a U.S.

²³² See, e.g., Sullivan & Cromwell Letter at 2-3, 6-9 (arguing against the extraterritorial application to foreign affiliates of a U.S. person, stating that when a foreign entity's "counterparty to a transaction is a non-U.S. affiliate of a U.S. person," the transactions are "removed from the U.S. stream of commerce. As a result, there is no 'direct' effect on U.S. commerce and it is highly unlikely that the transactions would have any significant effect on U.S. commerce"); ISDA Letter I at 11 (stating that "Non-U.S. entities (including non-U.S. affiliates and branches of U.S. banks) should not be required to register as Dealers where they are conducting business with non-U.S. counterparties.").

²³³ See Cleary Letter IV at 7 ("The non-U.S. affiliate of a U.S. person is, in its own insolvency or that of its parent, typically subject to separate resolution from its parent and other affiliates").

²³⁴ See, e.g., Cleary Letter IV at 7 (arguing that "[a]lthough bank branches are not usually separately capitalized," they should not be considered U.S. persons because their operations are subject to separate local licensing, examination, and books and records requirements); SIFMA Letter I at 15 n.37 ("We acknowledge that Title VII capital requirements cannot be applied at the branch-level and, therefore, must be applied at the bank level."); Sullivan & Cromwell Letter at 16 (remarking that "foreign branches have long been allowed to engage in a wider range of activities than are their U.S. head offices and have benefitted from the presumption against applying U.S. law extraterritorially" despite the fact that "foreign branches of U.S. banks are not corporate entities separate and apart from their bank parents").

branch, agency, or affiliate that acts as an agent of a non-U.S. person for security-based swaps transactions.²³⁵

Several commenters acknowledged concerns that persons may seek to book transactions through non-U.S. branches or subsidiaries in an effort to evade the requirements of Title VII.²³⁶ These commenters, however, urged that the Commissions not seek to address the potential for evasion through an overbroad definition of a security-based swap dealer, noting that there are legitimate business reasons for conducting security-based swap transactions with non-U.S. persons through non-U.S. operations.²³⁷

²³⁵ See, e.g., IIB Letter at 10 (suggesting that a U.S.-based person who acts as an agent for a non-U.S. person in soliciting or negotiating security-based swap transactions with counterparties located outside of the U.S. should register as a broker-dealer); Rabobank Letter at 3 (recommending that U.S. affiliates who help to arrange swaps transactions with U.S. persons should “register as futures commissions merchants or introducing brokers, broker-dealers, or swap dealers depending upon their respective roles in soliciting transactions, receiving customer margin, performing delegated compliance functions, effecting transactions as an agent on exchanges and swap execution facilities and in OTC markets, or clearing customer transactions”); cf. Newedge Letter at 1-2 (asserting that broker-dealers and foreign entities subject to comparable regulations who “engage principally in customer [security-based] swap facilitation activities” should not be subject to security-based swap dealer and major security-based swaps participant registration requirements because they already are “subject to stringent rules relating to capital, risk, margin and other requirements by virtue of their registration status”; and alternatively, suggesting that registrants who “execute swaps solely in response to customer orders and that hedge each such transactions individually . . . should be exempt since, among other things, their trading poses little or no risk to themselves, their customers or the markets generally.”).

²³⁶ See, e.g., Sullivan & Cromwell Letter at 10 (“We understand the concerns that the Commission may have that persons would seek to book transactions through non-U.S. branches or subsidiaries in order to evade the requirements of the CEA or Exchange Act.”).

²³⁷ See, e.g., Sullivan & Cromwell Letter at 9-10 (expressing understanding for the Commissions’ evasion concerns, but noting that U.S. companies have legitimate business reasons for establishing their non-U.S. operations, including requirements in some foreign jurisdictions that only local banks and local branches of foreign banks may engage in swap activities); Cleary Letter IV at 5-7 (noting legitimate business reasons for

(b) Foreign Regulators

Foreign regulators have reached out to the Commission through correspondence and bilateral and multilateral discussions to better understand the approach being considered by the Commission, to express concern about the potential impact of potential approaches on their markets, and to seek regulatory coordination.²³⁸ One of the principal concerns of foreign regulators is that the Commission would require foreign entities to register with the Commission and subject them to regulatory requirements that are duplicative of, or potentially conflict with, the requirements imposed by their home country or host country.²³⁹ In their view, the Commission's application of Title VII requirements to foreign entities in jurisdictions that commit to developing or have developed similar OTC derivatives regulations would fail to acknowledge, under general principles of international comity, the effectiveness, suitability, and scope of foreign regulatory regimes and place undue regulatory burdens on foreign entities that conduct security-based swap business with U.S. persons.²⁴⁰

establishing non-U.S. operations abroad, and stating that the Commissions "should not adopt an extraterritorial regulatory framework premised on the assumption that activities conducted outside the U.S. will be undertaken for the purpose of evasion").

²³⁸ See, e.g., BaFIN Letter at 1-2 ("Close cooperation of our respective authorities, accompanied by a Memorandum of Understanding, might help to establish an adequate regulatory environment for the swap activities of US and German entities and to provide the confidence that the respective national legislation is adequately recognized and complied with.").

²³⁹ See, e.g., JFSA Letter I at 1-2 (requesting that Japanese financial institutions be exempted from "Swap Dealer" and "Major Swap Participant" registration under the Dodd-Frank Act); BaFIN Letter at 1 ("The obligations for foreign banks should be proportionate and take into account equivalent requirements in their home jurisdiction."). See also ECB Letter at 2 (expressing concern about the "possible inconsistency between US and EU legislation with respect to differing rules on exempting public international institutions . . . from the clearing and reporting obligation.").

²⁴⁰ See Asian-Pacific Regulators Letter at 4.

Such concerns from foreign regulators include comments that U.S. regulators should not ask financial institutions domiciled in their jurisdictions to register as security-based swap dealers because this would create undesirable redundancies for those financial institutions that are already regulated in the foreign jurisdiction.²⁴¹ Certain foreign regulators also argued that the Commission should not regulate foreign subsidiaries of U.S. security-based swap dealers because these entities would already be regulated by a foreign regulator.²⁴² Some foreign regulators expressed the expectation that the Commission would limit the registration of foreign banks as security-based swap dealers to operations conducting activities with U.S. counterparties or clients and would not apply the registration and regulation requirements to foreign banks as a whole.²⁴³

4. Application of the De Minimis Exception to Cross-Border Security-Based Swap Dealing Activity

The Commission recognizes the concerns raised by commenters regarding the potential for imposing inconsistent or conflicting requirements on security-based swap dealers with global operations, as well as their desire that the Commission take into account the principles of

²⁴¹ See, e.g., JFSA Letter I at 1 (“If these institutions were also to be regulated under US DFA framework, this will create an undesirable and redundant effect on these Japanese institutions.”).

²⁴² See, e.g., ACP/AMF Letter at 1-32 (“[W]e strongly support . . . a mutual recognition regime built around an adequate and balanced symmetrical system taking into account the home and the host country regulatory regimes. Thus . . . we expect that [the registration of non-resident entities] will be limited to activities in relation with US counterparties and/or clients and will not involve similar obligations to the financial organizations as a whole. The obligations for non-resident entities should indeed be proportionate and take into [account] equivalent requirements in their home jurisdiction.”).

²⁴³ See, e.g., BaFIN Letter at 1 (“Without questioning the registration of foreign banks, I suppose that such registration will be limited to activities in relation with US counterparties and/or clients and will not involve similar obligations to foreign banks as a whole”).

international comity when applying Title VII to cross-border dealing activity. After considering the goals of the Dodd-Frank Act and the scope of the provisions of Title VII covering security-based swap dealers, in light of the global nature of the security-based swap market, the various structures of dealing operations, and the views of commenters, the Commission is proposing an approach to the application of the Title VII registration requirement to cross-border security-based swap dealing activity that focuses on whether dealing conduct occurs with U.S. persons or otherwise occurs within the United States.

Specifically, as explained below, the Commission is proposing to require a non-U.S. person engaged in security-based swap dealing activity to register with the Commission as a security-based swap dealer pursuant to Section 15F(a)(1) of the Exchange Act²⁴⁴ if the notional amount of security-based swap transactions connected with its dealing activity with U.S. persons (other than with foreign branches of U.S. banks)²⁴⁵ or otherwise conducted within the United States²⁴⁶ exceeds the de minimis threshold in the security-based swap dealer definition.²⁴⁷ A U.S. person engaged in security-based swap dealing activity would be required to count all security-based swap transactions connected with its dealing activity toward the de minimis threshold, including transactions conducted through a foreign branch.²⁴⁸

²⁴⁴ 15 U.S.C. 78o-10(a)(1).

²⁴⁵ Proposed Rule 3a71-3(a)(7) under the Exchange Act (defining “U.S. person”), as discussed in Section III.B.5, *infra*; proposed Rule 3a71-3(a)(1) under the Exchange Act (defining “foreign branch”), as discussed in Section III.B.7, *infra*.

²⁴⁶ Proposed Rule 3a71-3(a)(5) under the Exchange Act (defining “transaction conducted within the United States”), as discussed in Section III.B.6, *infra*.

²⁴⁷ Proposed Rule 3a71-3(b) under the Exchange Act; *see also* 17 CFR § 240.3a71-2.

²⁴⁸ *See id.*

(a) Meaning of the Term “Person” in the Security-Based Swap Dealer Definition

As a preliminary matter, we note that, as the Commission discussed in the Intermediary Definitions Adopting Release, the term “person” as used in the security-based swap dealer definition should be interpreted to refer to a particular legal person.²⁴⁹ Accordingly, a trading desk, department, office, branch, or other discrete business unit that is not a separately organized legal person would not be viewed as a security-based swap dealer (regardless of where located); rather, the legal person of which it is a part would be the security-based swap dealer.²⁵⁰ Similarly, the term “person” in the Commission’s rules implementing the de minimis exception should be interpreted to refer to a particular legal person.²⁵¹

Thus, the security-based swap dealer definition would apply to the particular legal person performing the dealing activity, even if that person’s dealing activity is limited to a trading desk or discrete business unit.²⁵² The presumption is that a person who falls within the security-based

²⁴⁹ See Intermediary Definitions Adopting Release, 77 FR at 30624. Section 3(a)(9) of the Exchange Act defines “person” as “a natural person, company, government, or political subdivision, agency, or instrumentality of a government.” 15 U.S.C. 78c(a)(9); see also proposed Rule 3a71-3(a)(7) under the Exchange Act (defining “U.S. person”), as discussed in Section III.B.5, infra.

²⁵⁰ This approach is consistent with the Commission’s discussion in the Intermediary Definitions Adopting Release regarding the entity-level designation of security-based swap dealers. 77 FR at 30624. It also generally is consistent with the Commission’s traditional entity approach to the registration of broker-dealers, as discussed in Section III.B.2, supra.

²⁵¹ See 17 CFR § 240.3a71-2; proposed Rule 3a71-3(b) under the Exchange Act.

²⁵² Within an affiliated group of companies, only those legal persons that engage in dealing activities will be designated as dealers; that designation will not be imputed to other non-dealer affiliates or to the group as a whole. A single affiliate group may have multiple swap or security-based swap dealers. See Intermediary Definitions Adopting Release, 77 FR at 30624-25. But see Section III.B.8, infra (discussing aggregation).

swap dealer definition is a dealer with regard to all of its security-based swap activities.²⁵³ As a result, a legal person with a branch, agency, or office that is engaged in dealing activity in connection with transactions above the de minimis threshold would be required to register as a security-based swap dealer, even if the legal person's dealing activity were limited to such branch, agency, or office. By contrast, each affiliate of a security-based swap dealer would need to separately consider whether it falls within the de minimis exception if that affiliate engages in security-based swap dealing activity.²⁵⁴

(b) Proposed Rule

We are proposing a rule identifying the types of security-based swap transactions that should be included in a person's calculation of the notional amount of security-based swap transactions connected with dealing activity for purposes of determining whether the de minimis exception excludes that dealer from the security-based swap dealer definition.²⁵⁵ The proposed

²⁵³ The definition of security-based swap dealer provides that a person may be designated as a security-based swap dealer for a single type or class or category of security-based swaps or activity, and not others. See Section 3(a)(71)(B) of the Exchange Act, 15 U.S.C. 78c(71)(B); 17 CFR § 240.3a71-1(c) ("A person that is a security-based swap dealer in general shall be deemed to be a security-based swap dealer with respect to each security-based swap it enters into, regardless of the type, class, or category of the security-based swap or the person's activities in connection with the security-based swap, unless the Commission limits the person's designation as a security-based swap dealer to specified types, classes, or categories of security-based swaps or specified activities of the person in connection with security-based swaps."). See note 588, *infra*.

Although the Commission is not proposing to designate non-U.S. persons as security-based swap dealers in a limited capacity, the Commission's proposed approach would limit the application of certain transaction-level requirements to the "U.S. Business" of foreign security-based swap dealers. See Section III.C.4, *infra*.

²⁵⁴ See Section III.B.8, *infra* (discussing inter-affiliate transactions), and Section III.B.8, *infra* (discussing aggregation).

²⁵⁵ Proposed Rule 3a71-3(b) under the Exchange Act. Appendix B to this release contains a table that identifies whether a potential security-based swap dealer would be required to count a transaction with a specific type of counterparty toward its de minimis threshold.

rule confirms that all of a U.S. person's security-based swap transactions conducted in a dealing capacity would count toward its de minimis threshold, wherever those transactions are solicited, negotiated, executed, or booked.²⁵⁶ Although we recognize that some commenters have suggested that the Commission should not require U.S. persons to include positions connected with dealing activity conducted through foreign branches in calculating the amount of their dealing activity,²⁵⁷ we are not proposing to adopt this approach. The security-based swap dealing activity of a foreign branch is activity of the U.S. legal person regardless of the role played by the foreign branch or the location of the security-based swap dealing activity. We believe that any dealing activity undertaken by a U.S. person occurs at least in part within the United States and therefore warrants application of Title VII, regardless of where particular dealing activity in connection with the transactions is conducted.²⁵⁸ The security-based swap dealing activity of a U.S. person creates risk to the U.S. person and to the U.S. financial system, because the risk of such transactions ultimately is borne by the U.S. person, even if the transactions in connection with that dealing activity are conducted in part outside the United

The table in Appendix B is only a summary of the rules and interpretations proposed in this release that is provided for ease of reference; it does not supersede, and should be read in conjunction with, the proposed rules and interpretations.

²⁵⁶ Proposed Rule 3a71-3(b)(1)(i) under the Exchange Act. As noted above, as used in this release, "security-based swap dealing," "security-based swap dealing activity," "dealing activity," and related concepts have the meanings described in the Intermediary Definitions Adopting Release, 77 FR 30596, unless otherwise indicated in this release. Such dealing activity is normally carried out through interactions with counterparties or potential counterparties, which includes solicitation, negotiation, or execution of a security-based swap.

²⁵⁷ See, e.g., Sullivan and Cromwell Letter, at 9-11.

²⁵⁸ See notes 231 and 234, supra. As noted in Section II.A.3 above, the security-based swap transactions of U.S. persons, wherever entered into, give rise to ongoing obligations that may affect the financial stability of the United States and thus present the type of risk that Title VII was intended to address.

States, and because the U.S. person is part of the U.S. financial system.²⁵⁹ To achieve the purposes of Title VII, including the reduction of systemic risk, we preliminarily believe that U.S. persons that engage in security-based swap dealing activity through foreign branches should be subject to the regulatory framework for dealers established by Congress in Title VII, even if they deal exclusively with non-U.S. persons.

By contrast, a non-U.S. person would be required to consider only the security-based swap transactions connected with its dealing activity with U.S. persons (other than foreign branches of U.S. banks)²⁶⁰ or otherwise conducted within the United States²⁶¹ for purposes of the de minimis exception.²⁶² Under this proposed approach, a non-U.S. person would be required to calculate its security-based swap position for purposes of the de minimis threshold by adding together the notional amount of transactions connected with dealing activity with U.S. persons

²⁵⁹ These risk concerns may be greater for uncleared security-based swap than for cleared security-based swaps where the U.S. person would not retain the credit risk of its counterparty; however, cleared security-based swaps still represent an importation of risk into the U.S. financial system when entered into by U.S. persons because in the context of cleared security-based swaps, the U.S. persons would be exposed to the credit, financial, and operational risks of the clearing agency.

²⁶⁰ Proposed Rule 3a71-3(a)(7) under the Exchange Act (defining “U.S. person”), as discussed in Section III.B.5; proposed Rule 3a71-3(a)(1) under the Exchange Act (defining “foreign branch”), as discussed in Section III.B.7, *infra*.

²⁶¹ Proposed Rule 3a71-3(a)(5) under the Exchange Act (defining “transaction conducted within the United States”), as discussed in Section III.B.6, *infra*. Proposed Rule 3a71-3(a)(9) under the Exchange Act defines “United States” as “the United States of America, its territories and possessions, any States of the United States, and the District of Columbia.” The proposed definition of “United States” is consistent with the definition of that term in other contexts in the federal securities laws. *See, e.g.*, 17 CFR § 230.902(l); 17 CFR § 240.15a-6(b)(6).

²⁶² Proposed Rule 3a71-3(b)(1)(ii) under the Exchange Act.

(other than foreign branches of U.S. banks)²⁶³ or otherwise conducted within the United States.²⁶⁴ As a result, a foreign entity with a global security-based swap dealing business, but whose transactions connected with its dealing activity with U.S. persons (other than foreign branches of U.S. banks) or otherwise conducted within the United States fall under the de minimis threshold, would not fall within the security-based swap dealer definition and, therefore, would not be required to register as a security-based swap dealer.²⁶⁵

²⁶³ See Section III.B.7, infra (discussing the exception from the de minimis threshold for transactions by foreign dealers with foreign branches of U.S. banks).

²⁶⁴ Proposed Rule 3a71-3(b)(1)(ii) under the Exchange Act. For purposes of the de minimis threshold, the U.S. person-status of a non-U.S. person's counterparty would be relevant only at the time of a transaction that arises out of the non-U.S. person's dealing activity. Any change in a counterparty's U.S. person status after the transaction is executed would not affect that transaction's treatment for purposes of the de minimis exception, though it would affect the treatment of any subsequent dealing transactions with that counterparty. See also Product Definitions Adopting Release, 77 FR at 48286 ("If the material terms of a Title VII instrument are amended or modified during its life based on an exercise of discretion and not through predetermined criteria or a predetermined self-executing formula, the Commissions view the amended or modified Title VII instrument as a new Title VII instrument").

²⁶⁵ See 17 CFR § 240.3a71-2(a). The Commission notes that, to the extent that a non-U.S. person does not conduct dealing activity within the United States or with U.S. persons (or to the extent that the volume of positions connected with such dealing activity does not exceed the de minimis threshold discussed below), it would not be required to register with the Commission as a security-based swap dealer under Section 15F(a)(1) of the Exchange Act regardless of the volume of non-dealing security-based swap transactions it has within the United States or with U.S. persons. See Intermediary Definitions Adopting Release, 77 FR at 30631. Such an entity still would be subject to the major security-based swap participant thresholds with respect to its non-dealing security-based swap transactions. However, once a non-U.S. person's transactions with U.S. persons (other than foreign branches of U.S. banks) or otherwise conducted within the United States involve dealing activity that exceeds the de minimis threshold, that person would be required to register as a security-based swap dealer and would be subject to the statutory requirements applicable to security-based swap dealers for all of its security-based swap transactions. See Intermediary Definitions Adopting Release, 77 FR at 30645.

This approach to the de minimis exception for non-U.S. persons engaged in cross-border dealing activity preliminarily appears to us to focus appropriately on a non-U.S. person's security-based swap dealing activity in the United States. In addition, this proposed approach, when combined with our broader approach to the registration and regulation of foreign security-based swap dealers, appears to us to appropriately focus our oversight on those non-U.S. persons engaged in security-based swap dealing activities that most directly impact the U.S. security-based swap market and U.S. financial system and that, therefore, warrant the application of the provisions of Title VII covering security-based swap dealers.²⁶⁶

The Commission is not proposing, as some commenters have suggested, an approach modeled on Rule 15a-6(a)(3), which would permit non-U.S. persons to conduct security-based swap dealing activity with U.S. persons without registering with the Commission if such dealing activity were intermediated by a registered security-based swap dealer.²⁶⁷ The Commission preliminarily believes that such an approach would not address the risk to the U.S. financial system by dealing activity of non-U.S. persons within the United States or with U.S. persons. As a dealer, the non-U.S. person would be the party to the security-based swap transaction and, therefore, the party that bears the financial risk of such transaction and whose financial integrity is of primary concern to the Commission. This concern is heightened by the fact, noted above,

²⁶⁶ The Commission understands that entities such as foreign central banks, international financial institutions, multilateral development banks, and sovereign wealth funds ("SWFs") (together, "foreign public sector financial institutions" or "FPSFIs") rarely enter into security-based swap transactions in a dealing capacity. As such, we believe that the proposed approach outlined in this release would sufficiently address the dealer registration concerns of these entities. The Commission is soliciting comment on whether our proposal sufficiently addresses the concerns of FPSFIs and whether our understanding of the security-based swap activity of such entities is accurate. See also Section III.B.5(b)iv, infra (discussing international organizations).

²⁶⁷ See note 229, supra.

that, unlike most other securities transactions, security-based swap transactions give rise to ongoing obligations between the transaction counterparties.²⁶⁸ Under the alternative suggested, the important financial responsibility requirements that Title VII imposes on security-based swap dealers would not apply to the non-U.S. person with respect to that transaction. Instead, the intermediating registered security-based swap dealer would be subject to the financial responsibility rules with respect to the transaction, but since it would not be a party to, and would not bear the financial risk of, the security-based swap transaction, it would not bear the ongoing financial risk of such transaction. As a result, the financial responsibility requirements imposed on the intermediating dealer would not address the dealing risk posed by the non-U.S. person in this context.²⁶⁹

Request for Comment

The Commission requests comment on all aspects of the proposed rule regarding the application of the de minimis exception to U.S. persons and non-U.S. persons, including the following:

- Should the proposed rule limit the de minimis test to the notional amount of a U.S. person's positions connected with its dealing activity involving transactions with other U.S. persons or otherwise conducted within the United States? For example,

²⁶⁸ See Section II.A.3, *supra*.

²⁶⁹ The Commission also is not proposing a dealer-to-dealer exception modeled on Rule 15a-6(a)(4)(i) (providing that a foreign broker or dealer shall be exempt from the registration requirements of Section 15(a)(1) or 15B(a)(1) of the Exchange Act to the extent that the foreign broker or dealer effects transactions in securities with or for, or induces or attempts to induce the purchase or sale of any security by “[a] registered broker or dealer, whether the registered broker or dealer is acting as principal for its own account or as agent for others, or a bank acting in a broker or dealer capacity as permitted by U.S. law”).

should the proposed rule be altered to provide that U.S. banks would not include the notional amount of transactions connected with the dealing activity of their foreign branches in the de minimis calculation, rather than counting these transactions against the de minimis threshold as required under the proposed approach? Why or why not?

- Should the proposed rule require non-U.S. persons to count transactions with the foreign branches of U.S. banks towards their de minimis calculations? Why or why not?
- Should the proposed rule follow an approach modeled on Rule 15a-6(a)(3), which would permit non-U.S. persons to conduct security-based swap dealing activity within the United States without registering with the Commission if those transactions were intermediated by a registered U.S. security-based swap dealer? If so, what compliance obligations, if any, should the unregistered non-U.S. person be subject to? What obligations should the U.S. security-based swap dealer be subject to with respect to such intermediated transactions, particularly with respect to capital, margin, and segregation requirements? How would this approach deal with risk concerns, especially with any security-based swaps not subject to clearing?
- Should the proposed rule follow an approach modeled on Rule 15a-6(a)(4)(i), which would permit non-U.S. persons to conduct security-based swap dealing activity within the United States without registering with the Commission if those transactions were with a registered U.S. security-based swap dealer? If so, what conditions, if any, should the Commission impose on such an exception?
- Should non-U.S. persons acting in a dealing capacity be required to count transactions entered into with registered security-based swap dealers toward their de minimis

threshold? Why or why not? If non-U.S. persons are not required to count security-based swap transactions, conducted in a dealing capacity, with registered security-based swap dealers, should U.S. persons be required to count security-based swap transactions, conducted in a dealing capacity, with registered security-based swap dealers? If not, why not? If so, why?

- The CFTC has proposed an interpretation that would require a non-U.S. person to consider the aggregate notional value of its swap dealing transactions (or any swap dealing transactions of its affiliates under common control) where the non-U.S. person's obligations are guaranteed by a U.S. person.²⁷⁰ Should the proposed rule require a non-U.S. person whose security-based swap transactions are guaranteed by a U.S. person to count all of its security-based swap dealing transactions that are guaranteed by a U.S. person toward the de minimis threshold, even if they are not entered into with U.S. persons or otherwise conducted within the United States?
- Should the proposed rule require counting against the de minimis threshold the notional amount of a non-U.S. person's transactions entered into in its dealing capacity within the United States or with a U.S. person? Should a non-U.S. person be required instead to aggregate the total worldwide notional amount of its security-based swap transactions entered into in a dealing capacity, regardless of the geographic location of the dealing activity or the counterparty's status as a U.S. person if it engages in any dealing transactions with U.S. persons? Why or why not?

²⁷⁰ See CFTC Cross-Border Proposal, 77 FR at 41221.

- What circumstances, if any, would justify requiring a non-U.S. person to register with the Commission if its dealing activity arising from its transactions with non-U.S. persons outside the United States would exceed the de minimis threshold if it had been conducted within the United States or with U.S. persons but the non-U.S. person enters into transactions within the United States or with U.S. persons solely in a non-dealing capacity?
- What circumstances would justify following a different territorial approach that would treat transactions connected with the dealing activity conducted by a U.S. person through its foreign locations with non-U.S. persons as outside the United States and not required to be counted against such U.S. person's de minimis threshold?
- Does the Commission's proposed approach adequately address the concerns of FPSFIs? Is our understanding of the security-based swap activity of FPSFIs accurate? If not, please explain.
- What would be the market impact of the proposed approach to apply the de minimis exception in the cross-border context? How would the proposed application of the de minimis exception to U.S. persons and non-U.S. persons affect the competitiveness of U.S. entities in the global marketplace (both in the United States as well as in foreign jurisdictions)? Would the proposed approach place any market participants at a competitive disadvantage or advantage? If so, please explain. Would the proposed approach be a more general burden on competition? If so, please explain. What other measures should the Commission consider to implement the de minimis

exception? What would be the market impacts and competitiveness effects of alternatives to the proposed approach discussed in this release?

5. Proposed Definition of “U.S. Person”

(a) Introduction

The proposed rule defining “U.S. person” would identify a person’s status as a U.S. person for purposes of applying the calculation for the de minimis exception in the cross-border context.²⁷¹ The proposed definition of U.S. person generally follows an approach to defining U.S. person similar to that used by the Commission in other contexts.²⁷² Specifically, the proposed rule would define U.S. person to mean any of the following:

- Any natural person resident in the United States;

²⁷¹ Proposed Rule 3a71-3(a)(7) under the Exchange Act. The definition of “U.S. person” also is used in other proposed rules and interpretive guidance discussed below. See Sections IV - XI, infra.

²⁷² See, e.g., Regulation S Adopting Release, 55 FR at 18308 (“The Regulation adopted today is based on a territorial approach to Section 5 of the Securities Act.”). Although the proposed rule generally follows the same approach as Regulation S, the Commission preliminarily believes that it is necessary to depart from Regulation S in certain respects. See Section III.B.10, infra (comparing the proposed definition of “U.S.” person with the definition of “U.S. person” in Regulation S). Notably, neither the Exchange Act nor Rule 15a-6 contains a definition of U.S. person.

The proposed definition of U.S. person is similar to the definition of U.S. person that the CFTC staff provided its October 12, 2012 no-action letter. See Time-Limited No-Action Relief: Swaps Only With Certain Persons to be Included in Calculation of Aggregate Gross Notional Amount for Purposes of Swap Dealer De Minimis Exception and Calculation of Whether a Person is a Major Swap Participant (Oct. 12, 2012), available at: <http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/12-22.pdf>; see also Final CFTC Cross-Border Exemptive Order, 78 FR at 862 (indicating that for purposes of its temporary conditional relief the CFTC is taking a similar approach to the U.S. person definition as that set forth in the October 12, 2012 no-action letter).

- Any partnership, corporation, trust, or other legal person organized or incorporated under the laws of the United States²⁷³ or having its principal place of business in the United States; or
- Any account (whether discretionary or non-discretionary) of a U.S. person.²⁷⁴

The proposed rule also would provide that the term “U.S. person” would not include the following international organizations: the International Monetary Fund (“IMF”), the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, and their agencies and pension plans, and any other similar international organizations, their agencies and pension plans.²⁷⁵

We preliminarily believe that the proposed definition of U.S. person would achieve three objectives necessary to effective application of Title VII in the cross-border context. First, it would identify those types of individuals or entities that, by virtue of their location within the United States or their legal or other relationship with the United States, are likely to impact the U.S. market even if they transact with security-based swap dealers that are not U.S. persons.²⁷⁶ Second, it would identify those types of individuals or entities that, by virtue of their location

²⁷³ Proposed Rule 3a71-3(a)(9) under the Exchange Act defines “United States” as “the United States of America, its territories and possessions, any States of the United States, and the District of Columbia.”

²⁷⁴ Proposed Rule 3a71-3(a)(7)(i) under the Exchange Act.

²⁷⁵ Proposed Rule 3a71-3(a)(7)(ii) under the Exchange Act.

²⁷⁶ As noted in Section II.A.3 above, the security-based swap transactions of U.S. persons give rise to ongoing liability that is borne by a person located within the United States and thus are likely to pose the types of financial stability risks to U.S. financial system that Title VII was intended to address. The security-based swap activity of U.S. persons occurs, at least in part, within the United States.

within the United States or their legal or other relationship with the United States, are part of the U.S. security-based swap market and should receive the protections of Title VII. Third, it would permit us to identify dealing entities that most likely would be active in the U.S. security-based swap market and whose dealing activity most likely would pose a risk to the U.S. financial system by virtue of their counterparties' resident or domicile status.

Because of the nature of the risks posed by security-based swaps, which are borne by the entire corporate entity even if the transaction is entered into by a specific trading desk, office, or branch of such entity, consistent with the Commission's approach to the meaning of "person" in the security-based swap dealer definition, as discussed above, we are proposing to define the term "U.S. person" to include the entire entity, including its branches and offices that may be located in a foreign jurisdiction.²⁷⁷ Thus, under this approach, the term "U.S. person" would be interpreted to include any foreign trading desk, office, or branch of an entity that is organized under U.S. law or whose principal place of business is located in the United States.²⁷⁸

(b) Discussion

i. Natural Persons

Under the proposed rule, any natural person resident in the United States would be a U.S. person, regardless of that individual's citizenship status.²⁷⁹ Individuals resident abroad, on the other hand, would not be treated as U.S. persons, even if they possess U.S. citizenship.²⁸⁰ We

²⁷⁷ See Section III.B.4(a), *supra*.

²⁷⁸ *Id.*

²⁷⁹ Proposed Rule 3a71-3(a)(7)(i)(A) under the Exchange Act.

²⁸⁰ This proposed approach to treating natural persons as U.S. persons based on residency, rather than citizenship, differs from the proposed approach to legal entities, such as partnerships and corporations, discussed below.

preliminarily believe that natural persons residing within the United States who engage in security-based swap transactions may raise the types of concerns intended to be addressed by Title VII, including those related to transparency and customer protection.²⁸¹ We also note that this approach is generally consistent with the approach we have taken in prior rulemakings relating to the cross-border application of certain similar regulatory requirements.²⁸² Moreover, any risk to such person arising from its security-based swap activity may manifest itself most directly within the United States, where a significant portion of its commercial and legal relationships exist because that is where its residency is (unlike a U.S. citizen resident abroad).

ii. Corporations, Organizations, Trusts, and Other Legal Persons

Under the proposed rule, any partnership, corporation, trust, or other legal person organized or incorporated under the laws of the United States²⁸³ or having as its principal place of business in the United States would be a U.S. person.²⁸⁴ We have previously looked to an entity's place of organization or incorporation to determine whether it is a U.S. person in adopting rules under the federal securities laws,²⁸⁵ and we preliminarily believe that it is also appropriate to do so in the context of Title VII. We preliminarily believe that the decision of a corporation, trustee, or other entity to organize under the laws of the United States indicates a

²⁸¹ See note 4, *supra*.

²⁸² See Rule 15a-6 Adopting Release, 54 FR at 30017 (providing that foreign broker-dealers soliciting U.S. investors abroad generally would not be subject to registration requirements with the Commission).

²⁸³ Proposed Rule 3a71-3(a)(9) under the Exchange Act (defining "United States").

²⁸⁴ Proposed Rule 3a71-3(a)(7)(i)(B) under the Exchange Act.

²⁸⁵ See Regulation S Adopting Release, 55 FR at 18316.

degree of involvement in the U.S. economy or legal system that warrants ensuring that its security-based swap activity is subject to the requirements of Title VII.²⁸⁶

Similarly, we believe that the proposed definition should ensure that Title VII applies to entities that are organized or incorporated in a jurisdiction outside the United States if they have their principal place of business in the United States.²⁸⁷ Any risk to such entities arising from their security-based swap activity is likely to manifest itself most directly within the United States, where a significant portion of their commercial and legal relationships would be likely to exist. Moreover, focusing exclusively on whether an entity is organized or incorporated in the United States could encourage some entities that are currently organized or incorporated in the United States to incorporate in a non-U.S. jurisdiction to avoid the costs of complying with Title VII while maintaining their principal place of business—and thus in all likelihood, the risks arising from their security-based swap transactions—within the United States. To prevent this possibility, we are proposing to define “U.S. person” to include entities that are organized or incorporated abroad but have their principal place of business within the United States.²⁸⁸

²⁸⁶ Under this prong of the proposed rule, “special entities,” as defined in Section 15F(h)(2)(C) of the Exchange Act, would be U.S. persons because they are legal persons organized under the laws of the United States. Section 15F(h)(2)(C) of the Exchange Act defines the term “special entity” as “(i) a Federal agency; (ii) a State, State agency, city, county, municipality, or other political subdivision of a State; (iii) any employee benefit plan, as defined in Section 3 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002; (iv) any governmental plan, as defined in Section 3 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002; or (v) any endowment, including an endowment that is an organization described in Section 501(c)(3) of the Internal Revenue Code of 1986.” 15 U.S.C. 78o-10(h)(2)(C).

²⁸⁷ For example, a business may be incorporated under the laws of a foreign jurisdiction but nonetheless have its business operations, including its home office, in the United States.

²⁸⁸ As discussed in Section III.B.6 below, the Commission also is proposing to require non-U.S. persons that conduct security-based swap transactions within the United States, in a dealing capacity, to count such transactions toward their de minimis threshold. In

An entity's status as a U.S. person under the proposed rule would be determined at the legal entity-level and thus apply to the entire legal entity, including any foreign operations that are part of the U.S. legal entity.²⁸⁹ Consistent with this entity-level approach, a foreign branch, agency, or office of a U.S. person would be treated as a U.S. person under the proposed definition.²⁹⁰ As the Commission noted in proposing Regulation SBSR, "[b]ecause a branch or office has no separate legal existence under corporate law, the branch or office would be an integral part of the U.S. person itself."²⁹¹ In other words, because a branch or office is merely an extension of the head office, not a separately incorporated or organized legal entity, we preliminarily believe that it lacks the legal independence to be considered a non-U.S. person for purposes of Title VII if its head office is a U.S. person. We preliminarily believe a wholesale exclusion from the requirements of Title VII for a foreign branch, agency, or office of a U.S. person is not warranted with respect to its security-based swap transactions because the legal

addition, the Commission is proposing to subject security-based swap transactions that are conducted within the United States to certain transaction-level requirements in Title VII in connection with reporting and dissemination, clearing, and trade execution. See Sections VIII - X, infra.

²⁸⁹ In principle, Regulation S looks to the location of the branch rather than the jurisdiction in which the entity is organized or incorporated in determining whether the branch is a U.S. person. See 17 CFR §§ 230.902(k)(1)(v) and (2)(v). Thus, under Regulation S, the foreign branch of a U.S. bank is not treated as a U.S. person while the U.S. branch of a foreign bank is treated as a U.S. person. Under subsection (a)(7)(ii) of proposed Rule 3a71-3 under the Exchange Act, the foreign branch of a U.S. bank would be treated as part of a U.S. person. See Section III.B.10, infra (discussing the proposed definition of "U.S. person" with the definition of "U.S. person" in Regulation S).

²⁹⁰ Proposed Rule 3a71-3(a)(7) under the Exchange Act.

²⁹¹ See Regulation SBSR Proposing Release, 75 FR at 75240 ("The Commission intends for this proposed definition [of U.S. person] to include branches and offices of U.S. persons"). The Commission is re-proposing Regulation SBSR in this release, including its definition of U.S. person. See Section VIII, infra.

obligations and economic risks associated with the transactions directly affect a U.S. person, of which the branch, agency, or office is merely a part.

Under the proposed definition, the status of an entity as a U.S. person would have no bearing on whether separately incorporated or organized legal entities in its affiliated corporate group are U.S. persons. Accordingly, a foreign subsidiary of a U.S. person would not be a U.S. person by virtue of its relationship with its U.S. parent. Similarly, a foreign entity with a U.S. subsidiary would not be a U.S. person simply by virtue of its relationship with its U.S. subsidiary.²⁹² The Commission preliminarily believes that it is appropriate to treat each affiliate separately because of the distinct legal status of each of the affiliates.²⁹³

iii. Accounts of U.S. Persons

Consistent with the proposed definition's focus on the location of the person bearing the actual risk arising from the security-based swap transaction, the proposed definition of U.S. person would include any accounts (whether discretionary or not) of U.S. persons.²⁹⁴ Such accounts would be U.S. persons regardless of whether the entity at which the account is held or maintained is a U.S. person. Conversely, accounts of non-U.S. persons would not be U.S. persons solely because they are held by a U.S. financial institution or other entity that is itself a U.S. person.²⁹⁵ In our view, the purposes of Title VII require that its provisions apply to the

²⁹² See Section III.B.8, *infra*.

²⁹³ But see Section III.B.8, *infra* (discussing the aggregation of affiliate positions for purposes of the *de minimis* calculation).

²⁹⁴ Proposed Rule 3a71-3(a)(7)(i)(C) under the Exchange Act.

²⁹⁵ An account of a non-U.S. person and, therefore, not a "U.S. person" under proposed Rule 3a71-3(a)(7) under the Exchange Act, may nevertheless engage in "transactions conducted within the United States," as defined in proposed Rule 3a71-3(a)(5) under the Exchange Act. For example, if a non-U.S. person executes a security-based swap from an office located in the United States that security-based swap would be a "transaction

person that actually bears the risks arising from the security-based swap transaction.²⁹⁶ For this reason, we preliminarily believe that the status of accounts, wherever located, should turn on whether any owner of the account is itself a U.S. person,²⁹⁷ and not on the status of the fiduciary or other person managing the account, the discretionary or non-discretionary nature of the account, or the status of the entity at which the account is held or maintained.²⁹⁸ Thus any account of a U.S. person would be a U.S. person for purposes of Title VII.

iv. International Organizations

In addition to identifying the persons that fall within the U.S. person definition, the proposed rule also provides a list of specific international organizations that do not fall within such definition.²⁹⁹ This list includes “the International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian

conducted within the United States” even though neither party would be a “U.S. person.” Similarly, if a non-U.S. person solicits a counterparty within the United States to enter into a security-based swap transaction, that transaction would be a “transaction conducted within the United States,” regardless of whether both counterparties were non-U.S. persons. See Section III.B.6, *infra*.

²⁹⁶ The same approach would apply to an account of a partnership, corporation, trust, or other legal person (e.g., a fund or a special-purpose investment vehicle) to enter into a security-based swap. If the partnership, corporation, trust, or other legal person were a U.S. person, the account would be a U.S. person.

²⁹⁷ For purposes of this definition, the term “account” includes both discretionary accounts and non-discretionary accounts. See proposed Rule 3a71-3(a)(7)(i)(C) under the Exchange Act.

²⁹⁸ This proposed approach is consistent with the treatment of managed accounts in the context of the major security-based swap participant definition, whereby the swap or security-based swap positions in client accounts managed by asset managers or investment advisers are not attributed to such entities for purposes of the major participant definitions, but rather are attributed to the beneficial owners of such positions based on where the risk associated with those positions ultimately lies. See Intermediary Definitions Adopting Release, 77 FR at 30690.

²⁹⁹ Proposed Rule 3a71-3(a)(7)(ii) under the Exchange Act.

Development Bank, the African Development Bank, the United Nations, and their agencies and pension plans, and any other similar international organizations, their agencies and pension plans.”³⁰⁰ Although these organizations may have headquarters in the United States, the Commission preliminarily believes that most of their membership and financial activity are outside the United States. Thus, based on the nature of these entities as international organizations the Commission is proposing not to treat them as U.S. persons for purposes of Title VII.³⁰¹

(c) Conclusion

In short, by following a territorial approach, the Commission preliminarily believes that the proposed definition of U.S. person describes the types of individuals and entities residing, organized, or conducting business within the United States, and the types of accounts that should be designated as U.S. persons for purposes of the proposed rule regarding application of the de minimis exception to security-based swap dealers.³⁰²

Request for Comment

The Commission requests comment on all aspects of the proposed definition of “U.S. person,” including the following:

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Id.

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Regulation S also specifies that these international organizations are not considered U.S. persons, but Regulation S also considers affiliates of such organizations to be non-U.S. persons. See 17 CFR § 230.902(k)(2)(vi). The Commission is soliciting comment on whether affiliates of such organizations should be treated as non-U.S. persons under proposed Rule 3a71-3(a)(7) under the Exchange Act. Currently, under the proposed rule, an affiliate of one of these international organizations would have to separately consider its U.S. person-status.

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As discussed below, the proposed definition is used in other proposed rules and interpretive guidance in the release. See Sections IV - XI, infra.

- Does the proposed definition of “U.S. person” appropriately address the concerns of security-based swap dealer regulation under Title VII?
- Does the proposed definition appropriately identify all individuals or entities that should be designated as U.S. persons? Is the proposed definition too narrow or too broad? Why? Do the proposed criteria for determining whether an entity is a U.S. person effectively describe the types of counterparties that are relevant to identifying the transactions a security-based swap dealer must count when calculating its de minimis threshold for purposes of determining whether it is required to register as a security-based swap dealer and comply with the requirements of Title VII? Does the proposed definition appropriately identify the types of entities that should be entitled to the protections afforded to counterparties of security-based swap dealers under Title VII?
- Does the proposed definition appropriately treat natural persons residing in the United States as U.S. persons? Should certain categories of persons residing in the United States be excluded from the definition of U.S. person? Should certain categories of persons (such as U.S. citizens or permanent residents) residing abroad be included in the definition of U.S. person? Please explain why excluding or including particular categories of natural persons would be consistent with and further the objectives of dealer regulation under Title VII.
- Is the proposed approach to the U.S. person status of natural persons based on residency, rather than citizenship, appropriate? In particular, is the proposed approach to natural persons, which differs from the proposed approach to legal

- entities, such as partnerships and corporations, appropriate in light of the fact that, as the Commission understands, natural persons rarely enter into security-based swaps?
- Does incorporation or organization under the laws of the United States appropriately define the types of entities (both for-profit and non-profit) that should be treated as U.S. persons under Title VII? Is it appropriate to define an entity as a U.S. person if it has its principal place of business in the United States, even if it is incorporated or organized under the laws of a foreign jurisdiction? Why or why not?
 - Does the proposed rule adequately address the risk of evasion or avoidance of Title VII requirements? Are there entities incorporated or organized under foreign law that should be defined as a U.S. person under the proposed rule that are not currently so defined? For example, should an entity incorporated or organized under foreign law but whose security-based swap transactions are guaranteed by a U.S. person be defined as a U.S. person? Why or why not? Should a foreign entity that conducts security-based swap dealing activity predominantly with U.S. persons or within the United States be defined as a U.S. person? If so, why?
 - Is it appropriate to determine the U.S. person status of a corporation or organization on an entity-wide basis? Why or why not? Should foreign branches, offices, or agencies of U.S. persons be U.S. persons? Why or why not? What distinguishes transactions mediated or entered into by a foreign branch of a U.S. bank from transactions entered into by the head office of such U.S. bank for purposes of Title VII regulation?
 - What, if any, competitive concerns would be raised by defining foreign branches, offices, or agencies of U.S. persons as non-U.S. persons? Please explain the

mechanism of any competitive effects. For example, would particular business structures become unworkable under this approach and what would be the relevant impact? If so, please explain possible alternatives and their relative competitiveness.

- Should the proposed rule include within the definition of U.S. person foreign affiliates of U.S. persons? Should other factors be taken into account in determining the status of such affiliated entities, such as, for example, whether performance on the security-based swap obligations of the foreign entity is guaranteed by a U.S. affiliate? Should a foreign entity with performance on its security-based swap obligations guaranteed by a U.S. affiliate, where such foreign entity's security-based swap dealing activity is conducted predominantly or exclusively with non-U.S. persons, be included within the definition of U.S. person? Why or why not?
- Should a foreign branch of a U.S. parent, including a foreign branch of a U.S. bank, be included in the definition of "U.S. person" for all purposes under Title VII? Why or why not?
- Should a majority-owned subsidiary of a U.S. parent, regardless of whether the subsidiary has financial guarantees from the U.S. parent, be included in the definition of "U.S. person" for purposes of Title VII? Why or why not?
- Should an account of one U.S. person and one or more non-U.S. persons be treated as a U.S. person? Should the Commission instead establish a de minimis threshold amount or otherwise allows some U.S. person ownership without triggering U.S. person status for the account? If so, how?
- The CFTC has proposed a definition of U.S. person that would include a legal entity that is directly or indirectly majority-owned by one or more U.S. persons and in

which such person(s) bears unlimited responsibility for the obligations and liabilities of the legal entity (other than a limited liability company or limited liability partnership where partners have limited liability).³⁰³ Should the Commission adopt a similar approach? If so, why? How should majority ownership be determined? Is majority ownership the appropriate test? If not, should some other percentage test be used (e.g., 25% or some other measure of control)? Are there operational or other difficulties in implementing such an approach?

- Should entities, whatever their place of domicile, that guarantee the performance of U.S. person counterparties to security-based swaps themselves be deemed U.S. persons? Why or why not? How would treating such indirect counterparties to security-based swaps as U.S. persons affect the application of Title VII rules?
- Is the proposed definition's focus on the status of the person bearing the actual risk in the transaction (e.g., looking at the status of the account owner rather than the person with authority to direct the investment decisions) appropriate in determining whether the person is a U.S. person?
- The CFTC has proposed a definition of U.S. person that would include any pension plan for the employees, officers or principals of a legal entity with its principal place of business inside the United States. Should the Commission adopt a similar approach? If so, what categories of entities would or would not be U.S. persons when compared to the Commission's proposed approach? How is including or excluding

³⁰³ See CFTC Further Proposed Guidance, 78 FR at 912.

such entities, as applicable, from the definition of U.S. person consistent with and in furtherance of the objectives of Title VII?

- Does the proposed rule appropriately address the treatment of certain international organizations with respect to the definition of U.S. person? Should any or all of the organizations specifically identified in the proposed rule be treated as U.S. persons? If so, why? Are there other similarly situated international organizations that should also be explicitly excluded from the U.S. person definition? Should the affiliates of international organizations be treated as non-U.S. persons, even if organized under U.S. law? If so, why? If not, why not?
- Should the proposed definition expressly exclude from the definition of U.S. person any other entity or category of entities? If so, which ones and why?
- The CFTC has proposed a definition of U.S. person that would include any commodity pool, pooled account, or collective investment vehicle (whether or not it is organized or incorporated in the United States) of which a majority ownership is held, directly or indirectly, by a U.S. person. Should the Commission adopt a similar definition that includes any investment fund, commodity pool, pooled account, or collective investment vehicle of which a majority ownership is held by one or more U.S. persons, even if such entity is not incorporated or organized under the laws of the United States, or does not have its principal place of business in the United States? If so, why and how should majority ownership be determined? Is majority ownership the appropriate test? If not, should some other percentage test be used (e.g., 25% or some other measure of control)? Are there operational or other difficulties in implementing such an approach?

- The CFTC has proposed a definition of U.S. person that would include any commodity pool, pooled account, or collective investment vehicle the operator of which would be required to register as a commodity pool operator under the CEA.³⁰⁴ Should the Commission adopt a similar definition that includes any investment fund, commodity pool, pooled account, or collective investment vehicle the operator of which would be required to register as a commodity pool operator under the CEA or an investment adviser under the Investment Advisers Act of 1940 (“Investment Advisers Act”)? If so, why?
- Should the definition of U.S. person specifically address the status of estates, which is specifically addressed in Regulation S?³⁰⁵ If so, please explain the types of security-based swap transaction such entities typically engage in and describe any problems created by the proposed definition of U.S. person relative to the goals of Title VII.
- The CFTC has proposed a definition of U.S. person that would include any estate or trust, the income of which is subject to U.S. income tax regardless of source. Should the Commission adopt a similar approach? If so, why?
- Should the Commission define the term “principal place of business” for purposes of the proposed definition of “U.S. person”? If so, should the Commission define “principal place of business” as the location of the personnel who direct, control, or

³⁰⁴ See CFTC Cross-Border Proposal, 77 FR at 41218.

³⁰⁵ See Section III.B.10, *infra* (discussing the definition of “U.S. person” in Regulation S).

coordinate the security-based swap activities of the entity?³⁰⁶ If no, how should the Commission define it?

6. Proposed Definition of “Transaction Conducted Within the United States”

We are proposing a definition of “transaction conducted within the United States” to identify security-based swap transactions that involve activities in the United States that the Commission preliminarily believes would warrant requiring a non-U.S. person to count such transactions toward its de minimis threshold in the security-based swap dealer definition.³⁰⁷ Under the proposed rule, “transaction conducted within the United States” would be defined to mean any “security-based swap transaction that is solicited, negotiated, executed, or booked within the United States, by or on behalf of either counterparty to the transaction, regardless of the location, domicile, or residence status of either counterparty to the transaction.”³⁰⁸ It would

³⁰⁶ This focus would be generally consistent with the focus of the definition of “principal office and place of business” in the Investment Advisers Act, where it is defined as “the executive office of the investment adviser from which the officers, partners, or managers of the investment adviser direct, control, and coordinate the activities of the investment adviser.” 17 CFR § 275.222-1(b).

³⁰⁷ Proposed Rule 3a71-3(a)(5) under the Exchange Act. The proposed definition of “transaction conducted within the United States” also is used in other places in the release in the context of our proposed application of Title VII requirements in the cross-border context. See Sections VIII - X, infra. The proposed definition of “transaction conducted within the United States,” and related discussion in this release, is not intended to apply outside of the scope of the proposals set forth in this release, unless otherwise indicated. Accordingly, it thus does not affect other rights or obligations of parties under the Exchange Act or the federal securities laws generally.

³⁰⁸ Proposed Rule 3a71-3(a)(5)(i) under the Exchange Act. The use of the term “counterparty” in the proposed rule is intended to refer to the direct counterparty to the security-based swap transaction, not a party that provides a guarantee on the performance of the direct counterparty to the transaction. See Section VIII.A, infra (distinguishing between direct and indirect counterparties).

not, however, include a transaction conducted through a foreign branch of a U.S. bank, for reasons discussed below.³⁰⁹

As noted above, dealing activity is normally carried out through interactions with counterparties or potential counterparties that include solicitation, negotiation, execution, or booking of a security-based swap.³¹⁰ Engaging in any of these activities within the United States, as part of dealing activity, would involve a level of involvement in a security-based swap transaction that the Commission believes should require such transaction to count toward a potential security-based swap dealer's de minimis threshold. The proposed rule, therefore, is designed to identify for market participants the key aspects of a security-based swap transaction that the Commission believes should trigger security-based swap dealer registration requirements.

By contrast, we are not proposing to include either submitting a transaction for clearing in the United States or reporting a transaction to an SDR in the United States as activity that would cause a transaction to be conducted within the United States under the proposed rule, nor are we proposing to treat activities related to collateral management (e.g., exchange of margin payments) that may occur in the United States or involve U.S. banks or custodians as activity conducted within the United States for these purposes. We recognize that submission of a

³⁰⁹ Proposed Rule 3a71-3(a)(4)(ii) under the Exchange Act. See proposed Rule 3a71-3(a)(4) under the Exchange Act (defining “transaction conducted through a foreign branch”), as discussed in Section III.B.7, infra.

³¹⁰ See Section II.B.2(b), supra. More generally, solicitation, negotiation, execution, and booking are activities that represent key stages in a potential or completed security-based swap transaction. As discussed below, transactions conducted within the United States, regardless of whether in a dealing or non-dealing capacity, would generally be subject to requirements relating to reporting and dissemination, clearing, and trade execution. See Sections VIII - X, infra.

transaction for clearing to a CCP located in the United States poses risk to the U.S. financial system, and collateral management plays a vital role in an entity's financial responsibility program and risk management. However, we preliminarily believe that none of these activities, by themselves, involves activities conducted between a potential dealer and its counterparty that may be characterized as dealing activity, although clearing and collateral management services may be offered in conjunction with dealing activity.

Under the rule adopted by the Commission, jointly with the CFTC, a potential security-based swap dealer is required to consider the security-based swap positions "connected with" the dealing activity in which the potential dealer—or any other entity controlling, controlled by or under common control with the potential dealer—engages over the course of the immediately preceding 12 months (or following the effective date of final rules implementing Section 3(a)(68) of the Exchange Act, 15 U.S.C. 78c(a)(68), if that period is less than 12 months).³¹¹ By incorporating the definition of a "transaction conducted within the United States" into the proposed rule applying the de minimis exception in the cross-border context,³¹² the Commission is proposing that non-U.S. persons engaged in cross-border dealing activity include in their de minimis calculations any security-based swap transaction that is connected with³¹³ an entity's dealing activity with another non-U.S. person if a U.S. branch or office of either counterparty, or

³¹¹ See 17 CFR § 240.3a71-2(a)(1).

³¹² See proposed Rule 3a71-3(b) under the Exchange Act.

³¹³ The de minimis exception threshold is computed based on the notional amount of an entity's security-based swap positions, connected with its dealing activity, not transactions that are merely solicited. See Intermediary Definitions Adopting Release, 77 FR at 30630.

an associated person³¹⁴ of either counterparty—including any affiliate and any associated person of any affiliate, or a third party agent, located within the United States—is directly involved in the transaction. Thus, a non-U.S. person engaged in security-based swap dealing activity would be required to count toward its de minimis threshold any dealing transaction entered into with another non-U.S. person that was conducted in the United States, whether the transaction falls within the “conducted within the United States” definition through such non-U.S. person’s own activity (or that of an agent within the United States), or that of its non-U.S. person counterparty (or such counterparty’s agent).³¹⁵ Similarly, if any transaction connected with a non-U.S. person’s dealing activity is executed within the United States, the non-U.S. person would be required to count that transaction toward its de minimis threshold.³¹⁶

We recognize that many of a non-U.S. person’s transactions conducted within the United States that arise out of its dealing activity may also be transactions with U.S. persons, and thus would already be counted for purposes of the de minimis threshold. However, requiring non-U.S. persons to include in their de minimis calculations only transactions with U.S. person counterparties would enable such persons to engage in significant amounts of security-based swap dealing activity within the United States without Commission oversight as a security-based swap dealer, so long as the dealing activity were limited to non-U.S. persons.³¹⁷ This would be

³¹⁴ See Section 3(a)(70) of the Exchange Act, 15 U.S.C. 78c(a)(70) (defining “person associated with a security-based swap dealer or major security-based swap participant”); see also note 472, *infra*.

³¹⁵ See Proposed Rule 3a71-3(b)(1)(ii) under the Exchange Act.

³¹⁶ See *id.*

³¹⁷ Depending on the nature of the activity and the person located in the United States engaging in the activity, such person may need to register with the Commission as a broker-dealer under Section 15(a)(1) of the Exchange Act, 15 U.S.C. 78o(a)(1).

the case if the potential dealer operated out of a branch, office, or affiliate, or utilized a third-party agent acting on its behalf within the United States, or merely directed its dealing activity to non-U.S. persons that themselves operate out of the United States, either through branches, office, or affiliates, or by utilizing third party agents.³¹⁸ The Commission preliminarily does not believe that this would be consistent with the purposes of the Dodd-Frank Act, which is intended, in part, to promote accountability and transparency in the U.S. security-based swap market.³¹⁹

First, we preliminarily believe that when a non-U.S. person engages in dealing activity with another non-U.S. person from within the United States either through an agent, branch, or office, or otherwise engages in security-based swap dealing activity within the United States (such as by soliciting persons within the United States from outside the United States), the solicitation, negotiation, or execution activity that occurs within the United States constitutes dealing activity that is described by the security-based swap dealer definition.³²⁰ This is the case even where such transaction is ultimately booked by the two non-U.S. entities outside the United States. Second, most market participants, including non-U.S. persons, entering into a security-based swap transaction with a security-based swap dealer, particularly through personnel located in the United States, could reasonably expect to be entitled to the customer protections of Title VII because of Title VII's role in setting the standards for the U.S. security-based swap market

³¹⁸ The Commission is not distinguishing, for purposes of the proposed rule, whether a potential dealer or its counterparty is operating out of a branch, an office, an affiliate, or utilizes a third-party agent to act on its behalf. We are, however, soliciting comment on whether there is a basis for drawing distinctions in this area and look forward to receiving commenters' views.

³¹⁹ See note 97, *supra*.

³²⁰ See Section II.B.2(b), *supra*.

and the market participant's decision to engage in a transaction within that market.³²¹ Given the Commission's responsibility in Title VII to regulate the U.S. security-based swap market, as well as reasonable market expectations and the risk of creating confusion among market participants,³²² we preliminarily do not believe that it is appropriate to diverge from our traditional approach to the regulation of broker-dealers by establishing a regulatory regime for the security-based swap market that would allow non-U.S. persons to engage in unregulated dealing activity within the United States, either when it acts through U.S. branches, office, or agents or it solicits, negotiates, or executes transactions with non-U.S. persons that themselves are operating out of the United States.

Moreover, suppose non-U.S. persons were not required to register when engaging in security-based swap dealing activity within the United States with other non-U.S. persons. Non-U.S. persons seeking to negotiate security-based swap transactions using personnel in the United States may choose to enter into security-based swap transactions with such unregistered non-U.S.

³²¹ The Commission previously has noted the role that the location of the dealer plays in setting expectations regarding the legal protections available in transactions with that dealer. See Rule 15a-6 Adopting Release, 54 FR at 30017 (noting that a U.S. citizen residing abroad who seeks out transactions with foreign broker-dealers would not generally expect U.S. securities laws to apply to the transaction); Regulation S Adopting Release, 55 FR at 18310 (noting the expectation that a buyer outside the United States who purchases securities offered outside the United States is aware that "the transaction is not subject to registration under the Securities Act"). See also Cleary Letter IV at 17 ("As both Commissions have consistently recognized in the past, the non-U.S. counterparty in . . . transactions [with a non-U.S. branch or affiliate of a U.S. person] conducted abroad have no expectation of protection under U.S. law"); Davis Polk Letter II at 20 ("Finally, the non-U.S. counterparty would not reasonably expect the swap [with a foreign bank swap dealer] to be subject to Title VII's requirements").

³²² See Rui Albuquerque and Neng Wang, "Agency Conflicts, Investment and Asset Pricing," *Journal of Finance*, Vol. 63, No. 1 (2008) (discussing the effect of customer protection on prices) and Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert Vishny, "Investor Protection and Corporate Valuation," *Journal of Finance*, Vol. 57, No. 3 (2002) (discussing the effect of customer protection on prices).

persons rather than with a U.S. person to avoid the application of Title VII. In this way, customers may choose to forego the protections of Title VII in order to achieve potential cost savings. This could limit the access of U.S. persons engaged in dealing activity within the United States to non-U.S. persons, as well as more generally limiting the ability of U.S. persons to access liquidity in the security-based swap market. Accordingly, the Commission is proposing that a non-U.S. person would be required to count its security-based swap transactions conducted within the United States (as well as its transactions with U.S. persons) that arise out of its dealing activity to determine whether the notional amount of its dealing transactions exceeds the de minimis threshold. This would have the effect of subjecting both non-U.S. persons engaged in dealing activity within the United States and U.S. persons engaged in dealing activity within the United States to the same set of rules, thus providing their counterparties the same set of protections.

Finally, although the proposed rule reflects the importance of ensuring that neither non-U.S. person counterparty is engaged in the relevant activities within the United States for purposes of this definition, we also recognize the operational difficulties that could arise in investigating the activities of a counterparty to ensure compliance with the rule. As a result, we are preliminarily proposing to allow parties to rely on a representation received from a counterparty indicating that a given transaction “is not solicited, negotiated, executed, or booked within the United States by or on behalf of such counterparty.”³²³ A party may rely on such a representation by its counterparty unless the party knows that the representation is not

³²³ Proposed Rule 3a71-3(a)(5)(iii) under the Exchange Act.

accurate.³²⁴ The Commission preliminarily believes that this would address whatever operational difficulties parties may have in determining whether or not their counterparty is conducting a transaction within the United States.

Request for Comment

The Commission requests comment on all aspects of the proposed rule regarding registration by non-U.S. persons who engage in dealing activity within the United States, including the following:

- Should non-U.S. persons be required to register by virtue of engaging in security-based swap dealing activity within the United States, even if none of this dealing activity is directed to, or otherwise involves, U.S. persons? Why or why not?
- Does the proposed approach appropriately impose the dealer registration requirement on non-U.S. persons based on their dealing activities conducted within the United States? Should a non-U.S. person be required to register as a security-based swap dealer if it enters into, or offers to enter into, security-based swap transactions that are

³²⁴ Id. Cf. Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than \$150 Million in Assets Under Management, and Foreign Private Advisers, Advisers Act Release No. 3222 (June 22, 2011), 76 FR 39646, 39676 (July 6, 2011) (“if an adviser reasonably believes that an investor is not ‘in the United States,’ the adviser may treat the investor as not being ‘in the United States’”). We are proposing to use a knowledge standard rather than a reasonable belief standard with respect to transactions conducted within the United States between non-U.S. person counterparties due to the fact that this definition applies to both counterparties to a transaction, thus each counterparty has an incentive to ensure the accuracy of its representation. In addition, the proposed “actual knowledge” standard and related discussion in this release are not intended to apply outside the scope of the proposals set forth in this release. Accordingly, it does not affect the standard for reliance on representations with respect to other rights or obligations of persons under the Exchange Act or the federal securities law generally.

transactions conducted within the United States if such non-U.S. person's dealing activity is limited to its foreign business? What about if the non-U.S. person engages in non-U.S. dealing activity, but also enters into transactions with U.S. persons in a non-dealing capacity?

- What, if any, market-transparency or counterparty-protection issues would be likely to arise if non-U.S. persons were not required to register if they engaged in dealing activity solely with non-U.S. persons from within the United States?
- What, if any, competition issues would be likely to arise if non-U.S. persons were not required to register if they engaged in dealing activity solely with non-U.S. persons from within the United States?
- Is the proposed approach toward determining whether dealing activity is conducted within the United States appropriate? Does the proposed rule identify appropriate factors in determining whether a transaction has been conducted within the United States? If not, what factors should be modified, removed, or added?
- Is the proposed identification of activities appropriate in the context of determining whether a security-based swap is a transaction conducted within the United States? If not, which activities should the Commission consider as key evidence of a transaction that is conducted within the United States?
- Is direct participation by a branch, agency, office, or associated person, including any affiliate and any associated person of any affiliate, within the United States an appropriate element for identifying whether a security-based swap transaction is a transaction conducted within the United States? Are there functions routinely

performed by these entities that should not trigger a registration requirement, even if performed within the United States?

- Is the direct participation of a third-party agent an appropriate element for identifying whether a security-based swap transaction is a transaction conducted within the United States? If not, why not?
- From an operational perspective, what, if any, changes to policies and procedures would be required to identify transactions conducted within the United States under the proposed approach? What changes would be required, for example, to monitor circumstances that would prevent a party from relying on representations?
- Does the proposed rule appropriately identify the range of security-based swap activities (i.e., solicitation, negotiation, execution, and booking) that should be considered in determining whether dealing activity is conducted within the United States? If not, what activities should be excluded or included? Why?
- Should a transaction entered into by a non-U.S. person in its capacity as a dealer be treated as dealing activity conducted within the United States if it is executed on an SB SEF, submitted to an SDR, or cleared by a security-based swap clearing agency physically located within the United States, even if no other activity related to the transaction were conducted within the United States?
- Should the Commission allow parties to rely on representations from their counterparties regarding compliance with the definition of “transaction conducted within the United States”? Are there alternatives to relying on representations to ensure compliance? Should parties be required to exercise reasonable standards of care and due diligence?

- Is the standard used for the proposed ability to rely on a representation appropriate? Should another standard of knowledge be used? If so, what standard would be more appropriate for this purpose?
- The CFTC has proposed an interpretation that does not consider whether swap dealing activity is conducted inside or outside the United States when determining whether the de minimis threshold is met.³²⁵ Should the Commission adopt this approach? If yes, please address the effect of both approaches on customer protection, market transparency, competition, and capital formation in the U.S. security-based swap market.
- What would be the market impact of the proposed approach to determining whether dealing activity occurred within the United States? How would the proposed approach affect the competitiveness of U.S. entities in the global marketplace (both in the United States as well as in foreign jurisdictions)? Would the proposed approach place any market participants at a competitive disadvantage or advantage? If so, please explain. Would the proposed approach be a more general burden on competition? If so, please explain. What other measures should the Commission consider to implement the proposed approach? What would be the market impacts and competitiveness effects of alternatives to the proposed approach discussed in this release?

³²⁵

See CFTC Cross-Border Proposal, 77 FR at 41219-20.

7. Proposed Treatment of Transactions with Foreign Branches of U.S. Banks

As noted above, under the proposed rule, a non-U.S. person would not be required to count toward the de minimis threshold in the security-based swap dealer definition its transactions with the foreign branch of a U.S. bank.³²⁶ For purposes of this proposed approach, and as described more fully below, “foreign branch” would be defined as any branch of a U.S. bank if:

- The branch is located outside the United States;
- The branch operates for valid business reasons; and
- The branch is engaged in the business of banking and is subject to substantive banking regulation in the jurisdiction where located.³²⁷

³²⁶ Proposed Rule 3a71-3(b)(1)(ii) under the Exchange Act. Section 716 of the Dodd-Frank Act (commonly known as the “Push-Out Rule”) prohibits the provision of certain types of “Federal assistance” to certain swap and security-based swap dealers and major swap and security-based swap participants referred to as “swaps entities,” subject to certain exceptions. In addition, Section 619 of the Dodd-Frank Act (commonly referred to as the “Volcker Rule”) adds a new Section 13 to the Bank Holding Company Act of 1956 (“BHC Act”) (to be codified at 12 U.S.C. 1851) that generally prohibits any banking entity from engaging in proprietary trading or from acquiring or retaining an ownership interest in, sponsoring, or having certain relationships with a hedge fund or private equity fund (“covered fund”), subject to certain exemptions. See Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, Exchange Act Release No. 66057 (Oct. 12, 2011), 76 FR 68846 (Nov. 7, 2011). Both the Push-Out Rule and the Volcker Rule will potentially limit the ability of U.S. banks to conduct security-based swap activity.

³²⁷ Proposed Rule 3a-71-3(a)(1) under the Exchange Act. We are not proposing to include “agencies” within the definition of “foreign branch” as such term is used in connection with our treatment of transactions with foreign branches of U.S. banks. We recognize that Regulation S groups agencies and branches together in defining the term U.S. person. See 17 CFR §§ 230.902(k)(1)(v), (2)(v). However, as discussed in Section III.B.10 below, although certain aspects of Regulation S may be useful in the context of security-based swaps, Title VII and Regulation S are tailored to serve different objectives. In particular, the common treatment of agencies and branches under Regulation S does not compel us to similarly group agencies and branches for purposes of our treatment of

We preliminarily believe that these factors are appropriate for determining which entities fall within the definition of a foreign branch for purposes of this proposed approach due to their focus on the physical location of the branch and the nature of the branch's business and regulation in a foreign jurisdiction. Requiring the branch to be located outside the United States is consistent with the goal of the proposed rule, which is to identify security-based swap activity that is not conducted within the United States. Requiring the branch to be operated for valid business purposes and to be engaged in the business of banking and subject to substantive banking regulation in a foreign jurisdiction is intended to help ensure that U.S. banks are not able to take advantage of the proposed rule by setting up offshore operations to evade the application of Title VII.

In order for a transaction to be a "transaction conducted through a foreign branch," and therefore excluded from a non-U.S. person's de minimis threshold calculation,³²⁸ the foreign branch must be the named counterparty to the transaction³²⁹ and the transaction must not be solicited, negotiated, or executed by a person within the United States on behalf of the foreign branch or its counterparty.³³⁰ To the extent that the transaction is conducted within the United States, as described in the immediately preceding section (whether on behalf of the U.S. bank to which the branch belongs or of the foreign counterparty), the non-U.S. person would be required

transactions with foreign branches of U.S. banks given the fact that the term "agency" does not have any operative meaning with respect to the foreign operations of U.S. banks.

³²⁸ Proposed Rules 3a71-3(b)(1)(ii) and (2)(ii) under the Exchange Act.

³²⁹ Proposed Rule 3a71-3(a)(4)(i)(A) under the Exchange Act.

³³⁰ Proposed Rule 3a71-3(a)(4)(i)(B) under the Exchange Act.

to count such transaction arising out of its dealing activity toward its de minimis threshold for purposes of determining whether it is required to register as a security-based swap dealer.³³¹

We believe that counting transactions with a foreign branch toward the de minimis threshold would be consistent with the view that a foreign branch of a U.S. bank is part of a U.S. person within the proposed definition.³³² We also recognize that such transactions pose risk to the U.S. financial system. At the same time, however, we believe that imposing registration requirements on non-U.S. persons solely by virtue of their transactions with foreign branches of U.S. banks could limit the access of U.S. banks to non-U.S. counterparties when they conduct their foreign security-based swap dealing activity through foreign branches because non-U.S. persons may not be willing to enter into transactions with them in order to avoid being required to register as a security-based swap dealer.³³³ We have preliminarily concluded that not requiring such transactions to be counted toward the foreign counterparty's de minimis threshold for purposes of the security-based swap dealer registration requirement would minimize this

³³¹ See Section III.B.6, supra.

³³² See Section III.B.5, supra.

³³³ See, e.g., Sullivan and Cromwell Letter at 14 (“The jurisdictional scope of the swaps entity definitions is critical to the ability of U.S. banking organizations to maintain their competitive position in foreign marketplaces. Imposing the regulatory regime of Title VII on their Non-U.S. Operations would place them at a disadvantage to their foreign bank competitors because the Non-U.S. Operations would be subject to an additional regulatory regime which their foreign competitors would not.”); Cleary IV at 7 (“Subjecting such non-U.S. branches and affiliates to U.S. requirements could effectively preclude them from, or significantly increase the cost of, managing their risk in the local financial markets, since local financial institutions may be required to comply with Dodd-Frank to provide those services”).

disparate treatment while ensuring that transactions involving foreign branches of U.S. banks remain subject to certain Title VII requirements (as described below).³³⁴

Finally, although the proposed rule reflects the importance of ensuring that neither counterparty is operating from within the United States for purposes of conducting a transaction through a foreign branch, we also recognize the operational difficulties that could arise in investigating the activities of a counterparty to ensure compliance with the rule. As a result, we are proposing to allow parties to rely on a representation received from a counterparty indicating that “no person within the United States is directly involved in soliciting, negotiating, executing, or booking” a given transaction on behalf of the counterparty.³³⁵ A party may rely on such a representation by its counterparty unless the party knows that the representation is not accurate. The Commission preliminarily believes that this would address whatever operational difficulties parties may have in determining whether or not their counterparty is conducting a transaction conducted through a foreign branch.

Request for Comment

The Commission requests comment on all aspects of the proposed treatment of transactions with foreign branches of U.S. persons for purposes of the de minimis exception, including the following:

³³⁴ See Section III.C, infra. Provided the transaction is not a transaction conducted within the United States under proposed Rule 3a71-3(a)(5) under the Exchange Act, the Commission also is not proposing to require non-U.S. persons to count transactions with a non-U.S. person toward their de minimis threshold even if the non-U.S. person’s performance on the security-based swap is guaranteed by a U.S. person. See Section III.B.9, infra.

³³⁵ Proposed Rule 3a71-3(a)(4)(ii) under the Exchange Act; see also Section III.B.6, supra.

- Would the proposed approach reduce the effectiveness of customer protections or any other provisions of Title VII? If so, how should these concerns be balanced against the competitiveness concerns identified as part of the rationale behind the proposed approach?
- Does the proposed approach appropriately address the potential for disparate competitive impacts related to the application of the de minimis exception to dealers operating out of foreign branches? If not, how might the Commission more effectively address these concerns?
- Does the proposed approach provide an advantage to U.S. banks engaging in security-based swap dealing activity through foreign branches? Are there competitiveness concerns raised by this approach for entities (either banks or nonbanks) that do not utilize the branch model? Are there competitiveness concerns for non-U.S. persons, including non-U.S. persons whose performance under security-based swaps is guaranteed by a U.S. person? If so, what are they?
- Should the Commission allow parties to rely on representations from their counterparties regarding compliance with the definition of “transaction conducted through a foreign branch”? Should the Commission separately allow parties to rely on representations from their counterparties regarding status under the “foreign branch” definition?
- Is the standard used for the proposed ability to rely on a representation appropriate? Should another standard of knowledge be used? If so, what standard would be more appropriate for this purpose?

- Should the definition of a “foreign branch” be broadened to include “agencies” of U.S. banks in addition to branches? If so, what rationale justifies the inclusion of agencies? In particular, what are the similarities (or differences) in the legal status and regulatory treatment of the foreign branches and foreign agencies of U.S. banks that would warrant similar treatment? How do foreign agencies of U.S. banks differ from foreign offices of U.S. persons that are not banks?
- How might the proposed approach to the foreign branches of U.S. banks be impacted by the Volcker Rule and the Push-Out Rule? How might security-based swap dealers alter their business practices in response to the Volcker Rule and the Push-Out Rule? Should the proposed approach to the foreign branches of U.S. banks be altered to account for these changes to business practice?
- What would be the market impact of the proposed treatment of transactions with foreign branches of U.S. banks? How would the proposed approach affect the competitiveness of U.S. entities in the global marketplace (both in the United States as well as in foreign jurisdictions)? Would the proposed approach place any market participants at a competitive disadvantage or advantage? If so, please explain. Would the proposed approach be a more general burden on competition? If so, please explain. What other measures should the Commission consider to implement the proposed approach? What would be the market impacts and competitiveness effects of alternatives to the proposed approach discussed in this release?

8. Proposed Rule Regarding Aggregation of Affiliate Positions

One key issue related to our proposed approach to the de minimis exception, both in the cross-border context and domestically, is the aggregation of transactions connected with the

dealing activity of an affiliate. In the Intermediary Definitions Adopting Release, the Commission and the CFTC jointly stated that the notional thresholds in the de minimis exception encompass swap and security-based swap dealing positions entered into by an affiliate controlling, controlled by, or under common control with the person at issue.³³⁶ The Commission and the CFTC further noted that for these purposes, control would be interpreted to mean the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract or otherwise.³³⁷ This aggregation of affiliate positions was deemed necessary to prevent persons from avoiding dealer regulation by dividing up dealing activity in excess of the notional thresholds among multiple affiliates.³³⁸

The Commission is proposing a rule that would describe how this aggregation requirement would apply to U.S. persons and non-U.S. persons engaged in cross-border security-based swap dealing activity, as well as to U.S. persons engaged in purely domestic transactions.³³⁹ As set forth in the Intermediary Definitions Adopting Release, the affiliate aggregation principle requires that a person aggregate the entire security-based swap dealing activity of any of its affiliates, without distinguishing whether the dealing positions are entered into by U.S. person affiliates or non-U.S. person affiliates, and without distinguishing whether

³³⁶ See Intermediary Definitions Adopting Release, 77 FR at 30631; 17 CFR § 240.3a71-2(a)(1).

³³⁷ See Intermediary Definitions Adopting Release, 77 FR at 30631 n.437.

³³⁸ See Intermediary Definitions Adopting Release, 77 FR at 30631.

³³⁹ Proposed Rule 3a71-4 under the Exchange Act.

the dealing positions are entered into with U.S. persons or non-U.S. persons.³⁴⁰ The proposed rule takes an approach that generally is consistent with the affiliate aggregation interpretive guidance jointly adopted by the Commission and the CFTC to require a person to aggregate all of the security-based swap dealing positions entered into by its U.S. person affiliates,³⁴¹ except that it excludes from such aggregation the positions of an affiliate that is a registered security-based swap dealer, under certain conditions.³⁴² The proposed rule also provides that such aggregation must include any security-based swap transactions of such person's non-U.S. person affiliates that would be required to be counted by such affiliates toward their respective de minimis thresholds in accordance with the proposed approach described above (i.e., a non-U.S. person affiliate would be required to calculate its security-based swap transactions connected with dealing activity conducted with U.S. persons (other than foreign branches of U.S. banks) or otherwise conducted within the United States).³⁴³

The proposed rule similarly provides that the affiliate aggregation principle also would apply to non-U.S. persons that engage in transactions in a dealing capacity with U.S. persons (other than foreign branches of U.S. banks) or otherwise within the United States. In determining whether its dealing activity exceeds the de minimis threshold, a non-U.S. person

³⁴⁰ See Intermediary Definitions Adopting Release, 77 FR at 30631 n.438 (explaining that the Commission intended to address the application of the aggregation principle to non-U.S. persons in a separate release); 17 CFR § 240.3a71-2(a)(1).

³⁴¹ Proposed Rule 3a71-3(b)(2)(i) under the Exchange Act. The proposed rule also clarifies that only a person directly engaged in dealing activity that is required to be counted toward such person's de minimis threshold would be required to aggregate the dealing activity of its affiliates.

³⁴² Proposed Rule 3a71-4 under the Exchange Act.

³⁴³ See Section III.B.4(b), supra; see also proposed Rule 3a71-3(b)(2)(ii) under the Exchange Act.

must aggregate the amount of its own transactions connected with its dealing activity with U.S. persons (other than foreign branches) or otherwise conducted within the United States with the amount of any security-based swap transactions connected with the dealing activity conducted by its affiliates, whether U.S. persons or non-U.S. persons, that such affiliates would be required to count toward their respective de minimis thresholds in accordance with the proposed approach described above³⁴⁴ (other than the transactions of affiliates that are registered security-based swap dealers).³⁴⁵ Transactions of affiliates that are themselves non-U.S. persons with other non-U.S. persons (or foreign branches of U.S. banks) outside the United States would not need to be aggregated for purposes of the de minimis exception.³⁴⁶

Thus, the Commission's proposal would require aggregation of the amount of dealing transactions of all affiliates, both U.S. persons and non-U.S. persons, other than registered security-based swap dealers. We believe that the Commission's proposed approach implements the de minimis exception in a manner that is consistent with the Dodd-Frank Act's focus on the U.S. security-based swap market.³⁴⁷ The proposed approach reflects the fact that all of a U.S. affiliate's security-based swap dealing transactions impact the U.S. financial system, regardless of whether such entity's counterparties are located in the United States or abroad. The same is not true of non-U.S. affiliates, however, because the security-based swap transactions entered

³⁴⁴ See Section III.B.4(b), *supra*. A U.S. person affiliate would be required to calculate all of its security-based swap transactions connected with its dealing activity and a non-U.S.-person affiliate would be required to calculate its security-based swap transactions connected with its dealing activity with U.S. persons (other than foreign branches of U.S. banks) or otherwise conducted within the United States.

³⁴⁵ Proposed Rules 3a71-3(b)(2)(i) and (ii) and proposed Rule 3a71-4 under the Exchange Act.

³⁴⁶ Id.

³⁴⁷ See Subtitle B of Title VII of the Dodd-Frank Act.

into by a non-U.S. affiliate with other non-U.S. persons outside the United States would not impact the U.S. financial system to the same extent as transactions with U.S. persons. Thus, because the statutory focus is on the U.S. security-based swap market, we preliminarily believe it is appropriate to distinguish between U.S. and non-U.S. affiliates based on the disparate impact of their security-based swap dealing transactions on the U.S. financial system when determining which dealing transactions should be aggregated for purposes of the de minimis threshold. This further suggests that we should aggregate the dealing positions of both U.S. and non-U.S. person affiliates that are not already registered security-based swap dealers, in accordance with the rule and guidance described in the following paragraph regarding aggregation of the positions of registered dealers, with the goal of capturing all dealing transactions that warrant imposing dealer registration and regulation³⁴⁸ and minimizing the opportunity for a person to evasively engage in large amounts of dealing activity.³⁴⁹ As a result, where the aggregate security-based swap dealing activity of an affiliated group, calculated as described above, exceeds the de minimis threshold, then each affiliate within such group that engages in the security-based swap dealing activity included in such aggregation calculation would be required to register with the Commission as a security-based swap dealer, subject to the exception described below.

The Commission also is proposing a rule to address the affiliate aggregation of dealing positions for purposes of the de minimis threshold where one or more affiliates within a corporate group are registered with the Commission as security-based swap dealers.³⁵⁰ Under the proposed approach, a person calculating the amount of its security-based swap positions for

³⁴⁸ See note 4, supra.

³⁴⁹ See Intermediary Definitions Adopting Release, 77 FR at 30631.

³⁵⁰ Proposed Rule 3a71-4 under the Exchange Act.

purposes of the de minimis threshold would not need to include in such calculation the security-based swap transactions of an affiliate controlling, controlled by, or under common control with the person if such affiliate is registered with the Commission as a security-based swap dealer.³⁵¹ The application of this proposed rule would be limited to circumstances where a person's security-based swap activities are operationally independent from those of its registered security-based swap dealer affiliate. For purposes of this proposed rule, the security-based swap activities of two affiliates would be considered operationally independent if the two affiliated persons maintained separate sales and trading functions, operations (including separate back offices), and risk management with respect to any security-based swap dealing activity conducted by either affiliate that is required to be counted against their respective de minimis thresholds. If any of these functions were jointly administered by the two affiliates, or were managed at a central location within the affiliates' corporate group (e.g., at the entity serving as the central booking entity) with respect to any security-based swap dealing activity conducted by either affiliate that is required to be counted against their respective de minimis thresholds, then an unregistered person would not be able to exclude the security-based swap dealing activities of its registered security-based swap dealer affiliate under the proposed rule.

Absent the proposed exclusion of the dealing positions of a registered security-based swap dealer affiliate in the proposed rule, any affiliate of a registered security-based swap dealer that engaged in security-based swap dealing activity with U.S. persons or within the United States would be required to aggregate the dealing positions of the registered security-based swap dealer with its own dealing positions for purposes of the de minimis threshold. Given that a registered security-based swap dealer would presumably conduct relevant security-based swap

³⁵¹

Id.

dealing positions in excess of the de minimis threshold over the course of the immediately preceding 12 months, all persons affiliated with a registered security-based swap dealer that engaged in any level of security-based swap dealing activity that is required to be counted against the de minimis threshold would necessarily be required to register with the Commission as security-based swap dealers because of the affiliate aggregation principle. We preliminarily do not believe that this outcome would be consistent with the statutory purpose of the de minimis exception, because it would prevent all affiliates of a registered dealer from taking advantage of the exception, even those engaged in a minimal amount of dealing activity relevant to Title VII dealer registration and regulation. We also do not believe that this scenario raises the concerns about evasion that underlie the de minimis affiliate aggregation rule jointly adopted by the Commission and the CFTC in the Intermediary Definitions Adopting Release, given that this proposed rule would apply only where a corporate group already included a registered dealer subject to Commission oversight, and the dealing positions of all commonly controlled unregistered affiliates in the corporate group would still be aggregated for purposes of the de minimis threshold.³⁵² For these reasons, we believe that it is appropriate not to include the security-based swap dealing positions of registered security-based swap dealers in the de minimis calculations of their commonly controlled affiliates provided that their security-based swap dealing activities that are relevant to the de minimis calculation are operationally independent of the registered security-based swap dealer affiliates.

³⁵² See Intermediary Definitions Adopting Release, 77 FR at 30631.

Request for Comment

The Commission requests comment on all aspects of the proposed rule regarding the aggregation of affiliate positions, including the following:

- Should the Commission permit affiliated persons to exclude the security-based swap dealing positions of affiliated registered security-based swap dealers from their de minimis calculations, as proposed? Why or why not?
- Would permitting affiliated entities to exclude the security-based swap dealing positions of registered security-based swap dealers from their de minimis calculations undermine any of the Title VII protections associated with security-based swap dealer registration and regulation? If so, please explain. Should the Commission further explain what “operationally independent” means? If so, what should the Commission consider?
- Should the Commission permit affiliated entities to exclude the security-based swap dealing positions of operationally independent affiliates from their de minimis calculations, even if such affiliates are not registered security-based swap dealers?
- The CFTC has adopted temporary conditional relief that would permit a non-U.S. person to exclude from its de minimis calculation the security-based swap dealing positions of an affiliated non-U.S. person that is registered as a swap dealer and not guaranteed by a U.S. person with respect to its swap obligations.³⁵³ Should the Commission adopt a similar interpretation to permit a non-U.S. person (but not a U.S. person) to exclude the dealing positions of its affiliated registered non-U.S. security-

³⁵³ See Final CFTC Cross-Border Exemptive Order, 78 FR at 868.

based swap dealer (but not the dealing positions of its affiliated registered U.S. security-based swap dealer)? Should the Commission condition such exclusion on the affiliated registered security-based swap dealer not being guaranteed by a U.S. person? If so, please describe the likely economic effects of providing different exclusions from the affiliate aggregation principle for U.S. and non-U.S. security-based swap dealers and how the Commission should best address them.

- The CFTC has also proposed an interpretation that would permit non-U.S. persons engaged in dealing activity with U.S. persons to aggregate the notional amounts of security-based swap dealing transactions by their non-U.S. affiliates separately from any dealing activity performed by their U.S. affiliates.³⁵⁴ Should the Commission adopt a similar approach? If so, please explain how this approach is consistent with the de minimis threshold and the rationale provided for the affiliate aggregation principle in the Intermediaries Definitions Adopting Release. In addition, please describe the likely economic effects of providing an effectively higher de minimis threshold for corporate groups that engage in dealing activity with U.S. persons or within the United States through affiliates located in the United States and in foreign jurisdictions.
- What would be the market impact of the proposed approach to aggregation of affiliate positions? How would the proposed approach affect the competitiveness of U.S. entities in the global marketplace (both in the United States as well as in foreign jurisdictions)? Would the proposed approach place any market participants at a

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See CFTC Cross-Border Proposal, 77 FR at 41219-20; see also Final CFTC Cross-Border Exemptive Order, 78 FR at 867-68 (providing temporary conditional relief from the CFTC's de minimis aggregation requirements).

competitive disadvantage or advantage? If so, please explain. Would the proposed approach be a more general burden on competition? If so, please explain. What other measures should the Commission consider to implement the proposed approach? What would be the market impacts and competitiveness effects of alternatives to the proposed approach discussed in this release?

9. Treatment of Inter-Affiliate and Guaranteed Transactions

Consistent with the approach taken in the Intermediary Definitions Adopting Release, the Commission is proposing that cross-border security-based swap transactions between majority-owned affiliates would not need to be considered when determining whether a person is a security-based swap dealer.³⁵⁵ Thus, a non-U.S. person engaged in dealing activity outside the United States would not be required to register as a security-based swap dealer simply by virtue of entering into security-based swap transactions with its majority-owned U.S. affiliate, even if such inter-affiliate security-based swaps were back-to-back transactions (*i.e.*, the foreign subsidiary was acting as a “conduit” for the U.S. person). Similarly, a U.S. person would not be required to register as a security-based swap dealer as a result of back-to-back transactions with a non-U.S. person subsidiary that acts as a conduit for such U.S. person.³⁵⁶ Instead, as proposed,

³⁵⁵ See 17 CFR § 240.3a71-1(d), as discussed in the Intermediary Definitions Adopting Release, 77 FR at 30624-25. For the purposes of this rule, which was adopted in the Intermediary Definitions Adopting Release, counterparties are considered majority-owned affiliates if one party directly or indirectly owns a majority interest in the other, or if a third party directly or indirectly owns a majority interest in both, based on the right to vote or direct the vote of a majority of a class of voting securities of an entity, the power to sell or direct the sale of a majority of a class of voting securities of an entity, or the right to receive upon dissolution or the contribution of a majority of the capital of a partnership. See 17 CFR § 240.3a71-1(d)(2).

³⁵⁶ This approach differs from the treatment of conduit entities in the CFTC Cross-Border Proposal. Under the CFTC Cross-Border Proposal, a U.S. entity may be required to register as a swap dealer as a result of its inter-affiliate swap transactions with an

there must be an independent basis for requiring a person to register as a security-based swap dealer that is unrelated to its inter-affiliate transactions.³⁵⁷

Furthermore, the Commission is proposing not to require a non-U.S. person that receives a guarantee from a U.S. person of its performance on security-based swaps with non-U.S. persons outside the United States to count its dealing transactions with those non-U.S. persons toward the de minimis threshold as a U.S. person would be required to do.³⁵⁸ We believe that the primary risk related to these transactions is the risk posed to the United States via the guarantee from a U.S. person, not the dealing activity occurring between two non-U.S. persons outside the United States. As a result, we do not believe that the risk posed by the existence of the U.S. guarantee would be better addressed through requiring non-U.S. persons receiving such guarantees to register with the Commission as security-based swap dealers. One way that the accumulation of risk resulting from security-based swap positions is addressed in Title VII is through the major security-based swap participant registration category. We preliminarily believe that the risk associated with guarantees by U.S. persons of the performance on security-based swap obligations of non-U.S. persons may be best addressed through the application of principles of attribution in the major security-based swap participant definition described in the

affiliated foreign dealer if the foreign dealer is acting as a conduit by transferring swaps to the U.S. entity through back-to-back transactions. See CFTC Cross-Border Proposal, 77 FR at 41222.

³⁵⁷ Proposed Rule 3a71-4 under the Exchange Act.

³⁵⁸ This approach differs from the treatment of guaranteed entities in the CFTC Cross-Border Proposal. Under the CFTC Cross-Border Proposal, a non-U.S. person that receives a guarantee from a U.S. person would be required to count all of its swap dealing transactions against the de minimis threshold. See CFTC Cross-Border Proposal, 77 FR at 41221.

Intermediary Definitions Adopting Release.³⁵⁹ We preliminarily believe that use of the major security-based swap participant definition to address the risks posed to the United States as a result of guarantees by U.S. persons effectively deals with the specific regulatory concerns posed by the risks these guarantees present to the U.S. financial system and is consistent with the regulatory framework set forth in the Dodd-Frank Act.³⁶⁰

The Commission also is proposing not to require a foreign dealer to count security-based swap transactions with non-U.S. persons that receive guarantees from U.S. persons toward the de minimis threshold. The Commission notes that, in many respects, the risk created for U.S. persons and the U.S. financial system in these transactions is the same as the risk posed if the U.S. person who provides the guarantee had entered into transactions directly with non-U.S. persons. The U.S. guarantor would be held responsible to settle those obligations, thus maintaining similar liability as though the U.S. person had entered into security-based swap transactions directly with a non-U.S. person. The Commission preliminarily believes that the risk posed to the U.S. markets by non-U.S. persons engaged in dealing activity with non-U.S. persons outside the United States whose performance under security-based swaps is guaranteed by a U.S. person can be best addressed through the major security-based swap participant definition and requirements applicable to major security-based swap participants, as the risks to the United States appear to arise only from the resulting positions and not the dealing activity as such.

³⁵⁹ See Intermediary Definitions Adopting Release, 77 FR at 30688-89; Section V.C.2(a), infra.

³⁶⁰ See, e.g., Section IV, infra; see also Bank Holding Company Act of 1956 (12 U.S.C. § 1841, et seq.); Title I of the Dodd-Frank Act (concerning regulation of certain nonbank financial companies and bank holding companies that pose a threat to the financial stability of the United States).

Finally, as discussed below, the Commission is proposing to subject a security-based swap transaction between two non-U.S. persons where at least one of the persons receives a guarantee on the performance of its obligations from a U.S. person to the regulatory reporting requirement (but not, in some cases, to real-time public reporting).³⁶¹ If the proposed approach is adopted, the Commission would gain an understanding of market developments in this area as a result of the proposed de minimis exception.

Request for Comment

The Commission requests comment on all aspects of the proposed treatment of inter-affiliate and guaranteed transactions, including the following:

- Should the Commission revise our proposed approach to inter-affiliate transactions to require those transactions to be considered when determining whether a person is a security-based swap dealer? If so, why?
- If the Commission determines not to exclude inter-affiliate transactions from security-based swap dealing activity in the cross-border context, how could such a decision be reconciled with the exclusion for inter-affiliate transactions provided in the Intermediary Definitions Adopting Release? Should the Commission and the CFTC jointly reconsider the approach to inter-affiliate transactions provided in the Intermediary Definitions Adopting Release?
- Should the Commission require the registration of non-U.S. dealers that receive guarantees on the performance of their security-based swap obligations from U.S. persons based on their transactions with non-U.S. persons as well as U.S. persons?

³⁶¹ See Section VIII, infra. Under proposed Regulation SBSR, inter-affiliate transactions would be subject to reporting and dissemination requirements. See id.

Why or why not? Should the U.S. guarantor be viewed as engaging indirectly in dealing activity through its affiliate and, therefore, required to register as a security-based swap dealer if the security-based swap transactions in connection with its dealing activity exceed the de minimis threshold? Should there be a concern that the U.S. guarantor is using the non-US affiliate to evade the requirements of Title VII?

- Does the proposed approach to guarantees effectively address concerns related to the risk posed to the U.S. financial system resulting from guarantees by U.S. persons of security-based swap dealing activity by non-U.S. persons?
- Are there competitiveness concerns related to the proposed approach to guarantees with regard to U.S. entities that engage in non-U.S. security-based swap dealing activity through business models that do not rely on guarantees of non-U.S. persons, such as those that operate through foreign branches?
- The CFTC has proposed an interpretation that would subject an entity that operates a “central booking system” where swaps are booked into a single legal entity, to any applicable swap dealer registration requirement as if it had entered into such swaps directly, irrespective of whether such entity is a U.S. person or whether the booking entity is a counterparty to the swap or enters into the swap indirectly through a back-to-back swap or other arrangement with its affiliate or subsidiary.³⁶² Should the Commission adopt a similar approach? If so, please describe how such a decision could be reconciled with the exclusion for inter-affiliate transactions provided in the Intermediary Definitions Adopting Release.

³⁶² See CFTC Cross-Border Proposal, 77 FR at 41221-22.

- What would be the market impact of the proposed approach to inter-affiliate and guaranteed transactions? How would the application of the proposed approach affect the competitiveness of U.S. entities in the global marketplace (both in the United States as well as in foreign jurisdictions)? Would the proposed approach place any market participants at a competitive disadvantage or advantage? If so, please explain. Would the proposed approach be a more general burden on competition? If so, please explain. What other measures should the Commission consider to implement the proposed approach? What would be the market impacts and competitiveness effects of alternatives to the proposed approach discussed in this release?

10. Comparison with Definition of "U.S. Person" in Regulation S

In proposing an entity-based approach to the definition of a U.S. person, we have declined to follow the suggestions by some commenters that we adopt the definition of "U.S. person" used in Regulation S, which among other things expressly excludes from the definition of "U.S. person" agencies or branches of U.S. persons located outside the United States.³⁶³

³⁶³ See, e.g., Cleary Letter IV at 2 ("The Agencies should adopt a consistent definition of 'U.S. person' based on SEC Regulation S for purposes of analyzing whether a transaction involving one or more such persons may be subject to the provisions of Dodd-Frank."); Davis Polk I at 6 n.6 ("We propose that the term 'U.S. counterparty' be defined in the same way as the term 'U.S. person' in Rule 902(k) of the SEC's Regulation S under the Securities Act, 17 CFR § 230.902(k). This established definition is familiar to countless financial market professionals. Following the 'U.S. person' definition in Regulation S, rather than creating an entirely new definition, would avoid confusion and also provide consistency of application and legal certainty for a financial institution that offers a security and a swap to the same customer, which is common."); SIFMA Letter I at 5 ("To determine whether a party to a swap is a 'U.S. person,' the Commissions should rely on the existing definition of that term contained in Rule 902(k) of the SEC's Regulation S. This established, workable definition is familiar to regulators and market participants alike, and would provide legal certainty. It is noteworthy that the Regulation S definition of U.S. person does not include non-U.S. affiliates of U.S. persons or non-U.S. branches of a U.S. bank and generally excludes collective investment vehicles established outside

Although we recognize that the Regulation S definition of U.S. person has the advantage of familiarity for many market participants, Regulation S addresses specific policy concerns that are different from those addressed by Title VII.³⁶⁴ Specifically, the definition of U.S. person in Regulation S was adopted in the context of providing an “issuer safe harbor” from the registration requirements of Section 5 of the Securities Act, which was intended “to ensure that the [unregistered] securities offered [abroad] come to rest offshore.”³⁶⁵ In that context, providing a safe harbor based in part on the location of the person, branch, or office making the investment decision is consistent with the goals of that regulatory framework, which include protecting the integrity of the registration requirements applicable to securities publicly offered in the United States under the Securities Act. The Regulation S definition of “U.S. person” reflects this policy judgment.

We preliminarily believe that the definition of U.S. person in Title VII should encompass, for example, not only a person that has its place of residence or legal organization within the United States, but also its principal place of business within the United States, as the security-based swap activities of such entities are likely to manifest themselves most directly within the United States, where the majority of their commercial, legal, and financial relationships would be likely to exist because that is where their business principally occurs.³⁶⁶

the United States with U.S. investors.”) (footnotes omitted); see also Section III.B.5(c), supra.

³⁶⁴ See 17 CFR § 230.901(k); see also Regulation S Adopting Release, 55 FR at 18306.

³⁶⁵ Regulation S Adopting Release, 55 FR at 18307.

³⁶⁶ See proposed Rule 3a71-3(a)(7)(i)(B) under the Exchange Act; Section III.B.5(b)ii, supra.

Similarly, we preliminarily believe that the definition of U.S. person in Title VII should include accounts of a U.S. person, regardless of whether the account is a discretionary account or is held by a dealer or other person that is not resident in the United States, because the U.S. person bears the direct risk of transactions in the account, regardless of where the investment decision is made.³⁶⁷ Moreover, we are proposing that an entity's U.S.-person status would apply to the entity as a whole, since the risks related to the concerns of Title VII are borne by the entire entity and not just by the specific business unit (or branch or office) engaged in security-based swap activity.³⁶⁸ With its exclusions for certain foreign branches and agencies of U.S. persons from the definition of "U.S. person," Regulation S would not address the entity-wide nature of the risks that Title VII seeks to address.³⁶⁹

The Commission preliminarily believes that adopting the definition of "U.S. person" in Regulation S without significant modifications would not achieve the goals of Title VII. As discussed above, we are instead proposing a definition of U.S. person that focuses primarily on the location of the person bearing the direct risk of the transaction. Regulation S, with its focus on the person making the investment decision (rather than the person actually bearing the risk),

³⁶⁷ See proposed Rule 3a71-3(a)(7)(i)(C) under the Exchange Act; Section III.B.5(b)iii, supra.

³⁶⁸ See Section III.B.5(a), supra.

³⁶⁹ Under Regulation S, the foreign branch of a U.S. bank is not treated as a U.S. person while the U.S. branch of a foreign bank is treated as a U.S. person. By contrast, under proposed Rule 3a71-3(a)(7)(i)(B) under the Exchange Act, the foreign branch of a U.S. bank would be treated as part of a U.S. person while the U.S. branch of a foreign bank would be treated as a non-U.S. person.

would not necessarily capture the entity that actually bears the risks arising from security-based swap transactions that Title VII seeks to address.³⁷⁰

In light of the specific objectives of Title VII, the Commission preliminarily believes that a definition of U.S. person specifically tailored to the regulatory objectives it is meant to serve, as described above, is appropriate.³⁷¹

Request for Comment

The Commission requests comment on all aspects of the proposed definition of U.S. person, including the following:

- Should the Commission adopt the definition of U.S. person in Regulation S? If so, how should the Commission reconcile the objectives of Title VII with the objectives that Regulation S is meant to serve?

³⁷⁰ Rather than creating a U.S. person definition specifically tailored to Title VII, the Commission could have proposed a modified version of Regulation S. However, significantly modifying the definition of “U.S. person” in Regulation S to accommodate the objectives of Title VII would largely eliminate the benefits associated with adopting a consistent and well-established regulatory standard.

³⁷¹ See Section III.B.3(b)(4), *infra*. The Commission notes that it took a different approach to the definition of U.S. person and activity in the United States in connection with the Commission’s exemption from registration for foreign private advisers. See Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than \$150 Million in Assets Under Management, and Foreign Private Advisers, Advisers Act Release No 3222, 76 FR 39646 (July 6, 2011) (the “Foreign Private Adviser Exemption”). The Foreign Private Adviser Exemption defines certain terms in the statutory definition of “foreign private adviser” (added by Section 402 of the Dodd-Frank Act and codified at section 202(a)(30) of the Investment Advisers Act) by incorporating the definition of a “U.S. person” and “United States” under Regulation S. As discussed in this subsection, the Commission preliminarily believes that it would be inappropriate to follow the approach in Regulation S in its entirety with respect to the cross-border regulation of security-based swaps, although it may be appropriate in the context of the Foreign Private Adviser Exemption given the similar policy objectives with Regulation S.

- Should the Commission include all U.S. citizens in the definition of U.S. person, regardless of a person's residence or domicile?
- Should the Commission include within the definition of U.S. person entities and accounts where the discretion to enter into security-based swaps resides with a U.S. person? To what extent would this approach produce a result that differs from the current approach reflected in the proposed rule and the definitions of "security-based swap dealer" and "major security-based swap participant"?

C. Regulation of Security-Based Swap Dealers in Title VII

1. Introduction

To help address the potential effects of registration, and attendant regulatory requirements, on foreign security-based swap dealers³⁷² with global security-based swap businesses and U.S. security-based swap dealers³⁷³ that engage in security-based swap dealing activity through foreign branches that also may be subject to registration or regulation in foreign jurisdictions, the Commission is proposing not to apply the external business conduct standards and segregation requirements in Title VII to the Foreign Business³⁷⁴ of such registered foreign

³⁷² Proposed Rule 3a71-3(a)(8) under the Exchange Act defines "U.S. security-based swap dealer" as a security-based swap dealer, as defined in Section 3(a)(71) of the Exchange Act, 15 U.S.C. 78c(a)(71), and the rules and regulations thereunder, that is a U.S. person, as defined in proposed Rule 3a71-3(a)(7) under the Exchange Act. Proposed Rule 3a71-3(a)(3) under the Exchange Act defines "foreign security-based swap dealer" as a security-based swap dealer, as defined in Section 3(a)(71) of the Exchange Act, and the rules and regulations thereunder, that is not a U.S. security-based swap dealer.

³⁷³ See note 372, supra.

³⁷⁴ As discussed below, proposed Rule 3a71-3(a)(2) under the Exchange Act defines "Foreign Business" as meaning the security-based swap transactions of foreign security-based swap dealers and U.S. security-based swap dealers "other than the U.S. Business of such entities." "U.S. Business" is defined in proposed Rule 3a71-3(a)(6) under the Exchange Act, with respect to a foreign security-based swap dealer, as (i) any transaction

security-based swap dealers and registered U.S. security-based swap dealers that engage in dealing activity through foreign branches with non-U.S. persons and foreign branches of U.S. banks.³⁷⁵ In addition, while we are not proposing a rule to limit the application of entity-level requirements in Title VII to foreign security-based swap dealers, we are proposing to establish a policy and procedural framework under which the Commission would permit substituted compliance in some circumstances by registered foreign security-based swap dealers with certain Title VII requirements specifically applicable to security-based swap dealers.³⁷⁶

In the following sections, we discuss the views of commenters, describe the transaction-level and entity-level requirements specifically applicable to security-based swap dealers in Title VII, and discuss the proposed application of transaction-level and entity-level requirements to registered security-based swap dealers in the cross-border context.

2. Comment Summary

Various foreign dealers expressed their views about the application of the Dodd-Frank Act requirements to their derivatives businesses. A number of them expressed concern that if the Commission applies security-based swap dealer regulations, not only to entities conducting business from within the United States, but also to foreign-domiciled entities, it could effectively prevent foreign dealers from, among other things, managing their global security-based swap

entered into, or offered to be entered into, by or on behalf of such foreign security-based swap dealer, with a U.S. person (other than with a foreign branch); or (ii) any transaction conducted within the United States; and, with respect to a U.S. security-based swap dealer, as any transaction by or on behalf of such U.S. security-based swap dealer, wherever entered into or offered to be entered into, other than a transaction conducted through a foreign branch, as defined in proposed Rule 3a71-3(a)(4), with a non-U.S. person or another foreign branch. See Section III.C.4, infra.

³⁷⁵ Proposed Rule 3a71-3(b) under the Exchange Act.

³⁷⁶ Proposed Rule 3a71-5 under the Exchange Act, as discussed in Section XI, infra.

business out of a centralized booking entity (i.e., the entity that acts as principal—the named counterparty—to a security-based swap transaction), which they maintain has many advantages for foreign dealers and their clients, including more efficient counterparty netting, greater transparency, greater financial counterparty financial strength, and operational efficiencies.³⁷⁷

One commenter cautioned that if the regulations lead foreign dealers to create “fragmented booking structures” to avoid duplicative and conflicting regulatory regimes, it could harm U.S. consumers through increased transaction costs with foreign dealers.³⁷⁸

Many commenters suggested that to preserve a registration framework that would allow foreign dealers to continue to book their global security-based swap business out of a central non-U.S. entity, the Commission should use our limited designation authority under the Dodd-Frank Act’s swap dealer definition to designate and regulate only specific activities and particular branches or agencies of foreign banks that transact with U.S. customers, without subjecting the whole entity or its other branches to regulation.³⁷⁹

³⁷⁷ See, e.g., Société Générale Letter I at 3 (“Overall, the advantages of carrying out Swap transactions in and with a foreign bank with a consolidated booking structure help control risk significantly We believe it would be sensible for the Commissions to craft regulations that do not discourage foreign banks such as SG from registering as Swap Dealers.”); Davis Polk Letter I at 2, 5 (“We believe operating and managing a global swaps business out of a single booking entity presents many advantages from the perspective of foreign banks, customers and supervisors.”).

³⁷⁸ See ISDA Letter I at 10 (warning that “U.S. counterparties will . . . face increased costs and decreased liquidity if U.S. regulation forces non-U.S. SDs to create fragmented booking structures to avoid duplicative and conflicting regulatory regimes”).

³⁷⁹ See, e.g., IIB Letter at 11 (pointing out that Section 3(a)(71) of the Exchange Act, as amended by the Dodd-Frank Act, provides for limited designation as a security-based swap dealer “for a single type or single class . . . of activities, and not for other types, classes, of . . . activities,” and recommending that the Commissions designate as a Swap Dealer only the particular U.S. or non-U.S. branch or agency of the foreign bank involved in the execution of swaps with U.S. customers”); Rabobank Letter at 2 (recommending that to preserve “the benefits of the centralized booking model, a non-U.S. branch of a

In addition, various commenters suggested a variety of operational models through which foreign dealers could operate in the U.S. security-based swap market, generally premising the proposed registration and regulatory regime on the notion that home country supervision should apply to entity-level regulations (e.g., capital, risk management, and conflicts of interest), while Title VII transaction-level regulations should apply only to security-based swaps involving a U.S. counterparty.³⁸⁰ A number of commenters emphasized that transaction-level requirements should not apply to security-based swaps entered into between foreign counterparties.³⁸¹ Other commenters remarked that if the Commission regulates both the U.S.-facing business (i.e., transactions with U.S. persons) and the foreign-facing business (i.e., transactions with non-U.S. persons) of U.S. security-based swap dealers, but only the U.S.-facing business of foreign security-based swap dealers, then U.S. firms would be at a competitive disadvantage vis-à-vis their foreign counterparts with respect to transactions with foreign counterparties.³⁸²

foreign bank should register as a swap dealer solely with respect to its swap dealing activities with U.S. persons. Under this scenario, Title VII's transaction-level rules would apply only to the non-U.S. branch's swap dealing activities with U.S. persons and would not apply to its other activities or to the swap activities of other parts of the foreign bank").

³⁸⁰ See, e.g., Davis Polk Letter II at 4-20 (recommending reliance on comprehensive home country requirements such as capital, margin, conflicts of interest, risk management, and limited recordkeeping requirements for entity-level regulations if certain standards are met, and recommending the application of Title VII transaction-level rules to a swap dealer's swap dealing activities with U.S. persons).

³⁸¹ See, e.g., Sullivan & Cromwell Letter at 14-15 (asserting that subjecting foreign entities to transaction-level requirements on foreign transactions would likely lead to a competitive disadvantage, because other foreign "banking organizations that are not so burdened by such dual and potentially conflicting requirements would be able to provide a wider range of services..., which may cause customers to migrate away from" those foreign operations, which would limit their ability to manage, transfer, and reduce systemic risk).

³⁸² See, e.g., SIFMA Letter I at 11 (remarking that "U.S. swap dealers also may be at a competitive disadvantage relative to non-U.S. entities if U.S. swap dealers must comply

Several commenters further expressed concern that a requirement for foreign persons to register with the Commission as security-based swap dealers could be particularly problematic in the case of capital requirements, where foreign security-based swap dealers already would be subject to their home country's prudential requirements. These commenters favored deferring to foreign regulators the regulation and supervision of entity-level requirements when a foreign security-based swap dealer is subject to comprehensive and comparable home country regulation.³⁸³ One commenter recommended a comparability standard whereby the Federal Reserve and the Commission determine comparability even when a home country regulator does not require margin for non-cleared security-based swaps, if the home country's capital regime takes into account functionally equivalent capital charges.³⁸⁴ Several commenters recommended that, for monitoring purposes, U.S. regulators could rely on information-sharing arrangements with home regulators regarding foreign swap transactions and activities.³⁸⁵ A few commenters

with U.S. rules when dealing with a non-U.S. counterparty in a jurisdiction that does not have similar rules, for example, if the foreign rules do not mandate margin requirements for non-cleared swaps”).

³⁸³ See, e.g., Financial Services Roundtable Letter at 25 (suggesting that the Commissions should defer to foreign prudential regulators with regard to entity-level requirements such as capital and margin, when they are deemed consistent with U.S. standards); Davis Polk Letter I at 3-4 (emphasizing the importance of relying on home country regulation for entity-level rules such as capital, margin, conflicts of interest, risk management, and limited recordkeeping requirements).

³⁸⁴ See Davis Polk Letter II at 13-15 (recommending a comparability standard that “focuses on the similarities in regulatory objectives as opposed to identity of technical rules,” whereby the Federal Reserve, as the prudential regulator, could determine comparability even when a home country regulator does not require margin for non-cleared swaps, if “the capital regime in such home country is determined to take account appropriately of unmargined or undermargined swaps by imposing additional capital charges”).

³⁸⁵ See, e.g., Davis Polk Letter I at 9 (stating that “[w]here information is required from the foreign bank swap dealer, U.S. regulators should seek to rely upon regulatory examinations by home country regulators, and information sharing arrangements”).

argued that U.S. regulators should not have examination authority over foreign swap transactions and activities located outside the United States, and suggested that the Commissions obtain any necessary information about U.S. swap transactions and activities from U.S. affiliates of the foreign security-based swap dealer.³⁸⁶

3. Title VII Requirements Applicable to Security-Based Swap Dealers

Certain Title VII requirements specifically applicable to security-based swap dealers apply at a transaction level, that is, to security-based swap transactions with specific counterparties. Examples of transaction-level requirements in Title VII principally include requirements relating to external business conduct standards such as the requirement that a security-based swap dealer or major security-based swap participant verify that any counterparty meets the eligibility standards for an eligible contract participant³⁸⁷ and requirements relating to segregation of assets held as collateral in security-based swap transactions.³⁸⁸ Other requirements apply to security-based swap dealers at an entity level, that is, to the dealing entity as a whole. Examples of entity-level requirements include, among others, requirements relating to capital,³⁸⁹ risk management procedures,³⁹⁰ recordkeeping and reporting,³⁹¹ supervision,³⁹² and

³⁸⁶ See, e.g., Société Générale Letter I at 12 (recommending that a foreign dealer based outside the U.S. with no U.S. nexus “should be ‘ring-fenced’ and outside the scope of the Commissions’ examination and regulatory authority,” but allowing for a limited examination of a foreign bank’s U.S. facing business concerning its clearing, trade execution, and capital rules, through its U.S. domiciled agent who “would facilitate this examination by making all necessary information available directly to the Commissions”).

³⁸⁷ See, e.g., Section 15F(h)(3)(A) of the Exchange Act, 15 U.S.C. 78o-10(h)(3)(A). See generally Section 15F(h) (discussing external business conduct standards). However, requirements under Section 15F(h)(1), which address fraud, supervision and adherence to position limits, apply at the entity level.

³⁸⁸ See Section 3E of the Exchange Act, 15 U.S.C. 78c-5.

³⁸⁹ See Section 15F(e) of the Exchange Act, 15 U.S.C. 78o-10(e).

designation of a chief compliance officer.³⁹³ Some requirements can be considered both entity-level and transaction-level requirements. For instance, the margin requirement in Section 15F(e) of the Exchange Act can be considered both an entity-level requirement because margin affects the financial soundness of an entity and a transaction-level requirement because margin calculation is based on particular transactions (*i.e.*, an entity calculates margin based on the market value of specific transactions or on a portfolio basis).³⁹⁴

Below, we describe in more detail various transaction-level and entity-level requirements in Title VII applicable to security-based swap dealers.³⁹⁵

(a) Transaction-Level Requirements

In general, transaction-level requirements primarily focus on protecting counterparties by requiring security-based swap dealers to, among other things, provide certain disclosures to

³⁹⁰ See Section 15F(j)(2) of the Exchange Act, 15 U.S.C. 78o-10(j)(2).

³⁹¹ See Section 15F(k) of the Exchange Act, 15 U.S.C. 78o-10(k).

³⁹² See Section 15F(h)(1)(B) of the Exchange Act, 15 U.S.C. 78o-10(h)(1)(B).

³⁹³ See Section 15F(k) of the Exchange Act, 15 U.S.C. 78o-10(k).

³⁹⁴ See Section 15F(e) of the Exchange Act, 15 U.S.C. 78o-10(e). To take another example, the requirement that security-based swap dealers implement conflict-of-interest systems and procedures relating to security-based swaps in Section 15F(j)(5) of the Exchange Act, 15 U.S.C. 78o-10(j)(5), is transactional in the sense that potential conflicts of interest relate to particular security-based swap transactions. At the same time, however, it also is an entity-level requirement because implementing such systems and procedures would require, among other things, a security-based swap dealer to establish structural and institutional safeguards to wall off the activities of persons within the firm relating to research or analysis of the price or market for any security-based swap. See External Business Conduct Standards Proposing Release, 76 FR at 42420.

³⁹⁵ For purposes of this discussion, we are addressing only requirements applicable to security-based swap dealers in Sections 3E and 15F of the Exchange Act, 15 U.S.C. 78c-5 and 78o-10, and the rules and regulations thereunder. Title VII requirements relating to regulatory reporting and public dissemination, clearing, and trade execution are discussed in Sections VIII - X below.

counterparties, adhere to certain standards of business conduct, and segregate customer funds, securities, and other assets. The following briefly describes the most significant transaction-level requirements applicable to security-based swap dealers in Title VII.

i. External Business Conduct Standards

Section 15F(h) of the Exchange Act requires the Commission to adopt rules specifying external business conduct standards for security-based swap dealers in their dealings with counterparties,³⁹⁶ including counterparties that are “special entities.”³⁹⁷ Congress granted the Commission broad authority to promulgate business conduct requirements, as the Commission determines to be appropriate in the public interest, for the protection of investors or otherwise in furtherance of the purposes of the Exchange Act.³⁹⁸

These standards, as described in Section 15F(h)(3) of the Exchange Act, must require security-based swap dealers to: (i) verify that a counterparty meets the eligibility standards for an ECP; (ii) disclose to the counterparty material information about the security-based swap, including material risks and characteristics of the security-based swap, and material incentives

³⁹⁶ Section 15F(h)(6) of the Exchange Act, 15 U.S.C. 78o-10(h)(6), directs the Commission to prescribe rules governing external business conduct standards for security-based swap dealers. Section 15F(h) of the Exchange Act, 15 U.S.C. 78o-10(h), also generally authorizes and requires the Commission to adopt rules for major security-based swap participants. See Section IV, infra.

³⁹⁷ Section 15F(h)(2)(C) of the Exchange Act, 15 U.S.C. 78o-10(h)(2)(C). See note 286, supra.

³⁹⁸ See Section 15F(h)(3)(D) of the Exchange Act, 15 U.S.C. 78o-10(h)(3)(D) (“[b]usiness conduct requirements adopted by the Commission shall establish such other standards and requirements as the Commission may determine are appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this Act”). See also Section 15F(h)(1)(D) of the Exchange Act (requiring that security-based swap dealers to comply as well with “such business conduct standards . . . as may be prescribed by the Commission by rule or regulation that relate to . . . such other matters as the Commission determines to be appropriate”).

and conflicts of interest of the security-based swap dealer in connection with the security-based swap; and (iii) provide the counterparty with information concerning the daily mark for the security-based swap. Section 15F(h)(3) also directs the Commission to establish a duty for security-based swap dealers to communicate information in a fair and balanced manner based on principles of fair dealing and good faith.

In addition, Section 15F(h)(4) of the Exchange Act requires that a security-based swap dealer that “acts as an advisor to a special entity” must act in the “best interests” of the special entity and undertake “reasonable efforts to obtain such information as is necessary to make a reasonable determination” that a recommended security-based swap is in the best interests of the special entity.³⁹⁹ Section 15F(h)(5) requires that security-based swap dealers that enter into, or offer to enter into, security-based swaps with a special entity comply with any duty established by the Commission that requires a security-based swap dealer to have a “reasonable basis” for believing that a special entity has an “independent representative” that meets certain criteria and undertakes a duty to act in the “best interests” of the special entity.

The Commission has proposed Rules 15Fh-1 through 15Fh-6 under the Exchange Act to implement the business conduct requirements described above.⁴⁰⁰ In addition to external business conduct standards expressly addressed by Title VII, the Commission has proposed certain other business conduct requirements for security-based swap dealers that the Commission preliminarily believed would further the principles that underlie the Dodd-Frank Act. These rules would, among other things, impose certain “know your counterparty” and suitability

³⁹⁹ See External Business Conduct Standards Proposing Release, 76 FR at 42423-25.

⁴⁰⁰ See External Business Conduct Standards Proposing Release, 76 FR 42396.

obligations on security-based swap dealers, as well as restrict security-based swap dealers from engaging in certain “pay to play” activities.⁴⁰¹

ii. Segregation of Assets

Segregation requirements are designed to identify and protect customer property held by a security-based swap dealer as collateral in order to facilitate the prompt return of the property to customers or counterparties in a liquidation proceeding of such security-based swap dealer.⁴⁰² Segregation not only protects counterparties who are customers of a security-based swap dealer but also facilitates orderly liquidation of a security-based swap dealer and minimizes the disruption to and impact on the U.S. security-based swap market and the U.S. financial system overall caused by insolvency and liquidation of a security-based swap dealer.

Section 3E of the Exchange Act provides the Commission with rulemaking authority to prescribe segregation requirements for securities-based swap dealers that receive assets from, for, or on behalf of a counterparty to margin, guarantee, or secure a security-based swap transaction.⁴⁰³ Section 3E(c) provides the Commission with rulemaking authority to prescribe how any margin received by a security-based swap dealer with respect to cleared security-based swap transactions may be maintained, accounted for, treated and dealt with by the security-based swap dealer.⁴⁰⁴ In addition, Section 3E(g) extended the customer protections of the U.S. Bankruptcy Code to counterparties of a security-based swap dealer with respect to cleared

⁴⁰¹ See External Business Conduct Standards Proposing Release, 76 FR at 42399-400; proposed Rules 15Fh-3(e) (“know your counterparty”), 15Fh-3(f) (“suitability”), and 15Fh-6 (“pay to play”) under the Exchange Act.

⁴⁰² Proposed Rule 18a-4 under the Exchange Act, as discussed in Section II.C. of the Capital, Margin, and Segregation Proposing Release, 77 FR at 70274.

⁴⁰³ See Section 3E of the Exchange Act, 15 U.S.C. 78c-5.

⁴⁰⁴ See Section 3E(c)(2) of the Exchange Act, 15 U.S.C. 78c-5(c)(2).

security-based swaps, and with respect to non-cleared security-based swaps, if there is a customer protection requirement under Section 15(c)(3) or a segregation requirement prescribed by the Commission.⁴⁰⁵ The Commission has proposed Rule 18a-4 under the Exchange Act to establish segregation requirements for security-based swap dealers with respect to both cleared and non-cleared security-based swap transactions.⁴⁰⁶ The provisions of proposed Rule 18a-4 were modeled on the broker-dealer customer protection rule and take into account the characteristics of security-based swaps.⁴⁰⁷

(b) Entity-Level Requirements

Entity-level requirements in Title VII primarily address concerns relating to the security-based swap dealer as a whole, with a particular focus on safety and soundness of the entity to reduce systemic risk in the U.S. financial system.⁴⁰⁸ The most significant entity-level requirements, as discussed below, are capital and margin requirements. Certain other entity-level requirements relate to the capital and margin requirements because, at their core, they relate to how the firm identifies and manages its risk exposure arising from its activities (e.g., risk management requirements). Given their functions, these entity-level requirements would be

⁴⁰⁵ See Section 3E(g) of the Exchange Act, 15 U.S.C. 78c-5(g); Capital, Margin, and Segregation Proposing Release, 77 FR at 70275.

⁴⁰⁶ Proposed Rule 18a-4 under the Exchange Act, as discussed in the Capital, Margin, and Segregation Proposing Release, 77 FR at 70274-88.

⁴⁰⁷ 17 CFR § 240.15c3-3. See Capital, Margin, and Segregation Proposing Release, 77 FR at 70276.

⁴⁰⁸ For example, Section 15F(e)(3) of the Exchange Act provides that the requirements relating to capital and margin imposed by the Commission pursuant to Section 15F(e)(2) shall help ensure the safety and soundness of the security-based swap dealer and be appropriate for the risk associated with the non-cleared security-based swaps held as a security-based swap dealer in order “[t]o offset the greater risk to the security-based swap dealer . . . and the financial system arising from the use of security-based swaps that are not cleared.”

applied under our proposal on a firm-wide basis to address risks to the security-based swap dealer as a whole.

i. Capital

The Commission is required to establish minimum requirements relating to capital for security-based swap dealers for which there is not a prudential regulator (“nonbank security-based swap dealers”).⁴⁰⁹ The prudential regulators are required to establish requirements relating to capital for bank security-based swap dealers.⁴¹⁰ Some security-based swap dealers may also be registered as swap dealers with the CFTC. The CFTC is required to establish capital requirements for nonbank swap dealers.⁴¹¹ The prudential regulators are required to establish capital requirements for bank swap dealers.⁴¹²

The objective of the Commission’s proposed capital rule for security-based swap dealers is the same as the Commission’s capital rule for broker-dealers; specifically, to ensure that the entity maintains at all times sufficient liquid assets to (i) promptly satisfy its liabilities—the

⁴⁰⁹ See Section 15F(e)(1)(B) of the Exchange Act, 15 U.S.C. 78o-10(e)(1)(B); note 34, supra (discussing the term “prudential regulator”).

⁴¹⁰ See Section 15F(e)(1)(A) of the Exchange Act, 15 U.S.C. 78o-10(e)(1)(A); see also Prudential Regulators Proposed Rule, Margin and Capital Requirements for Covered Swap Entities, 76 FR 27564 (May 11, 2011) (“Prudential Regulator Margin and Capital Proposal”).

⁴¹¹ See Section 4s(e)(1)(B) of the CEA, 7 U.S.C. 6s(e)(1)(B), as added by Section 731 of the Dodd-Frank Act; see also CFTC Proposed Rule, Capital Requirements of Swap Dealers and Major Swap Participants, 76 FR 27802 (May 12, 2011) (“CFTC Capital Proposal”).

⁴¹² See Section 4s(e)(1)(A) of the CEA, 7 U.S.C. 6s(e)(1)(A); see also Prudential Regulator Margin and Capital Proposal, 76 FR 27564.

claims of customers, creditors, and other security-based swap dealers, and (ii) provide a cushion of liquid assets in excess of liabilities to cover potential market, credit, and other risks.⁴¹³

As noted above, the Commission's proposed capital rules focus on the liquid assets of a nonbank security-based swap dealer available to satisfy its liabilities or cover its risks in a liquidation scenario. This focus on liquid assets would distinguish the Commission's capital rules applicable to security-based swap dealers from those applicable to banks, which generally include a more permissive list of assets that may be taken into account for purposes of capital calculations.⁴¹⁴ The difference in approach between the capital rules applicable to nonbank dealers and bank dealers is supported by certain operational, policy, and legal differences between nonbank security-based swap dealers and bank security-based swap dealers.⁴¹⁵ Notably, existing capital standards for banks and broker-dealers reflect, in part, differences in their funding models and access to certain types of financial support, and we expect that those same differences also will exist between bank security-based swap dealers and nonbank security-based swap dealers. For example, banks obtain funding through customer deposits and can generally

⁴¹³ See Capital, Margin, and Segregation Proposing Release, 77 FR at 70218 (“[T]he capital and other financial responsibility requirements for broker-dealers generally provide a reasonable template for crafting the corresponding requirements for nonbank [security-based swap dealers]. For example, among other considerations, the objectives of capital standards for both types of entities are similar.”).

⁴¹⁴ See, e.g., Basel Committee on Banking Supervision (“BCBS”), Basel III: International framework for liquidity risk measurement, standards and monitoring for banks (Dec. 2010) (“Basel III”), available at: <http://www.bis.org/publ/bcbs188.pdf>.

⁴¹⁵ See Capital, Margin, and Segregation Proposing Release, 77 FR at 70218. In this release, the Commission discussed the operational, policy, and legal differences between banks and nonbank entities for distinguishing the Commission's capital rules from those applicable to bank security-based swap dealers.

obtain liquidity through the Federal Reserve's discount window to meet their obligations,⁴¹⁶ whereas broker-dealers and nonbank security-based swap dealers cannot.⁴¹⁷ Thus all of a nonbank entity's counterparty obligations must be met through the nonbank entity's own liquid assets. For these reasons, the Commission's proposed capital standard for nonbank security-based swap dealers is a net liquid assets test modeled on the broker-dealer capital standard in Rule 15c3-1 under the Exchange Act.⁴¹⁸

ii. Margin

Margin may be viewed as an entity-level requirement given its effect on the financial soundness of an entity, as well as a transaction-level requirement due to the fact that margin is calculated based on particular transactions and positions. Although margin is calculated based on individual transactions, the cumulative effect of collecting margin from counterparties is to protect an entity from the default of its counterparties. Given the emphasis placed on the financial soundness of security-based swap dealers in Title VII,⁴¹⁹ we believe that margin should

⁴¹⁶ Depository institutions that maintain transaction accounts or non-personal time deposits subject to reserve requirements are eligible to borrow funds from the Federal Reserve's discount window, such as commercial banks, thrift institutions, and U.S. branches and agencies of foreign banks. See Regulation D, 12 CFR § 204.

⁴¹⁷ Under the segregation requirements in Rule 15c3-3 under the Exchange Act and proposed Rule 18a-4 under the Exchange Act, broker-dealers and security-based swap dealers are not permitted to rehypothecate customer assets to finance their business activity. Thus, they cannot use customer assets as a source of funding, whereas banks are in the business of investing customer deposits (subject to banking regulations).

⁴¹⁸ Id.

⁴¹⁹ See, e.g., Section 15F(e)(3)(A)(i) of the Exchange Act, 15 U.S.C. 78o-10(e)(3)(A)(i) (stating that Title VII's capital and margin requirements are intended to "help ensure the safety and soundness of the security-based swap dealer or major security-based swap participant"). In setting capital and margin requirements for security-based swap dealers and major security-based swap participants, the Commission's goal is to help ensure the safety and soundness of these entities because of their connection to the U.S. financial system.

be treated as an entity-level requirement for purposes of implementing Title VII in the cross-border context.

We recognize that this approach differs from the approach to margin proposed by the CFTC in its cross-border guidance, which focused on the transaction-by-transaction nature of margin and thus treated it as a transaction-level requirement.⁴²⁰ However, we preliminarily believe that treating margin as an entity-level requirement is consistent with the role margin plays as part of an integrated program of financial responsibility requirements, along with the capital standards and segregation requirements, that are intended to enhance the financial integrity of security-based swap dealers.⁴²¹ The margin requirements proposed by the Commission are intended to work in tandem with the capital requirements to strengthen the financial system by reducing the potential for default to an acceptable level and limiting the amount of leverage that can be employed by security-based swap dealers and other market participants.⁴²² For example, the capital requirements proposed by the Commission take into account whether a security-based swap is cleared or non-cleared, the amount of margin collateral imposed by registered clearing agencies with respect to cleared security-based swaps, and the circumstances where non-cleared security-based swaps are excepted from the margin collection requirements imposed by the Commission, and would impose a capital charge in certain cases for uncollateralized or insufficiently collateralized exposures arising from cleared or non-cleared security-based swaps in order to account for the counterparty default risk that is not adequately

⁴²⁰ See CFTC Cross-Border Proposal, 77 FR at 41226.

⁴²¹ See Capital, Margin, and Segregation Proposing Release, 77 FR at 70303 and 70259.

⁴²² See *id.* at 70304.

addressed by margin collateral.⁴²³ We preliminarily do not believe that margin would effectively fulfill its purpose as part of a comprehensive financial responsibility program for non-bank security-based swap dealers if the Commission were to treat margin solely as a transaction-level requirement.

The division of regulatory responsibilities related to margin requirements in Title VII mirrors that of the capital requirements discussed above. As with capital, the Commission is required to establish minimum requirements relating to initial and variation margin on all security-based swaps that are not cleared by a registered clearing agency for nonbank security-based swap dealers.⁴²⁴ The prudential regulators are required to establish requirements relating to margin for bank security-based swap dealers.⁴²⁵ Security-based swap dealers that are also registered as swap dealers with the CFTC also would be subject to CFTC requirements for nonbank swap dealers with respect to initial and variation margin requirements on all swaps that are not cleared by a registered derivatives clearing organization.⁴²⁶

⁴²³ See *id.* at 70245-46.

⁴²⁴ See Sections 15F(e)(1)(B) and (2)(B) of the Exchange Act, 15 U.S.C. 78o-10(e)(1)(B) and (2)(B).

⁴²⁵ See Section 15F(e)(1)(A) of the Exchange Act, 15 U.S.C. 78o-10(e)(1)(A); see also Prudential Regulator Margin and Capital Proposal, 76 FR 27564.

⁴²⁶ See Section 4s(e)(1)(B) of the CEA, 7 U.S.C. 6s(e)(1)(B), as added by Section 731 of the Dodd-Frank Act; see also CFTC Proposed Rule, Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 76 FR 23732 (Apr. 28, 2011) (“CFTC Margin Proposal”). The CFTC also has adopted segregation requirements for cleared swaps and proposed segregation requirements for non-cleared swaps. See Protection of Cleared Swaps Customer Contracts and Collateral; Conforming Amendments to the Commodity Broker Bankruptcy Provisions, 77 FR 6336 (Feb. 7, 2012) (“CFTC Segregation for Cleared Swaps Final Release”); Protection of Collateral of Counterparties to Uncleared Swaps; Treatment of Securities in a Portfolio Margining Account in a Commodity Broker Bankruptcy, 75 FR 75432 (Dec. 3, 2010) (“CFTC Segregation for Uncleared Swaps Proposing Release”).

The objective of the margin requirements for security-based swap dealers is to offset the greater risk to the security-based swap dealer and the financial system arising from the use of security-based swaps that are not cleared.⁴²⁷ Margin serves as a buffer in the event a counterparty fails to meet an obligation to the security-based swap dealer and the security-based swap dealer must liquidate the assets posted by the counterparty to satisfy the obligation.⁴²⁸ More generally, under Title VII, the Commission is specifically required to set both capital and margin requirements for nonbank security-based swap dealers that (i) help ensure the safety and soundness of the nonbank security-based swap dealer and (ii) are appropriate for the risk associated with the non-cleared swaps held as a security-based swap dealer.⁴²⁹

Pursuant to Section 15F(e) of the Exchange Act, the Commission has proposed Rule 18a-3 to establish margin requirements for nonbank security-based swap dealers with respect to non-cleared security-based swaps.⁴³⁰ Proposed Rule 18a-3 is based on the margin rules applicable to broker-dealers.⁴³¹ The goal of modeling proposed Rule 18a-3 on the broker-dealer margin rules is to promote consistency with existing rules and to facilitate the portfolio margining of security-based swaps with other types of securities.⁴³² Proposed Rule 18a-3 is intended to form part of

⁴²⁷ See Section 15F(e)(3)(A) of the Exchange Act, 15 U.S.C. 78o-10(e)(3)(A).

⁴²⁸ See Capital, Margin, and Segregation Proposing Release, 77 FR at 70259.

⁴²⁹ See Sections 15F(e)(3)(A)(i) and (ii) of the Exchange Act, 15 U.S.C. 78o-10(e)(3)(A)(i) and (ii).

⁴³⁰ See Capital, Margin, and Segregation Proposing Release, 77 FR at 70257-74.

⁴³¹ See *id.* at 70259. Broker-dealers are subject to margin requirements in Regulation T promulgated by the Federal Reserve (12 CFR §§ 220.1 *et. seq.*), in rules promulgated by the self-regulatory organizations (“SROs”) (see, e.g., Rules 4210-4240 of the Financial Industry Regulatory Authority (“FINRA”)), and with respect to security futures, in rules jointly promulgated by the Commission and the CFTC (17 CFR §§ 242.400-406).

⁴³² See Capital, Margin, and Segregation Proposing Release, 77 FR at 70259.

an integrated program of financial responsibility requirements, along with the proposed capital and segregation standards.⁴³³

The Commission preliminarily believes that it is necessary to treat margin as an entity-level requirement applicable to all of a dealer's security-based swap transactions in order to effectively address the Dodd-Frank Act requirements for setting margin. We preliminarily believe that treating margin solely as a transaction-level requirement, and applying margin requirements differently to a security-based swap dealer's U.S. Business and Foreign Business,⁴³⁴ would not adequately further the goals of using margin to ensure the safety and soundness of security-based swap dealers because it could result in security-based swap dealers with global businesses collecting significantly less collateral than would otherwise be required to the extent that they are not required by local law to collect margin from their counterparties. Further, separately applying margin in this way would force those counterparties entering into transactions that constitute the U.S. Business of a dealer to bear a greater burden in ensuring the safety and soundness of such dealer than counterparties that are part of the dealer's Foreign Business.⁴³⁵ We thus preliminarily believe that it is appropriate to treat margin as an entity-level requirement applicable to the security-based swap transactions of registered security-based swap

⁴³³ Id.

⁴³⁴ See proposed Rule 3a71-3(a)(2) under the Exchange Act (defining "Foreign Business").

⁴³⁵ Although we do not believe that it is appropriate to distinguish between the geographic locations of counterparties when applying the margin requirement, we recognize that it may be appropriate, in certain circumstances, to distinguish between types of counterparties in applying margin based on such factors as the risk they pose to dealers and the policy goal of promoting liquidity in dealers. See Capital, Margin, and Segregation Proposing Release, 77 FR at 70265-68 (proposing to exclude both transactions with commercial end users and those with other dealers from certain margin requirements applicable to security-based swap dealers).

dealers regardless of the location of their counterparties. As noted below, the Commission is soliciting comment on this approach.

iii. Risk Management

Registered security-based swap dealers are required to establish robust and professional risk management systems adequate for managing their day-to-day business.⁴³⁶ The Commission has proposed that nonbank security-based swap dealers would be required to comply with existing Rule 15c3-4 under the Exchange Act.⁴³⁷ This rule, originally adopted for OTC derivative dealers, requires firms subject to its provisions to establish, document, and maintain a comprehensive system of internal risk management controls to assist in managing the risks associated with its business activities, including market, credit, leverage, liquidity, legal, and operational risks.⁴³⁸ These various risks arise from both the U.S. Business and Foreign Business of a global security-based swap dealer. A risk management system limited in scope to cover only one type of business, or limited to certain security-based swap transactions, would not effectively control the risks undertaken by a security-based swap dealer because the risks stemming from business outside the scope of such risk management system could still negatively impact the dealer. As a result, we preliminarily believe that it is necessary to treat risk management requirements as entity-level requirements in order to place risk controls over the

⁴³⁶ See Section 15F(j)(2) of the Exchange Act, 15 U.S.C. 78o-10(j)(2).

⁴³⁷ See proposed new paragraph (a)(10)(ii) of Rule 15c3-1 under the Exchange Act (17 CFR § 240.15c3-1); paragraph (g) of proposed new Rule 18a-1 under the Exchange Act. See also 17 CFR § 240.15c3-4; Capital, Margin, and Segregation Proposing Release, 77 FR at 70250-51. The Commission has not proposed rules relating to risk management for bank security-based swap dealers.

⁴³⁸ See OTC Derivatives Dealers, Exchange Act Release No. 40594 (Oct. 23, 1998), 63 FR 59362 (Nov. 3, 1998).

entire security-based swap business, thus effectively addressing the Dodd-Frank Act requirements for managing risk within security-based swap dealers.

Rule 15c3-4 identifies a number of qualitative factors that would need to be a part of the risk management controls of a nonbank security-based swap dealer. For example, a nonbank security-based swap dealer would need to have a risk control unit that reports directly to senior management and is independent from business trading units, and it would be required to separate duties between personnel responsible for entering into a transaction and those responsible for recording the transaction in the books and records of the firm.⁴³⁹ In addition, the Commission is authorized to adopt rules governing documentation standards of security-based swap dealers for timely and accurate confirmation, processing, netting, documentation, and valuation of security-based swaps.⁴⁴⁰ Pursuant to this authority, the Commission has proposed rules regarding trade acknowledgement and verification related to security-based swap transactions.⁴⁴¹

iv. Recordkeeping and Reporting

Registered nonbank security-based swap dealers are required to keep books and records in such form and manner and for such period as may be prescribed by the Commission by rule or regulation; registered bank security-based swap dealers are required to keep books and records of all activities related to their “business as a security-based swap dealer” in such form and manner and for such period as may be prescribed by the Commission.⁴⁴² Registered security-based swap

⁴³⁹ See 17 CFR § 240.15c3-4(c), as discussed in the Capital, Margin, and Segregation Proposing Release, 77 FR at 70250.

⁴⁴⁰ See Section 15F(i) of the Exchange Act, 15 U.S.C. 78o-10(i).

⁴⁴¹ See Trade Acknowledgement Proposing Release, 76 FR 3859.

⁴⁴² See Sections 15F(f)(1)(B)(i) and (ii) of the Exchange Act, 15 U.S.C. 78o-10(f)(1)(B)(i) and (ii).

dealers also are required to make such reports as are required by the Commission regarding the transactions and positions, and financial condition of the registrant.⁴⁴³

In addition, security-based swap dealers are required to maintain daily trading records of the security-based swaps they enter into.⁴⁴⁴ Security-based swap dealers also are required to disclose to the Commission and the prudential regulators information concerning: (i) terms and conditions of their security-based swaps; (ii) security-based swap trading operations, mechanisms, and practices; (iii) financial integrity protections relating to security-based swaps; and (iv) other information relevant to their trading in security-based swaps.⁴⁴⁵

Each of these types of records is an important part of the Commission's oversight of our registrants because it provides the Commission with vital information regarding such entities. If the Commission's information were limited in scope to cover only one type of business, or limited to only certain security-based swap activities, the Commission would not be able to effectively regulate our registered security-based swap dealers because it would not have a full picture of the business of such registrants. As a result, we preliminarily believe that it is necessary to treat recordkeeping and reporting as entity-level requirements in order to provide the Commission with the information necessary to regulate registered security-based swap dealers and thus effectively address the Dodd-Frank Act requirements for maintaining books and records.

⁴⁴³ See Section 15F(f)(1)(A) of the Exchange Act, 15 U.S.C. 78o-10(f)(1)(A).

⁴⁴⁴ See Section 15F(g) of the Exchange Act, 15 U.S.C. 78o-10(g).

⁴⁴⁵ See Section 15F(j)(3) of the Exchange Act, 15 U.S.C. 78o-10(j)(3).

The Commission has not yet proposed rules regarding the recordkeeping and reporting requirements under Section 15F of the Exchange Act and solicits comment regarding the application of recordkeeping and reporting requirements in the cross-border context.

v. Internal System and Controls

Security-based swap dealers are required to establish and enforce systems and procedures to obtain any information that is necessary to perform any of the functions that are required under Section 15F(j) of the Exchange Act⁴⁴⁶ and to provide this information to the Commission, or the responsible prudential regulator, upon request.⁴⁴⁷ The Commission has proposed a rule that would require a registered security-based swap dealer to establish policies and procedures that are reasonably designed to comply with its responsibilities under Section 15F(j) of the Exchange Act.⁴⁴⁸

Many of the functions required under Section 15F(j) of the Exchange Act are entity-level in nature (e.g., risk management procedures⁴⁴⁹ and conflicts of interest⁴⁵⁰). As a result, we preliminarily believe that the requirement to establish and enforce systems and procedures to

⁴⁴⁶ 15 U.S.C. 78o-10(j). These functions include monitoring of applicable position limits under Section 15F(j)(1) of the Exchange Act, 15 U.S.C. 78o-10(j)(1); establishment of risk management procedures under Section 15F(j)(2) of the Exchange Act, 15 U.S.C. 78o-10(j)(2); disclosure of general information to the Commission and prudential regulators under Section 15F(j)(3) of the Exchange Act, 15 U.S.C. 78o-10(j)(3); establishment of policies and procedures to avoid conflicts of interest under Section 15F(j)(5) of the Exchange Act, 15 U.S.C. 78o-10(j)(5); and avoidance of any actions that result in an unreasonable restraint of trade or place any material anticompetitive burden on trading or clearing under Section 15F(j)(6) of the Exchange Act, 15 U.S.C. 78o-10(j)(6).

⁴⁴⁷ See Section 15F(j)(4) of the Exchange Act, 15 U.S.C. 78o-10(j)(4).

⁴⁴⁸ See proposed Rule 15Fh-3(h)(2)(iv) under the Exchange Act, as discussed in the External Business Conduct Standards Proposing Release, 76 FR at 42420.

⁴⁴⁹ See Section III.C.3(b)iii, *supra*.

⁴⁵⁰ See Section III.C.3(b)vii, *infra*.

obtain any information that is necessary to perform these functions cannot be effectively implemented unless it also is treated as an entity-level requirement, or else it would not cover the full scope of the requirements under Section 15F(j) of the Exchange Act to which it applies.

vi. Diligent Supervision

The Commission is authorized under the Dodd-Frank Act to adopt rules requiring diligent supervision of the business of security-based swap dealers.⁴⁵¹ The Commission has proposed a rule that would establish supervisory obligations and that would incorporate principles from Section 15(b) of the Exchange Act and existing SRO rules.⁴⁵² Among other things, under proposed Rule 15Fh-3(h), a security-based swap dealer would be required to establish, maintain, and enforce a system to supervise, and would be required to supervise diligently, its business and its associated persons, with a view to preventing violations of applicable federal securities laws, and the rules and regulations thereunder, relating to its business as a security-based swap dealer.⁴⁵³ The rule proposed by the Commission also would establish certain minimum requirements relating to the supervisory systems that are prescriptive in nature, that is, they would impose specific obligations on security-based swap dealers.⁴⁵⁴

As previously noted, the purpose of diligent supervision requirements is to prevent violations of applicable federal securities laws, and the rules and regulations thereunder, relating to an entity's business as a security-based swap dealer. An entity's business as a security-based

⁴⁵¹ See Section 15F(h)(1)(B) of the Exchange Act, 15 U.S.C. 78o-10(h)(1)(B).

⁴⁵² Proposed Rule 15Fh-3(h) under the Exchange Act, as discussed in the External Business Conduct Standards Proposing Release, 76 FR at 42419-21.

⁴⁵³ Proposed Rule 15Fh-3(h)(1) under the Exchange Act, as discussed in the External Business Conduct Standards Proposing Release, 76 FR at 42419-21.

⁴⁵⁴ Proposed Rule 15Fh-3(h)(2) under the Exchange Act, as discussed in the External Business Conduct Standards Proposing Release, 76 FR at 42419-21.

swap dealer is not limited to either its Foreign Business or its U.S. Business, but rather is comprised of its entire global security-based swap dealing activity. As a result, we preliminarily believe that it is necessary to treat diligent supervision as an entity-level requirement applicable to all of a dealer's security-based swap transactions in order to effectively address the Dodd-Frank Act requirements for diligent supervision. We believe that treating diligent supervision solely as a transaction-level requirement, and applying supervisory requirements differently to a security-based swap dealer's U.S. Business and Foreign Business, would not further the Dodd-Frank Act goal of establishing effective supervisory systems for security-based swap dealers.

vii. Conflicts of Interest

Section 15F(j)(5) of the Exchange Act requires security-based swap dealers to implement conflict-of-interest systems and procedures. Such policies and procedures must establish structural and institutional safeguards to ensure that the activities of any person within the firm relating to research or analysis of the price or market for any security-based swap, or acting in the role of providing clearing activities, or making determinations as to accepting clearing customers are separated by appropriate informational partitions within the firm from the review, pressure, or oversight of persons whose involvement in pricing, trading, or clearing activities might potentially bias their judgment or supervision, and contravene the core principles of open access and the business conduct standards addressed in Title VII.⁴⁵⁵ The Commission has proposed a rule that would require a security-based swap dealer to establish policies and

⁴⁵⁵ See Section 15F(j)(5) of the Exchange Act, 15 U.S.C. 78o-10(j)(5), as discussed in the External Business Conduct Standards Proposing Release, 76 FR at 42420.

procedures that are reasonably designed to comply with its responsibilities under Section 15F(j)(5).⁴⁵⁶

The Commission preliminarily believes that it is necessary to treat conflicts of interest as an entity-level requirement applicable to all of a dealer's security-based swap transactions in order to effectively address the Dodd-Frank Act requirements for setting systems and procedures to prevent conflicts of interest from biasing the judgment or supervision of security-based swap dealers. We believe that treating conflicts of interest solely as a transaction-level requirement, and applying the required structural and institutional safeguards differently to a security-based swap dealer's U.S. Business and Foreign Business, would not further the goals of preventing conflicts of interest from influencing the security-based swap dealing activities of registered security-based swap dealers because such safeguards would only be in place for a portion of a security-based swap dealer's activities.

viii. Chief Compliance Officer

Registered security-based swap dealers are required to designate a chief compliance officer who reports directly to the board of directors or to the senior officer of the security-based swap dealer.⁴⁵⁷ The chief compliance officer's responsibilities include reviewing and ensuring compliance of the security-based swap dealer with applicable requirements in the Exchange Act and the rules and regulations thereunder, resolution of conflicts of interest, administration of business conduct policies and procedures, and establishment of procedures for the remediation of

⁴⁵⁶ Proposed Rule 15Fh-3(h)(2)(iv) under the Exchange Act, as discussed in the External Business Conduct Standards Proposing Release, 76 FR at 42420.

⁴⁵⁷ See Section 15F(k) of the Exchange Act, 15 U.S.C. 78o-10(k).

noncompliance issues.⁴⁵⁸ The chief compliance officer also is required to prepare and sign a report that contains a description of the security-based swap dealer's compliance with applicable requirements in the Exchange Act, and the rules and regulations thereunder, and each of the security-based swap dealer's policies and procedures.⁴⁵⁹ The Commission has proposed a rule to implement these statutory requirements relating to the designation and functions of a chief compliance officer.⁴⁶⁰

As noted above, part of the chief compliance officer's responsibilities, under the proposed rule, include establishing, maintaining, and reviewing policies and procedures reasonably designed to ensure compliance with applicable requirements in the Exchange Act and the rules and regulations thereunder.⁴⁶¹ Many of Title VII requirements, such as those applicable to security-based swap dealers that are described in this section, apply at the entity level. As a result, we preliminarily believe that it is necessary to treat the chief compliance officer as an entity-level requirement applicable to all of a dealer's security-based swap business in order to effectively address the Dodd-Frank Act requirements for the chief compliance officer. We believe that treating the chief compliance officer solely as a transaction-level requirement, and applying the chief compliance officer requirements differently to a security-based swap dealer's U.S. Business and Foreign Business, would be unworkable given the chief compliance officer's

⁴⁵⁸ See Section 15F(k)(2) of the Exchange Act, 15 U.S.C. 78o-10(k)(2).

⁴⁵⁹ See Section 15F(k)(3) of the Exchange Act, 15 U.S.C. 78o-10(k)(3).

⁴⁶⁰ Proposed Rule 15Fk-1 under the Exchange Act, as discussed in the External Business Conduct Standards Proposing Release, 76 FR at 42435-38.

⁴⁶¹ See Proposed Rule 15Fk-1(b)(2) under the Exchange Act, as discussed in the External Business Conduct Standards Proposing Release, 76 FR at 42435-36.

oversight responsibilities over entity-level requirements and thus would not further the goals of establishing the chief compliance officer role for security-based swap dealers.

ix. Inspection and Examination

Registered bank and nonbank security-based swap dealers are obligated to keep their books and records required pursuant to Commission rules and regulations open to inspection and examination by any representative of the Commission.⁴⁶² The Commission has proposed a rule that would require, among other things, “nonresident security-based swap dealers” that are required to register with the Commission to appoint and identify to the Commission an agent in the United States (other than the Commission or a Commission member, official, or employee) for service of process.⁴⁶³ In addition, the proposed rule would require that a nonresident security-based swap dealer certify that the firm can, as a matter of law, provide the Commission with prompt access to its books and records and can, as a matter of law, submit to onsite inspection and examination by the Commission.⁴⁶⁴ The proposed rule also would require that the nonresident security-based swap dealer provide the Commission with an opinion of counsel concurring that the firm can, as a matter of law, provide the Commission with prompt access to

⁴⁶² See Section 15F(f)(1)(C) of the Exchange Act, 15 U.S.C. 78o-10(f)(1)(C). Registered bank security-based swap dealers are only required to keep the books and records associated with the activities related to their security-based swap dealing business, as prescribed by the Commission, and to make these books and records available for inspection by any representative of the Commission. See *id.*

⁴⁶³ Proposed Rule 15Fb2-4 under the Exchange Act, as discussed in the Registration Proposing Release, 76 FR at 65799. For a description of the term “nonresident security-based swap dealer” as defined in proposed Rule 15Fb2-4(a) under the Exchange Act, including how that definition differs from the definition of the term “foreign security-based swap dealer” as proposed in this release, see note 579 above.

⁴⁶⁴ Proposed Rule 15Fb2-4 under the Exchange Act, as discussed in the Registration Proposing Release, 76 FR at 65800.

its books and records and can, as a matter of law, submit to onsite inspection and examination by the Commission.⁴⁶⁵

In proposing this rule, the Commission stated that it preliminarily believed that the nonresident security-based swap certification and supporting opinion of counsel were important to confirm that each registered nonresident security-based swap dealer has taken the necessary steps to be in the position to provide the Commission with prompt access to its books and records and to be subject to inspection and examination by the Commission.⁴⁶⁶ To effectively fulfill our regulatory oversight responsibilities with respect to nonresident security-based swap dealers registered with it, the Commission stated that it must have access to those entities' records and the ability to examine them. The Commission recognized, however, that certain foreign jurisdictions may have laws that complicate the ability of financial institutions, such as nonresident security-based swap dealers located in their jurisdictions, to share and/or transfer certain information including personal financial data of individuals that the financial institutions come to possess from third persons (e.g., personal data relating to the identity of market participants or their customers).⁴⁶⁷ The Commission further stated that the required certification and opinion of counsel regarding the nonresident security-based swap dealer's ability to provide prompt access to books and records and to be subject to inspection and examination would allow the Commission to better evaluate a nonresident security-based swap dealer's ability to meet the requirements of registration and ongoing supervision.⁴⁶⁸

⁴⁶⁵ Proposed Rule 15Fb2-4 under the Exchange Act, as discussed in the Registration Proposing Release, 76 FR at 65799-801.

⁴⁶⁶ See Registration Proposing Release, 76 FR at 65800.

⁴⁶⁷ Id.

⁴⁶⁸ Id.

The Commission's inspection and examination authority is vital to our oversight of registered security-based swap dealers. If the Commission's inspection and examination were limited in scope to cover only one type of business, or limited to only certain security-based swap activities, the Commission would not be able to effectively regulate our registered security-based swap dealers because it would not have a full picture of the business of such registrants. As a result, we preliminarily believe that it is necessary to treat inspection and examination requirements as entity-level in order to provide the Commission with the information and access necessary to regulate registered security-based swap dealers.

x. Licensing Requirements and Statutory Disqualification

The Commission has not proposed any licensing requirements for associated persons of registered security-based swap dealers, that are specifically related to their security-based swap dealing activities. However, the Commission has proposed a rule that would require security-based swap dealers (and major security-based swap participants) to certify that no person associated with such entities who effects or is involved in effecting security-based swaps on their behalf is subject to statutory disqualification, as defined in Section 3(a)(39) of the Exchange Act.⁴⁶⁹ This proposed rule relates to paragraph (b)(6) of Section 15F of the Exchange Act,⁴⁷⁰ which generally prohibits security-based swap dealers (and major security-based swap participants) from permitting any of their associated persons⁴⁷¹ who are subject to a "statutory

⁴⁶⁹ 15 U.S.C. 78c(a)(39). See proposed Rule 15Fb6-1 under the Exchange Act, as discussed in the Registration Proposing Release, 76 FR at 65795.

⁴⁷⁰ 15 U.S.C. 78o-10(b)(6).

⁴⁷¹ Section 3(a)(70) of the Exchange Act, 15 U.S.C. 78c(a)(70), generally defines the term "person associated with" a security-based swap dealer or major security-based swap participant ("SBS Entity") to include: (i) any partner, officer, director, or branch manager of an SBS Entity (or any person occupying a similar status or performing similar

disqualification” to effect or be involved in effecting⁴⁷² security-based swaps on behalf of such entities if the security-based swap dealer (or major security-based swap participant) knew, or in the exercise of reasonable care should have known, of the statutory disqualification.⁴⁷³

The Commission preliminarily believes that it is necessary to treat requirements related to licensing and statutory disqualification as entity-level requirements applicable to all of a dealer’s security-based swap business in order to effectively address the Exchange Act’s statutory disqualification provision. We believe that treating licensing requirements and statutory disqualification solely as transaction-level requirements, and applying the statutory disqualification differently to a security-based swap dealer’s U.S. Business and Foreign Business, would not further the goals of preventing statutorily disqualified persons from effecting security-based swaps on behalf of registered security-based swap dealers because such disqualifications would only be in place for a portion of a security-based swap dealer’s activities.

functions); (ii) any person directly or indirectly controlling, controlled by, or under common control with an SBS Entity; or (iii) any employee of an SBS Entity. However, it generally excludes persons whose functions are solely clerical or ministerial.

⁴⁷² As stated in the Registration Proposing Release, “[t]he Commission believes that associated persons ‘involved in effecting’ security-based swaps would include, but not be limited to, persons involved in drafting and negotiating master agreements and confirmations, persons recommending security-based swap transactions to counterparties, persons on a trading desk actively involved in effecting security-based swap transactions, persons pricing security-based swap positions and managing collateral for the [security-based swap dealer or major security-based swap participant], and persons assuring that the [security-based swap dealer’s or major security-based swap participant’s] security-based swap business operates in compliance with applicable regulations. In short, the term would encompass persons engaged in functions necessary to facilitate the [security-based swap dealer’s or major security-based swap participant’s] security-based swap business.” Registration Proposing Release, 76 FR at 65795 n.56.

⁴⁷³ See Registration Proposing Release, 76 FR at 65795.

4. Application of Certain Transaction-Level Requirements⁴⁷⁴

(a) Proposed Rule

The Commission is proposing a rule that would provide that a registered foreign security-based swap dealer and a foreign branch of a registered U.S. security-based swap dealer, with respect to their Foreign Business, shall not be subject to the requirements relating to external business conduct standards described in Section 15F(h) of the Exchange Act,⁴⁷⁵ and the rules and regulations thereunder, other than the rules and regulations prescribed by the Commission pursuant to Section 15F(h)(1)(B).⁴⁷⁶

The proposed rule would define “Foreign Business” as security-based swap transactions entered into, or offered to be entered into, by or on behalf of a foreign security-based swap dealer or a U.S. security-based swap dealer that do not include its U.S. Business.⁴⁷⁷ The proposed rule would define “U.S. Business” as:

- With respect to a foreign security-based swap dealer, (i) any transaction entered into, or offered to be entered into, by or on behalf of such foreign security-based swap

⁴⁷⁴ For purposes of this discussion, we are addressing only requirements applicable to security-based swap dealers in Sections 3E and 15F of the Exchange Act, 15 U.S.C. 78c-5 and 78o-10, and the rules and regulations thereunder. Title VII requirements relating to reporting and dissemination, clearing, and trade execution are discussed in Sections VIII - X, infra.

⁴⁷⁵ 15 U.S.C. 78o-10(h).

⁴⁷⁶ Proposed Rule 3a71-3(c) under the Exchange Act. The approach under the proposed rule does not affect applicability of the general antifraud provisions of the federal securities laws to the activity of a foreign security-based swap dealer. See Section XII, infra.

⁴⁷⁷ Proposed Rule 3a71-3(a)(2) under the Exchange Act.

dealer, with a U.S. person (other than with a foreign branch), or (ii) any transaction conducted within the United States,⁴⁷⁸ and

- With respect to a U.S. security-based swap dealer, any transaction by or on behalf of such U.S. security-based swap dealer, wherever entered into or offered to be entered into, other than a transaction conducted through a foreign branch with a non-U.S. person or another foreign branch.⁴⁷⁹

Whether the activity occurred within the United States or with a U.S. person for purposes of identifying whether security-based swap transactions are part of a U.S. Business or Foreign Business would turn on the same factors used to determine whether a foreign security-based swap dealer is engaging in dealing activity within the United States or with U.S. persons, as discussed above.⁴⁸⁰ The proposed rule provides that a U.S. security-based swap dealer would be considered to have conducted a security-based swap transaction through a foreign branch if:

- The foreign branch is the counterparty to such security-based swap transaction; and
- No person within the United States is directly involved in soliciting, negotiating, or executing the security-based swap transaction on behalf of the foreign branch or its counterparty.⁴⁸¹

⁴⁷⁸ Proposed Rule 3a71-3(a)(6) under the Exchange Act. A person that meets the security-based swap dealer definition is a dealer with regard to all of its security-based swap activities, not just its dealing activities. See Intermediary Definitions Adopting Release, 77 FR at 30645. Accordingly, a foreign security-based swap dealer's U.S. Business would not be limited only to transactions arising from its dealing activity, but rather would include all types of security-based swap activity.

⁴⁷⁹ Proposed Rule 3a71-3(a)(6) under the Exchange Act.

⁴⁸⁰ See Section III.B.6, supra (discussing the proposed definition of "transaction conducted within the United States").

⁴⁸¹ Proposed Rule 3a71-3(a)(4) under the Exchange Act. See also proposed Rule 3a71-3(a)(5)(ii) under the Exchange Act (providing that the definition of "transaction

As discussed above,⁴⁸² the proposed rule would define “foreign branch” as any branch of a U.S. bank if:

- The branch is located outside the United States;
- The branch operates for valid business reasons; and
- The branch is engaged in the business of banking and is subject to substantive banking regulation in the jurisdiction where located.⁴⁸³

All other requirements in Section 15F of the Exchange Act, and the rules and regulations thereunder, would apply to both U.S. and foreign security-based swap dealers registered with the Commission, although the Commission is proposing to establish a policy and procedural framework under which it would consider permitting substituted compliance for foreign security-based swap dealers (but not for U.S. security-based swap dealers that conduct dealing activity through foreign branches) under certain circumstances, as discussed below.⁴⁸⁴

The Commission also is proposing a rule that would provide that a foreign security-based swap dealer would not be required to comply with the segregation requirements set forth in Section 3E of the Exchange Act, and the rules and regulations thereunder, with respect to security-based transactions with non-U.S. person counterparties in certain circumstances.⁴⁸⁵

Specifically, the Commission is proposing a rule that would provide the following:

- With respect to non-cleared security-based swap transactions:

conducted within the United States” shall not include a transaction conducted through a foreign branch).

⁴⁸² See Section III.B.7, *supra*.

⁴⁸³ Proposed Rule 3a71-3(a)(1) under the Exchange Act.

⁴⁸⁴ See Section XI.C, *infra*.

⁴⁸⁵ Proposed Rule 18a-4(e) under the Exchange Act.

- a registered foreign security-based swap dealer that is a registered broker-dealer would be subject to the requirements relating to segregation of assets held as collateral set forth in Section 3E of the Exchange Act, and rules and regulations thereunder, with respect to assets collected from, for, or on behalf of any counterparty to margin a non-cleared security-based swap transaction.
- a registered foreign security-based swap dealer that is not a registered broker-dealer would be subject to the requirements relating to segregation of assets held as collateral set forth in Section 3E of the Exchange Act, and Rules 18a-4(a)-(d), solely with respect to assets collected from, for, or on behalf of a counterparty that is a U.S. person to margin a non-cleared security-based swap transaction. The special account maintained by a registered foreign security-based swap dealer that is not a registered broker-dealer in accordance with proposed Rule 18a-4(c) would be required to be designated for the exclusive benefit of U.S. person security-based swap customers.⁴⁸⁶
- With respect to cleared security-based swap transactions:
 - a registered foreign security-based swap dealer that is not a foreign bank with a branch or agency in the United States and is a registered broker-dealer shall be subject to the requirements relating to segregation of assets held as collateral set forth in Section 3E of the Exchange Act, and rules and regulations thereunder, with respect to assets collected from, for, or on

⁴⁸⁶ Proposed Rule 18a-4(e)(1) under the Exchange Act.

behalf of any counterparty to margin a cleared security-based swap transaction.

- a registered foreign security-based swap dealer that is not a foreign bank with a branch or agency in the United States and that is not a registered broker-dealer shall be subject to the requirements relating to segregation of assets held as collateral set forth in Section 3E of the Exchange Act, and Rules 18a-4(a)-(d), only if such registered foreign security-based swap dealer accepts any assets from, for, or on behalf of a counterparty that is a U.S. person to margin, guarantee, or secure a cleared security-based swap transaction.⁴⁸⁷
- a registered foreign security-based swap dealer that is a foreign bank with a branch or agency in the United States would be subject to the requirements relating to segregation of assets held as collateral set forth in Section 3E of the Exchange Act, and Rules 18a-4(a)-(d),⁴⁸⁸ solely with respect to assets collected from a counterparty that is a U.S. person to margin a cleared security-based swap transaction. The special account maintained by a registered foreign security-based swap dealer that is a foreign bank with a branch or agency in the United States in accordance

⁴⁸⁷ Proposed Rule 18a-4(e)(2)(ii) under the Exchange Act.

⁴⁸⁸ See Capital, Margin, and Segregation Proposing Release, 77 FR at 70274-88 (proposing Rules 18a-4(a) - (d) under the Exchange Act).

with proposed Rule 18a-4(c) would be required to be designated for the exclusive benefit of U.S. person security-based swap customers.⁴⁸⁹

In addition, a registered foreign security-based swap dealer would be required to disclose to its counterparty the potential treatment of the assets segregated by such registered foreign security-based swap dealer pursuant to Section 3E of the Exchange Act, and rules and regulations thereunder, in insolvency proceedings under the U.S. bankruptcy law and applicable foreign insolvency laws.⁴⁹⁰

(b) Discussion

i. External Business Conduct Standards

a. Foreign Security-Based Swap Dealers

The Commission preliminarily believes it is appropriate not to impose on foreign security-based swap dealers the external business conduct standards in Section 15F(h) (other than rules and requirements prescribed by the Commission pursuant to Section 15F(h)(1)(B)) of the Exchange Act, and the rules and regulations thereunder, described in the proposed rule,⁴⁹¹ with respect to their Foreign Business, because these requirements relate primarily to customer protection. The Dodd-Frank Act's counterparty protection mandate focuses on the United States and the U.S. markets.⁴⁹² In addition, we preliminarily believe that foreign counterparties typically would not expect to receive the customer protections of Title VII when dealing with a foreign security-based swap dealer outside the United States. At the same time, our proposed

⁴⁸⁹ Proposed Rule 18a-4(e)(2)(i) under the Exchange Act.

⁴⁹⁰ Proposed Rule 18a-4(e)(3) under the Exchange Act.

⁴⁹¹ Proposed Rule 3a71-3(c) under the Exchange Act.

⁴⁹² See note 4, *supra*.

approach would preserve customer protections for U.S. counterparties that would expect to benefit from the protection afforded to them by Title VII of the Dodd-Frank Act.

Therefore, the Commission preliminarily believes that requiring foreign security-based swap dealers to comply with the external business conduct standards requirement with respect to their security-based swap transactions conducted outside the United States with non-U.S. persons (or with foreign branches of U.S. banks) would not advance this statutory purpose. Although this approach represents a departure from the entity approach the Commission has traditionally taken in the regulation of foreign broker-dealers, as discussed above, whereby the Commission applies our regulations to the entire global business of a registered broker-dealer, we preliminarily believe this departure is appropriate in the context of a global security-based swap market in order to create a regulatory framework that provides effective protections for counterparties that are U.S. persons while recognizing the role of foreign regulators in non-U.S. markets.

The Commission also preliminarily believes that this approach addresses many of the concerns raised by commenters, including foreign regulators, concerning the potential application of Title VII to transactions between registered foreign security-based swap dealers and non-U.S. counterparties. In addition, this approach is consistent with the reasonable expectations of U.S. person counterparties, who would expect to receive the protection of external business conduct standards and conflicts of interest requirements when dealing with a foreign security-based swap dealer within the United States.⁴⁹³

The Commission's proposed approach to external business conduct standards would not except foreign security-based swap dealers from the rules and requirements prescribed by the

⁴⁹³ See note 321, *supra*.

Commission pursuant to Section 15F(h)(1)(B) of the Exchange Act with respect to their Foreign Business.⁴⁹⁴ Section 15F(h)(1)(B) requires security-based swap dealers to conform with such business conduct standards relating to diligent supervision as the Commission shall prescribe.⁴⁹⁵ The Commission preliminarily believes that it is not appropriate to except foreign security-based swap dealers from compliance with such requirements. Because registered foreign security-based swap dealers would be subject to a number of obligations under the federal securities laws with respect to their security-based swap business, the Commission preliminarily believes that having systems in place reasonably designed to ensure diligent supervision would be an important aspect of their compliance with the federal securities laws. However, as discussed below, the Commission is proposing to permit substituted compliance with the diligent supervision requirement in Section 15F(h)(1)(B), and the rules and regulations thereunder, by foreign security-based swap dealers.⁴⁹⁶ The Commission preliminarily believes that foreign security-based swap dealers subject to regulation in a foreign jurisdiction are very likely to be subject to diligent supervision requirements and to the extent that such requirements are comparable to Commission requirements, we would consider permitting substituted compliance, as discussed below.⁴⁹⁷

The Commission is proposing to except foreign security-based swap dealers from complying with the rules and regulations that the Commission may prescribe pursuant to Section

⁴⁹⁴ Proposed Rule 3a71-3(c) under the Exchange Act.

⁴⁹⁵ 15 U.S.C. 78o-10(h)(1)(B). See Section III.C.3(b)vi, supra (discussing the diligent supervision requirements).

⁴⁹⁶ See Section XI.C, infra.

⁴⁹⁷ See id.

15F(h)(1)(A) or (C) of the Exchange Act.⁴⁹⁸ Section 15F(h)(1)(A) requires security-based swap dealers to conform with such business conduct standards relating to fraud, manipulation, and other abusive practices involving security-based swaps (including security-based swaps that are offered but not entered into) as prescribed by the Commission. Section 15F(h)(1)(C) requires security-based swap dealers to adhere to rules and regulations prescribed by the Commission with respect to applicable position limits. The Commission has not engaged in rulemaking pursuant to these provisions.⁴⁹⁹ If the Commission does propose rules pursuant to these provisions in the future, the Commission would consider, at that time, whether it would be appropriate to subject foreign security-based swap dealers to such requirements with respect to their Foreign Business.

b. U.S. Security-Based Swap Dealers

The Commission preliminarily believes it is appropriate not to subject U.S. security-based swap dealers to the external business conduct standards in Section 15F(h) (other than Section 15F(h)(1)(B)) of the Exchange Act, and the rules and regulations thereunder, as specified in the proposed rule, with respect to security-based swap transactions conducted through their foreign branches outside the United States with non-U.S. counterparties, because such

⁴⁹⁸ 15 U.S.C. 78o-10(h)(1)(A) and (C).

⁴⁹⁹ Although the Commission has not proposed rules under Section 15F(h)(1)(A) of the Exchange Act, the Commission has proposed new Rule 9j-1 under the Exchange Act, which is intended to prevent fraud, manipulation, and deception in connection with the offer, purchase, or sale of any security-based swap, the exercise of any right or performance of any obligation under a security-based swap, or the avoidance of such exercise or performance. See Prohibition Against Fraud, Manipulation, and Deception in Connection with Security-Based Swaps, Exchange Act Release No. 63236 (Nov. 3, 2010), 75 FR 68560 (Nov. 8, 2010). The Commission's view of its antifraud enforcement authority in the cross-border context is described in further detail in Section XI below.

requirements relate primarily to customer protection requirements. The Dodd-Frank Act generally is concerned with the protection of U.S. markets and participants in those markets.⁵⁰⁰ Therefore, we preliminarily believe that subjecting U.S. security-based swap dealers to the Title VII customer protection requirements with respect to their security-based swap transactions conducted through their foreign branches outside the United States (even though the transactions may pose risk to the U.S. financial system) with non-U.S. persons would produce little or no benefit to U.S. market participants. Although this approach would represent a departure from the entity approach the Commission has traditionally taken in the regulation of broker-dealers, whereby the Commission applies our regulations to the entire global business of a registered broker-dealer, we preliminarily believe it is appropriate in the context of a global security-based swap market in order to develop a national regulatory framework that provides effective protections for counterparties who are U.S. persons while recognizing the role of foreign regulators in non-U.S. markets.

The Commission also preliminarily believes that this approach would help address the potential application of duplicative and conflicting regulatory requirements to security-based swap transactions between the foreign branches of registered U.S. bank security-based swap dealers and non-U.S. counterparties. In addition, the Commission preliminarily believes this approach is consistent with the reasonable expectations of foreign counterparties, who would not necessarily expect to receive the protections of Title VII when dealing with a foreign branch of a

⁵⁰⁰ See note 4, *supra*.

U.S. bank outside the United States, even if it is registered as a security-based swap dealer with the Commission.⁵⁰¹

The purpose of the proposed provision defining when a security-based swap transaction would be considered to have been conducted through a foreign branch is intended to prevent U.S. security-based swap dealers from using the proposed rule to evade the application of Title VII.⁵⁰² Requiring that the foreign branch be the named counterparty to the security-based swap transaction and that no person within the United States be directly involved in soliciting, negotiating, or executing the security-based swap transaction on behalf of the foreign branch or its counterparty is intended to help ensure that the security-based swap transaction occurs outside the United States, even though the Commission recognizes that the risk of the transaction would ultimately be borne by the U.S. security-based swap dealer, of which the foreign branch is merely a part.⁵⁰³ The U.S. security-based swap dealer would still be subject to the entity-level requirements described above intended to address the risk the transactions pose to the U.S. financial system.

ii. Segregation Requirements

The segregation requirements set forth in Section 3E of the Exchange Act, and rules and regulations thereunder, are closely tied to U.S. bankruptcy laws.⁵⁰⁴ Subchapter III of Chapter 7,

⁵⁰¹ See note 321, *supra*. The proposed definition of foreign branch is the same as discussed above. See proposed Rule 3a71-3(a)(1) under the Exchange Act, as discussed in Section III.B.7, *supra*.

⁵⁰² Proposed Rule 3a71-3(a)(4) under the Exchange Act.

⁵⁰³ Proposed Rule 3a71-3(a)(4)(i) under the Exchange Act.

⁵⁰⁴ See Capital, Margin, and Segregation Proposing Release, 77 FR at 70274-78 (discussing the customer protection treatment provided by proposed Rules 18a-4(a) - (d) in the stockbroker liquidation provisions in the U.S. Bankruptcy Code).

Title 11 of the United States Code (the “stockbroker liquidation provisions”)⁵⁰⁵ provides special protections for “customers” of stockbrokers. Among other protections, “customers” share ratably with other customers ahead of virtually all other creditors in the “customer property” held by the failed stockbroker.⁵⁰⁶ The Dodd-Frank Act contains provisions designed to ensure that cash and securities held by a security-based swap dealer relating to security-based swaps will be deemed customer property under the stockbroker liquidation provisions.⁵⁰⁷ In particular, Section 3E(g) of the Exchange Act⁵⁰⁸ provides, among other things, that a security-based swap shall be considered to be a “security” as such term is used in section 101(53A)(B)⁵⁰⁹ and the stockbroker liquidation provisions. Section 3E(g) also provides that an account that holds a security-based swap shall be considered to be a “securities account” as that term is defined in the stockbroker liquidation provisions.⁵¹⁰ In addition, Section 3E(g) provides that the terms “purchase” and “sale” as defined in Sections 3(a)(13) and (14) of the Exchange Act, respectively, shall be

⁵⁰⁵ See 11 U.S.C. 741-53.

⁵⁰⁶ See 11 U.S.C. 752.

⁵⁰⁷ See Pub. L. 111-203 § 763(d), adding Section 3E(g) to the Exchange Act, 15 U.S.C. 78c-5(g).

⁵⁰⁸ See 15 U.S.C. 78c-5(g).

⁵⁰⁹ See 11 U.S.C. 101(53A)(B). Section 101(53A) of the U.S. Bankruptcy Code defines a “stockbroker” to mean a person—(A) with respect to which there is a customer, as defined in section 741, subchapter III of chapter 7, title 11, United States Code (the definition section of the stockbroker liquidation provisions); and (B) that is engaged in the business of effecting transactions in securities—(i) for the account of others; or (ii) with members of the general public, from or for such person’s own account. See 11 U.S.C. 101(53A).

⁵¹⁰ See 15 U.S.C. 78c-5(g) and 11 U.S.C. 741. There is not a definition of “securities account” in 11 U.S.C. 741. The term “securities account” is used in 11 U.S.C. 741(2) and (4) in defining the terms “customer” and “customer property.”

applied to the terms “purchase” and “sale” as used in the stockbroker liquidation provisions.⁵¹¹ Finally, Section 3E(g) provides that the term “customer” as defined in the stockbroker liquidation provisions excludes any person to the extent the person has a claim based on a non-cleared security-based swap transaction except to the extent of any margin delivered to or by the customer with respect to which there is a customer protection requirement under Section 15(c)(3) of the Exchange Act or a segregation requirement.⁵¹²

The provisions of Section 3E(g) of the Exchange Act apply the customer protection elements of the stockbroker liquidation provisions to cleared security-based swaps, including related collateral, and, if subject to customer protection requirements under Section 15(c)(3) of the Exchange Act or a segregation requirement prescribed by the Commission, to collateral delivered as margin for non-cleared security-based swaps.⁵¹³ The Commission has proposed Rule 18a-4(a)-(d) to establish segregation requirements for security-based swap dealers with respect to cleared and non-cleared security-based swaps pursuant to Section 3E of the Exchange Act and pursuant to Section 15(c)(3) of the Exchange Act⁵¹⁴ with respect to security-based swap

⁵¹¹ See also 15 U.S.C. 78c-5(g) and 11 U.S.C. 741-753. Section 3(a)(13) of the Exchange Act, as amended by Section 761(a) of the Dodd-Frank Act, defines the term “purchase” to mean, in the case of security-based swaps, the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a security-based swap, as the context may require. See 15 U.S.C. 3(a)(13). Section 3(a)(14) of the Exchange Act, as amended by Section 761(a) of the Dodd-Frank Act, defines the term “sale” to mean, in the case of security-based swaps, the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a security-based swap, as the context may require. See 15 U.S.C. 3(a)(14).

⁵¹² See 15 U.S.C. 78c-5(g) and 11 U.S.C. 741(2).

⁵¹³ See 15 U.S.C. 78c-5(g) and 11 U.S.C. 741-53.

⁵¹⁴ 15 U.S.C. 78o(c)(3).

dealers that are broker-dealers.⁵¹⁵

Specifically, proposed Rule 18a-4(b) requires a security-based swap dealer to promptly obtain and thereafter maintain physical possession or control of all excess securities collateral carried for the accounts of security-based swap customers. Such possession or control requirement is designed to ensure the securities held for the accounts of security-based swap customers are under the control of the security-based swap dealer and, therefore, readily available to be returned to security-based swap customers. Proposed Rule 18a-4(c) requires a security-based swap dealer to maintain a special account for the exclusive benefit of security-based swap customers and have on deposit in that account at all times an amount of cash or qualified securities determined by computing the net amount of credits owed to customers.⁵¹⁶ The objective of the possession or control and special account requirements in proposed Rule 18a-4 is to facilitate the prompt return of “customer property” to security-based swap customers either before or during a liquidation proceeding if the firm fails. In the event of a failure of the security-based swap dealer, customers would share the “customer property” ratably with other customers and ahead of virtually all other creditors.⁵¹⁷ In addition, with respect to non-cleared security-based swaps, proposed Rule 18a-4(d) requires a security-based swap dealer to provide

⁵¹⁵ See proposed Rules 18a-4(a) - (d) under the Exchange Act and Section 3E of the Exchange Act, 15 U.S.C. 78c-5. See also the Capital, Margin, and Segregation Proposing Release, 77 FR at 70278-88, for detailed descriptions and discussions of the proposed segregation requirements for security-based swaps in proposed Rules 18a-4(a), (b), and (c) under the Exchange Act and special provisions for non-cleared security-based swaps in proposed Rule 18a-4(d) under the Exchange Act.

⁵¹⁶ See proposed Rule 18a-4(c) and the related discussion in the Capital, Margin, and Segregation Proposing Release, 77 FR at 70277.

⁵¹⁷ See the stockbroker liquidation provisions in the U.S. Bankruptcy Code, 11 U.S.C. 741-53.

the notice required under Section 3E(f)(1)(A) of the Exchange Act⁵¹⁸ to a counterparty in writing prior to the execution of the first non-cleared security-based swap transaction with such counterparty. If a counterparty to a non-cleared security-based swap elects to segregate funds or other property with a third-party custodian pursuant to Section 3E(f) of the Exchange Act or elects not to require the omnibus segregation of funds or other property pursuant to proposed Rule 18a-4(c), the security-based swap dealer must obtain an agreement from such counterparty to subordinate all claims against the security-based swap dealer to the claims of security-based swap customers of such security-based swap dealer.⁵¹⁹

As proposed in the Capital, Margin and Segregation Proposing Release, the segregation requirements in proposed Rule 18a-4(a)-(d) do not distinguish between U.S. security-based swap dealers and foreign security-based swap dealers or between U.S. person and non-U.S. person security-based swap counterparties, and do not address application of the segregation requirements in the cross-border context. The Commission preliminarily believes that the Dodd-Frank Act's mandate to promote financial stability, improve accountability, and protect counterparties focuses territorially on the United States and the U.S. security-based swap

⁵¹⁸ 15 U.S.C. 78c-5(f)(1)(A).

⁵¹⁹ See proposed Rules 18a-4(d)(1) and (d)(2)(i) and (ii) under the Exchange Act, as discussed in the Capital, Margin, and Segregation Proposing Release, 77 FR at 70287-88. If a non-cleared security-based swap counterparty elects to segregate funds or other property with a third-party custodian, the subordination agreement would be conditioned on the counterparty's funds and other property segregated at a third-party custodian not being included in the bankruptcy estate of the security-based swap dealer. If the election is not effective in keeping the counterparty's assets bankruptcy remote, then the counterparty should be treated as a security-based swap customer with a pro rata priority claim to customer property. See proposed Rule 18a-4(d)(2)(i) under the Exchange Act. If a non-cleared security-based swap counterparty elects not to segregate any assets at all, the security-based swap dealer would need to obtain an unconditional subordination agreement from the counterparty that waives segregation altogether. See proposed Rule 18a-4(d)(2)(ii) under the Exchange Act.

market⁵²⁰ and, therefore, is not proposing any changes with respect to U.S. security-based swap dealers to the segregation requirements already proposed.⁵²¹ The Commission's proposed approach to application of segregation requirements to foreign security-based swap dealers intends to protect U.S. person counterparties and minimize the impact of a failed security-based swap dealer on the U.S. financial system generally and the U.S. security-based swap market in particular.

a. Foreign Security-Based Swap Dealers

As stated above, Section 3E(g) extends the customer protection provided by the stockbroker liquidation provisions of the U.S. Bankruptcy Code to cleared security-based swaps and non-cleared security-based swaps in different ways. In addition, a foreign security-based swap dealer may not be subject to the stockbroker liquidation provisions if it is a foreign bank with a branch or agency in the United States.⁵²² Such foreign security-based swap dealer's insolvency and liquidation would be subject to banking regulations.⁵²³ On the other hand, if a foreign security-based swap dealer is not a foreign bank with a branch or agency in the United

⁵²⁰ See note 4, *supra*.

⁵²¹ See proposed Rules 18a-4(a) - (d) under the Exchange Act and Section 3E of the Exchange Act, 15 U.S.C. 78c-5. See also the Capital, Margin, and Segregation Proposing Release, 77 FR at 70278-88.

⁵²² See Section 109(b) of the U.S. Bankruptcy Code, 11 U.S.C. 109(b) (providing that a person may be a debtor under chapter 7 of the U.S. Bankruptcy Code only if such person is not, among other things, a bank or similar institution which is an insured bank as defined in Section 3(h) of the Federal Deposit Insurance Act, or a foreign bank that has a branch or agency (as defined in Section 1(b) of the International Banking Act of 1978) in the United States).

⁵²³ See 12 U.S.C. 1821-25. Whereas insured deposit institutions would be resolved under the Federal Deposit Insurance Act, uninsured U.S. branches of foreign banks would be resolved under either relevant state statutes, in the case of uninsured state branches, or the International Banking Act, in the case of uninsured federal branches.

States, it may be subject to the stockbroker liquidation provisions⁵²⁴ in a stockbroker liquidation proceeding in a U.S. bankruptcy court. Moreover, if a foreign security-based swap dealer is a registered broker-dealer, it is a member of the Securities Investor Protection Corporation (“SIPC”)⁵²⁵ and is subject to segregation requirements under Section 15(c)(3) of the Exchange Act,⁵²⁶ and rules and regulations thereunder.⁵²⁷ Such a foreign security-based swap dealer would be subject to the liquidation proceeding under the Securities Investor Protection Act of 1970 (the “SIPA”).⁵²⁸ Therefore, we propose an approach that would apply the segregation requirements to a foreign security-based swap dealer depending on whether it holds assets to secure cleared security-based swap transactions or non-cleared security-based swap transactions and whether such foreign security-based swap dealer is a registered broker-dealer, a foreign bank with a branch or agency in the United States, or neither of the above.⁵²⁹

⁵²⁴ See note 522, *supra*.

⁵²⁵ We recognize that a very limited number of registered foreign broker-dealers who do not conduct securities business in the United States and do not hold U.S. person customers’ funds are not members of SIPC.

⁵²⁶ 15 U.S.C. 78o(c)(3).

⁵²⁷ See Rule 15c3-3 under the Exchange Act, 17 CFR § 240.15c3-3.

⁵²⁸ See 15 U.S.C. 78aaa *et seq.*

⁵²⁹ We preliminarily believe that the proposed approach with respect to the segregation requirements set forth in Section 3E of the Exchange Act, and rules and regulations thereunder, is not being applied to persons who are “transact[ing] a business in security-based swaps without the jurisdiction of the United States,” within the meaning of Section 30(c). See Section II.B.2(a), *supra*. However, the Commission also preliminarily believes that the proposed approach with respect to the segregation requirements is necessary or appropriate to help prevent the evasion of the particular provisions of the Exchange Act that were added by the Dodd-Frank Act that are being implemented by the proposed approach and prophylactically will help ensure that the purposes of those provisions of the Dodd-Frank Act are not undermined. See Section II.B.2(e), *supra*; see also Section II.B.2(c), *supra*.

We recognize that a foreign security-based swap dealer may not be subject to the stockbroker liquidation provisions and its insolvency or liquidation proceeding in the United States may be administered under SIPA or banking regulations concurrently with other potential insolvency proceedings outside the United States under applicable foreign insolvency laws. Therefore, the effectiveness of the segregation requirements with respect to a foreign security-based swap dealer in practice may depend on many factors, including the type and objectives of the insolvency or liquidation proceeding and how the U.S. Bankruptcy Code, SIPA, banking regulations and applicable foreign insolvency laws are interpreted by the U.S. bankruptcy court, SIPC, Federal Deposit Insurance Corporation and relevant foreign authorities.

For example, if the segregation requirements do not apply to the entire business of a registered foreign security-based swap dealer that is a registered broker-dealer, or do not apply to assets received from non-U.S. person customers to secure cleared security-based swaps by a registered foreign security-based swap dealer that is not a registered broker-dealer (and is not a foreign bank with a branch or agency in the United States) if such foreign security-based swap dealer also receives assets from a U.S. person customer to secure clear security-based swaps, then U.S. security-based swap dealers would have an incentive to evade the full application of the segregation requirements by moving their operations outside the United States. In this event, these security-based swap dealers could use the assets collected from the non-U.S. person counterparties for their own business purposes, and the assets segregated (*i.e.*, assets posted by U.S. person customers) could be insufficient to satisfy the combined priority claims of both U.S. person and non-U.S. person customers, potentially resulting in losses to U.S. person customers in contravention of the purposes of the customer protection framework established by the Dodd-Frank Act. See discussions of application of the segregation requirements to a foreign security-based swap dealer that is a registered broker-dealer with respect to non-cleared security-based swaps in Section III.C.4(b)ii.b.i, application of the segregation requirements to a foreign security-based swap dealer that is a registered broker-dealer with respect to cleared security-based swaps in Section III.C.4(b)ii.c.i, and application of the segregation requirements to a foreign security-based swap dealer that is not a registered broker-dealer and is not a foreign bank with a branch or agency in the United States in Section III.C.4(b)ii.c.ii above.

b. Non-Cleared Security-Based Swaps

i. Foreign Security-Based Swap Dealer That Is a Registered Broker-Dealer

With respect to non-cleared security-based swaps, the Commission proposes to apply segregation requirements differently to foreign security-based swap dealers depending on whether they also are registered broker-dealers. Specifically, the Commission proposes to require a foreign security-based swap dealer that is a registered broker-dealer to segregate margin received from all counterparties to secure non-cleared security-based swap transactions, in accordance with Section 3E of the Exchange Act, and rules and regulations thereunder.⁵³⁰

If a foreign security-based swap dealer is a registered broker-dealer, it already would: (i) be subject to the customer protection requirements under Section 15(c)(3) of the Exchange Act,⁵³¹ and rules and regulations thereunder, including Rule 15c3-3 if it carries customer securities and cash; (ii) be required to maintain possession or control of customer securities and maintain cash or qualified securities in a special reserve account if it carries customer securities and cash; and (iii) if it is a member of SIPC, be liquidated in a formal proceeding under the SIPA.⁵³² Rule 15c3-3 under Section 15(c)(3) of the Exchange Act provides customer protection and defines “customer” broadly to include any person from whom or on whose behalf a broker or dealer has received or acquired or holds funds or securities for the account of that person.⁵³³ Therefore, if a foreign security-based swap dealer that is a registered broker-dealer receives

⁵³⁰ See proposed Rule 18a-4(e)(1)(i) under the Exchange Act.

⁵³¹ 15 U.S.C. 78o(c)(3).

⁵³² See Capital, Margin, and Segregation Proposing Release, 77 FR at 70276-77 (discussing the broker-dealer segregation rule—Rule 15c3-3 under the Exchange Act, 17 CFR § 240.15c3-3).

⁵³³ See Rule 15c3-3(a)(1) under the Exchange Act, 17 CFR § 240.15c3-3(a)(1).

collateral from a non-cleared security-based swap counterparty, such counterparty would be a “customer” and is afforded customer protection with respect to such collateral under Rule 15c3-3. As stated above, Section 3E(g) extends “customer” status to non-cleared security-based swap counterparties to the extent of any margin delivered to or by the counterparties with respect to which there is a customer protection requirement under Section 15(c)(3).⁵³⁴ Therefore, non-cleared security-based swap counterparties of a foreign security-based swap dealer that is a registered broker-dealer are “customers” within the meaning of the stockbroker liquidation provisions.⁵³⁵

As such, if the Commission does not require a foreign security-based swap dealer that is a registered broker-dealer to segregate all counterparties’ assets posted to secure non-cleared security-based swaps, in a SIPA liquidation proceeding of such foreign security-based swap dealer and broker-dealer,⁵³⁶ the pool of assets segregated pursuant to Rule 15c3-3 and proposed Rule 18a-4 may be insufficient to satisfy the combined claims of all customers, resulting in losses to all customers. Therefore, the Commission proposes to subject a foreign security-based swap dealer that is a registered broker-dealer to the segregation requirements set forth in Section

⁵³⁴ See Section 3E(g) of the Exchange Act, 15 U.S.C. 78c-5(g) (“The term ‘customer’, as defined in section 741 of title 11, United States Code, excludes any person, to the extent that such person has a claim based on any ... non-cleared security-based swap except to the extent of any margin delivered to or by the customer with respect to which there is a customer protection requirement under section 15(c)(3) or a segregation requirement.”).

⁵³⁵ A non-cleared security-based swap counterparty may waive its pro rata priority claim on customer property with other customers by executing a conditional subordination agreement pursuant to proposed Rule 18a-4(d)(i) under the Exchange Act to affirmatively elect individual segregation, or by executing an unconditional subordination agreement pursuant to proposed Rule 18a-4(d)(ii) under the Exchange Act to affirmatively waive segregation altogether.

⁵³⁶ In very limited circumstances where a foreign security-based swap dealer that is a registered broker-dealer is not a SIPC member, it would potentially be liquidated pursuant to the stockbroker liquidation provisions in a U.S. bankruptcy court.

3E of the Exchange Act, and rules and regulations thereunder, relating to assets received from all counterparties held as collateral to secure non-cleared security-based swap transactions.

ii. Non-Cleared Security-Based Swaps—Foreign Security-Based Swap Dealer That is Not a Registered Broker-Dealer

If a foreign security-based swap dealer is not a registered broker-dealer, its non-cleared security-based swap counterparties would be “customers” under the stockbroker liquidation provisions only to the extent that there is a segregation requirement prescribed by the Commission.⁵³⁷ The Commission proposes to subject such foreign security-based swap dealer to the segregation requirements set forth in Section 3E of the Exchange Act, and rules and regulations thereunder, solely with respect to non-cleared security-based swaps with U.S. person counterparties.⁵³⁸ This approach would provide U.S. person counterparties “customer” status under the stockbroker liquidation provisions and their assets would be segregated for their exclusive benefit. Non-U.S. person counterparties would not be “customers” and would not have “customer” status with respect to the segregated assets. As stated above, the Commission preliminarily believes that the objective of the Dodd-Frank Act is to protect U.S. counterparties and to minimize disruption to the U.S. financial system caused by a security-based swap dealer’s failure. Therefore, the Commission preliminarily believes that the proposed approach would achieve the benefit intended by the segregation requirements set forth in Section 3E of the Exchange Act, and rules and regulations thereunder.

The Commission recognizes that a foreign security-based swap dealer that is not a broker-dealer but is a foreign bank with a branch or agency (as defined in Section 1(b) of the

⁵³⁷ See Section 3E(g) of the Exchange Act, 15 U.S.C. 78c-5(g).

⁵³⁸ See proposed Rule 18a-4(e)(1)(ii) under the Exchange Act.

International Banking Act of 1978)⁵³⁹ in the United States may not be eligible to be liquidated pursuant to the stockbroker liquidation provisions.⁵⁴⁰ Such foreign security-based swap dealer's insolvency proceeding in the United States would be administered under banking regulations.⁵⁴¹ Nevertheless, the Commission preliminarily believes that imposing segregation requirements on such foreign security-based swap dealer when it receives collateral from U.S. person counterparties would reduce the likelihood of U.S. person counterparties incurring losses by helping identify U.S. customers' assets in an insolvency proceeding of such foreign security-based swap dealer in the United States and would potentially minimize disruption to the U.S. security-based swap market, thereby producing potential benefits to the U.S. financial system and U.S. counterparties that are consistent with the objectives of the Dodd-Frank Act.

c. Cleared Security-Based Swaps

In applying the segregation requirements to a foreign security-based swap dealer with respect to cleared security-based swap transactions, the Commission also proposes to distinguish among: (1) a foreign security-based swap dealer that is a registered broker-dealer; (2) a foreign security-based swap dealer that is not a registered broker-dealer and is not a foreign bank with a branch or agency in the United States; and (3) a foreign security-based swap dealer that is a foreign bank with a branch or agency in the United States. In the following paragraphs, we will discuss how we propose to apply the segregation requirements to foreign security-based swap

⁵³⁹ See Sections 1(b)(1), (3), and (7) of the International Banking Act of 1978, 12 U.S.C. 3101(b)(1), (3) and (7), for definitions of "agency," "branch," and "foreign bank."

⁵⁴⁰ See Section 109(b)(3)(B) of the U.S. Bankruptcy Code, 11 U.S.C. 109(b)(3)(B).

⁵⁴¹ See 12 U.S.C. 1821-25. Whereas insured deposit institutions would be resolved under the Federal Deposit Insurance Act, uninsured U.S. branches of foreign banks would be resolved under either relevant state statutes, in the case of uninsured state branches, or the International Banking Act, in the case of uninsured federal branches.

dealers in each of these categories with respect to assets held by them as collateral to secure cleared security-based swaps.

i. Foreign Security-Based Swap Dealer That Is a Registered Broker-Dealer

The proposed rule would apply segregation requirements to a foreign security-based swap dealer that is a registered broker-dealer with respect to assets received from all counterparties to secure cleared security-based swaps.⁵⁴² As stated above, Section 3E(g) of the Exchange Act extends customer protection under the stockbroker liquidation provisions to all cleared security-based swap counterparties and to all non-cleared security-based swap counterparties, with respect to which there is a customer protection requirement under Section 15(c)(3) of the Exchange Act.⁵⁴³ Therefore, all security-based swap counterparties of a foreign security-based swap dealer that is a registered broker-dealer are customers under the stockbroker liquidation provisions.⁵⁴⁴ In the absence of a Commission requirement that a foreign security-based swap dealer that is a registered broker-dealer segregate all cleared security-based swap counterparties' collateral, if such an entity were liquidated pursuant to SIPA, the amount of assets segregated could be less than the combined priority claims of all security-based swap customers, potentially resulting in losses to customers. Therefore, the Commission proposes to

⁵⁴² Proposed Rule 18a-4(e)(2)(i) under the Exchange Act.

⁵⁴³ See Section III.C.4(b)ii.b, *supra*.

⁵⁴⁴ A non-cleared security-based swap counterparty would be a customer of a foreign security-based swap dealer that is a registered broker-dealer and have a pro rata priority claim to customer property under the stockbroker liquidation provisions unless it affirmatively waives segregation altogether by executing an unconditional subordination agreement pursuant to proposed Rule 18a-4(d)(ii) under the Exchange Act, or elects individual segregation pursuant to Section 3E(f) of the Exchange Act by executing a conditional subordination agreement pursuant to proposed Rule 18a-4(d)(i) under the Exchange Act.

subject a foreign security-based swap dealer who is a registered broker-dealer to segregation requirements set forth in Section 3E of the Exchange Act, and rules and regulations thereunder, with respect to assets received from all counterparties to secure cleared security-based swaps.

ii. Foreign Security-Based Swap Dealer That Is Not a Registered Broker-Dealer and Is Not a Foreign Bank with Branch or Agency in the United States

If a foreign security-based swap dealer is not a registered broker-dealer and is not a foreign bank that has a branch or agency (as defined in Section 1(b) of the International Banking Act of 1978) in the United States, such foreign security-based swap dealer may be eligible to be a debtor under Chapter 7 of the U.S. Bankruptcy Code and may therefore be subject to the stockbroker liquidation provisions in the U.S. Bankruptcy Code.⁵⁴⁵ As stated above, Section 3E(g) of the Exchange Act provides “customer” status to all counterparties to cleared security-based swaps, making no distinction between U.S. customers or counterparties and non-U.S. person customers or counterparties.⁵⁴⁶ Therefore, in the case where such foreign security-based swap dealer receives any assets from, for, or on behalf of a U.S. person customer to margin, guarantee, or secure security-based swaps, if the Commission were to apply the segregation requirements only to assets posted by U.S. person customers but not to assets posted by non-U.S. person customers, in a stockbroker liquidation proceeding of such foreign security-based swap dealer, the assets segregated (*i.e.*, assets posted by U.S. person customers) could be insufficient to satisfy the combined priority claims of both U.S. person and non-U.S. person customers, potentially resulting in losses to U.S. person customers. As stated above, the Commission preliminarily believes that Section 3E intends to provide customer protection to U.S. person

⁵⁴⁵ See Section 109(b) of the U.S. Bankruptcy Code, 11 U.S.C. 109(b).

⁵⁴⁶ See 15 U.S.C. 78c-5(g) and 11 U.S.C. 741(2).

counterparties and apply segregation requirements in a way that would protect the U.S. financial system and counterparties in the United States. Therefore, the Commission proposes to apply segregation requirements described in Section 3E of the Exchange Act, and the rules and regulations thereunder, to a foreign security-based swap dealer that is not a registered broker-dealer and is not a foreign bank with a branch or agency in the United States with respect to assets received from both U.S. person counterparties and non-U.S. person counterparties if such foreign security-based swap dealer receives collateral from U.S. person counterparties to secure security-based swaps.⁵⁴⁷

iii. Foreign Security-Based Swap Dealer That is Not a Registered Broker-Dealer and is a Foreign Bank with Branch or Agency in the United States

Finally, if a foreign security-based swap dealer is not a registered broker-dealer and is a foreign bank that has a branch or agency in the United States, it is not eligible to be a debtor under Chapter 7 and will therefore not be subject to the stockbroker liquidation provisions of the U.S. Bankruptcy Code⁵⁴⁸ and its insolvency proceeding in the United States would be administered under banking regulations.⁵⁴⁹ Consistent with the objective of protecting U.S. person counterparties, the Commission is proposing that such foreign security-based swap dealer shall be subject to the segregation requirements set forth in Section 3E of the Exchange Act, and the rules and regulations thereunder, with respect to any assets received from, for or on behalf of

⁵⁴⁷ Proposed Rule 18a-4(e)(2)(ii) under the Exchange Act.

⁵⁴⁸ See Section 109(b) of the U.S. Bankruptcy Code, 11 U.S.C. 109(b).

⁵⁴⁹ See 12 U.S.C. 1821-25. Whereas insured deposit institutions would be resolved under the Federal Deposit Insurance Act, uninsured U.S. branches of foreign banks would be resolved under either relevant state statutes, in the case of uninsured state branches, or the International Banking Act, in the case of uninsured federal branches.

a counterparty who is a U.S. person to margin, guarantee, or secure a cleared security-based swap, but shall not be required to segregate assets received from, for or on behalf of all other counterparties to margin, guarantee, or secure a cleared security-based swap.⁵⁵⁰ The special account maintained by the foreign security-based swap dealer shall be designated for the exclusive benefit of U.S. person security-based swap customers. The Commission preliminarily believes that imposing segregation requirements on such foreign security-based swap dealer when it receives collateral from U.S. person counterparties would reduce the likelihood of U.S. person counterparties incurring losses by helping identify U.S. customers' assets in an insolvency proceeding of such foreign security-based swap dealer in the United States and would potentially minimize disruption to the U.S. security-based swap market, thereby producing potential benefits to the U.S. financial system and U.S. counterparties that are consistent with the objectives of the Dodd-Frank Act. For the same reason, the Commission preliminarily does not believe that extending segregation requirements and customer protection to such foreign security-based swap dealer's transactions with non-U.S. persons would advance the purposes of the Dodd-Frank Act.

d. Disclosure

In addition to the proposed rules described above relating to application of the segregation requirements to foreign security-based swap dealers, the Commission also is proposing to require foreign security-based swap dealers to make certain disclosures.⁵⁵¹ Since the treatment of the special account under Sections 3E(b) and (g) or individually segregated assets pursuant to Section 3E(f) of the Exchange Act in insolvency proceedings of a foreign

⁵⁵⁰ Proposed Rule 18a-4(e)(2)(iii) under the Exchange Act.

⁵⁵¹ Proposed Rule 18a-4(e)(3) under the Exchange Act.

security-based swap dealer may vary depending on the status of the foreign security-based swap dealer and the insolvency proceedings such foreign security-based swap dealer is subject to, the Commission proposes to require a foreign security-based swap dealer to disclose to each counterparty that is a U.S. person, prior to accepting any assets from, for, or on behalf of such counterparty to margin, guarantee, or secure a security-based swap, the potential treatment of the assets segregated by such foreign security-based swap dealer pursuant to Section 3E of the Exchange Act, and the rules and regulations thereunder, in insolvency proceedings relating to such foreign security-based swap dealer under U.S. bankruptcy law and applicable foreign insolvency laws. Pursuant to this proposed rule, the Commission intends to require that a foreign security-based swap dealer disclose whether it is subject to the segregation requirement set forth in Section 3E of the Exchange Act, and the rules and regulations thereunder, with respect to the assets collected from the U.S. person counterparty who will receive the disclosure, whether the foreign security-based swap dealer could be subject to the stockbroker liquidation provisions in the U.S. Bankruptcy Code, whether the segregated assets could be afforded customer property treatment under the U.S. bankruptcy law, and any other relevant considerations that may affect the treatment of the assets segregated under Section 3E of the Exchange Act in insolvency proceedings of a foreign security-based swap dealer.⁵⁵² Since the proposed rule regarding application of the segregation requirements in the cross-border context is designed to advance the goals of protecting U.S. person counterparties, the Commission believes that such disclosure would enhance U.S. person counterparty protection and the objectives that segregation requirements intend to achieve in the context of cross-border security-based swap dealing.

⁵⁵²

Proposed Rule 18a-4(e)(3) under the Exchange Act.

Request for Comment

The Commission requests comment on all aspects of the proposed rule regarding the application of transaction-level requirements relating to customer protection and segregation, including the following:

- What, if any, are the likely competitive effects, within the U.S. security-based swap market and among U.S. security-based swap dealers, of the proposed approach for foreign security-based swap dealers? Please describe the specific nature of any such effects.
- Should a foreign security-based swap dealer automatically be eligible for the proposed approach by virtue of being a nonresident entity? Alternatively, should the Commission consider other factors, such as the share of the foreign security-based swap dealer's business that constitutes U.S. Business, in determining how to apply transaction-level requirements?
- From an operational perspective, what types of internal controls would be necessary to identify Foreign Business and U.S. Business and ensure that the foreign security-based swap dealer complies with the external business conduct standards with respect to its U.S. Business? Should U.S. Business be generally defined with reference to the type of activity that, if performed in a dealing capacity, triggers the registration requirement?
- Does the proposed approach appropriately classify entity-level and transaction-level requirements? Does it appropriately identify those transaction-level requirements that relate to the operation of the security-based swap dealer on an entity level? If not,

please identify those requirements that should be classified differently and how doing so is consistent with the goals of Title VII.

- To what extent would foreign security-based swap dealers in various jurisdictions be prohibited from complying, under local law, with the Commission's requirements to provide the Commission with prompt access to their books and records and to submit to onsite inspection and examination by the Commission? If there are limitations, what are they, and under what circumstances would they arise? Are there other entity-level requirements that foreign security-based swap dealers would not be permitted to comply with under local law? If so, what are they?
- Should the external business conduct rules apply in transactions between a registered non-U.S. security-based swap dealer and foreign branches of a U.S. bank?
- Should the external business conduct rules apply in transactions between a registered non-U.S. security-based swap dealer and non-U.S. persons with U.S. guarantees in transactions outside the United States?
- Does the proposed application of the business conduct standards in the cross-border context appropriately implement the business conduct standards as described in Section 15F(h) of the Exchange Act?
- As described above, the Commission does not, at this time, propose to apply the business conduct standards in Section 15F(h) of the Exchange Act, and the rules and regulations thereunder (other than the rules and regulations relating to diligent supervision prescribed by the Commission pursuant to Section 15F(h)(1)(B)), to the Foreign Business of registered security-based swap dealers. Should such standards apply to the Foreign Business of registered security-based swap dealers? Would such

application of business conduct standards further the goals of Title VII of the Dodd-Frank Act?

- Should the Commission apply rules and regulations pursuant to Section 15F(h)(1)(A) of the Exchange Act relating to fraud, manipulation, and other abusive practices involving security-based swaps (including security-based swaps that are offered but not entered into) to the Foreign Business of registered foreign security-based swap dealers?
- Should the Commission apply rules and regulations pursuant to Section 15F(h)(1)(C) of the Exchange Act relating to position limits to the Foreign Business of foreign security-based swap dealers?
- Should the proposed rule relating to conflicts of interest set forth in Section 15F(j)(5) of the Exchange Act apply to both the U.S. Business and Foreign Business of security-based swap dealers?
- Does the proposed approach appropriately treat the rules and regulations prescribed by the Commission relating to diligent supervision pursuant to Section 15F(h)(1)(B) as entity-level requirements applicable to both the U.S. Business and the Foreign Business of foreign security-based swap dealers? Why or why not?
- Is it appropriate that the proposed rule does not apply future rules and regulations that the Commission may prescribe pursuant to Section 15F(h)(1)(A) of the Exchange Act relating to fraud, manipulation, and other abusive practices involving security-based swaps (including security-based swaps that are offered but not entered into) to the Foreign Business of foreign security-based swap dealers? Why or why not?

- Is it appropriate that the proposed rule does not apply future rules and regulations that the Commission may prescribe pursuant to Section 15F(h)(1)(C) of the Exchange Act relating to position limits to the Foreign Business of foreign security-based swap dealers? Why or why not?
- Does the proposed approach appropriately treat the requirements relating to conflicts of interest set forth in Section 15F(j)(5) of the Exchange Act as entity-level requirements applicable to both the U.S. Business and Foreign Business of foreign security-based swap dealers? If not, please identify any requirements that should not be applied to a foreign security-based swap dealer and explain how such an approach would be consistent with the goals of Title VII. Please identify what the costs or operational challenges would be, if any, for a registered security-based swap dealer to establish conflict-of-interest systems and procedures that would apply to its U.S. Business but not its Foreign Business.
- Does the proposed approach appropriately implement the requirements relating to segregation of assets held as collateral in Section 3E of the Exchange Act, and rules and regulations thereunder, in light of various statuses of foreign security-based swap dealers?
- Should the Commission apply segregation requirements to a foreign security-based swap dealer that is not subject to the stockbroker liquidation provisions in the U.S. Bankruptcy Code? If not, what are the reasons for not applying segregation requirements? If the segregation requirements do not apply, how would the objective of customer protection be achieved?

- Should the Commission adopt the disclosure requirement with respect to foreign security-based swap dealers? Why or why not? Is the proposed disclosure requirement feasible? What would the difficulties be in complying with the proposed disclosure requirement?
- The CFTC has proposed an interpretation that would effectively treat a non-U.S. person whose obligations are guaranteed by a U.S. person as a U.S. person for purposes of determining whether a swap between it and a non-U.S. swap dealer or major swap participant would be subject to transaction-level requirements as interpreted by the CFTC to include, without limitation, margin and segregation requirements, reporting, clearing, and trade execution.⁵⁵³ Should the Commission adopt a similar approach? What would be the effects on efficiency, competition and capital formation in the event that there are overlapping or duplicative requirements across multiple jurisdictions?
- In addition, the CFTC has proposed an interpretation that includes a description of a “conduit affiliate” that includes: (1) a non-U.S. person that is majority-owned, directly or indirectly, by a U.S. person where (2) the non-U.S. person regularly enters into swaps with one or more U.S. affiliates or subsidiaries of the U.S. person, and (3) the financial statements of the non-U.S. person are included in the consolidated financial statements of the U.S. person.⁵⁵⁴ Conduit affiliates would be subject to transaction-level requirements as if they were U.S. persons. Should the Commission consider a similar approach?

⁵⁵³ See CFTC Cross-Border Proposal, 77 FR at 41228-29.

⁵⁵⁴ See *id.* at 41229.

- The CFTC's proposed interpretation would subject foreign branches of U.S.-based bank swap dealers and major swap participants to the CFTC's entity-level requirements and transaction-level requirements (other than external business conduct standards for swaps with non-U.S. persons), provided that foreign branches would be eligible for a limited exception in emerging markets where foreign regulations are not comparable.⁵⁵⁵ Should the Commission consider a similar approach? If so, please explain how such an approach would be consistent with the goals of Title VII.
- What would be the market impact of the proposed approach to application of the transaction-level requirements relating to customer protection and segregation? How would the proposed application of transaction-level requirements affect the competitiveness of U.S. entities in the global marketplace (both in the United States as well as in foreign jurisdictions)? Would the proposed approach place any market participants at a competitive disadvantage or advantage? If so, please explain. Would the proposed approach be a more general burden on competition? If so, please explain. What other measures should the Commission consider to implement the transaction-level requirements? What would be the market impacts and competitiveness effects of alternatives to the proposed approach discussed in this release?

5. Application of Entity-Level Rules

(a) Introduction

As noted above, by their very nature, entity-level requirements apply to the operation of a security-based swap dealer as a whole. The Commission recognizes that the capital, margin, and

⁵⁵⁵ See *id.* at 41230-31.

other entity-level requirements that it adopts could have a substantial impact on international commerce and the relative competitive position of intermediaries operating in various, or multiple, jurisdictions. In particular, if these requirements are substantially more or less stringent than corresponding requirements, if any, that apply to intermediaries operating in security-based swap markets outside the United States, depending on how the rules are written, these differences could impact the ability of firms based in the United States to participate in non-U.S. markets, access to U.S. markets by foreign-based firms, and how and whether international firms make use of global “booking entities” to centralize risks related to security-based swaps, among other possible impacts. These issues have been the focus of numerous comments to the Commission and other regulators, as discussed above, as well as Congressional inquiries and other public dialogue.

(b) Proposed Approach

The Commission is not proposing to provide specific relief for foreign security-based swap dealers from Title VII entity-level requirements, although, as discussed in Section XI below, under a Commission substituted compliance determination, a foreign security-based swap dealer would be able to satisfy relevant Title VII entity-level requirements by substituting compliance with corresponding requirements under a foreign regulatory system.⁵⁵⁶ The Commission preliminarily believes that entity-level requirements are core requirements of the Commission’s responsibility to ensure the safety and soundness of registered security-based swap dealers.⁵⁵⁷ The Commission preliminarily believes that it would not be consistent with this

⁵⁵⁶ See Section XI, infra.

⁵⁵⁷ See note 419, supra.

mandate to provide a blanket exclusion to foreign security-based swap dealers from entity-level requirements applicable to such entities.⁵⁵⁸

For example, capital requirements play an essential role in ensuring the safety and soundness of security-based swap dealers. As discussed above, the Commission's proposed capital rules for nonbank security-based swap dealers are modeled on the net liquid assets test found in the capital requirements applicable to broker-dealers.⁵⁵⁹ We believe that this capital standard is necessary to ensure the safety and soundness of nonbank security-based swap dealers, and thus we are not proposing to exclude foreign nonbank security-based swap dealers from our capital rules. In addition, we believe that the capital, margin, and other entity-level requirements proposed and adopted by the Commission work together to provide a comprehensive regulatory scheme that is vital for ensuring the safety and soundness of registered security-based swap

⁵⁵⁸ We preliminarily believe that the proposed approach with respect to entity-level requirements is not being applied to persons who are "transact[ing] a business in security-based swaps without the jurisdiction of the United States," within the meaning of Section 30(c) of the Exchange Act. See Section II.B.2(a), supra. However, the Commission also preliminarily believes that the proposed approach with respect to entity-level requirements is necessary or appropriate to help prevent the evasion of the particular provisions of the Exchange Act that were added by the Dodd-Frank Act that are being implemented by the proposed approach and prophylactically will help ensure that the purposes of those provisions of the Dodd-Frank Act are not undermined. See Section II.B.2(e), supra; see also Section II.B.2(c), supra.

For example, if entity-level requirements do not apply to the entire business of a registered foreign security-based swap dealer, then U.S. security-based swap dealers would have an incentive to evade the full application of the entity-level requirements by moving their operations outside the United States. In this event, assuming the scope of the security-based swap dealers dealing activity remained unchanged, the risk presented by the entity to its U.S. counterparties and the U.S. financial system would remain unchanged. If, for instance, Title VII margin requirements did not apply to the entire entity, these entities could accumulate risk through their non-U.S. dealing activity and transmit that risk to U.S. counterparties in contravention of the purposes of the financial responsibility framework established by the Dodd-Frank Act. See Section III.C.3(b)ii, supra.

⁵⁵⁹ See Section III.C.3(b)i, supra.

dealers, and that the benefits of Title VII's entity-level requirements are equally important to both foreign and U.S. dealers registered with the Commission. As a result, we are not proposing to provide specific relief from individual entity-level requirements for foreign dealers.

We do, however, recognize the concerns raised by commenters regarding the application of entity-level requirements to foreign security-based swap dealers.⁵⁶⁰ We preliminarily believe that these concerns are largely addressed through the Commission's overall proposed approach to substituted compliance in the context of Title VII, which is discussed in detail in Section XI below. In general, the Commission is proposing a framework under which it may permit a registered foreign security-based swap dealer (or class thereof) to satisfy the capital, margin, and other requirements in Section 15F of the Exchange Act, and the rules and regulations thereunder, by complying with the corresponding requirements established by its foreign financial regulatory authority,⁵⁶¹ subject to certain conditions.⁵⁶² We preliminarily believe that providing foreign security-based swap dealers with the possibility of substituted compliance in this way will help

⁵⁶⁰ See, e.g., Davis Polk Letter II at 4-20; Sullivan & Cromwell Letter at 14-15.

⁵⁶¹ Section 3(a)(52) of the Exchange Act, 15 U.S.C. 78c(a)(52), defines "foreign financial regulatory authority" as "any (A) foreign securities authority, (B) other governmental body or foreign equivalent of a self-regulatory organization empowered by a foreign government to administer or enforce its laws relating to the regulation of fiduciaries, trusts, commercial lending, insurance, trading in contracts of sale of a commodity for future delivery, or other instruments traded on or subject to the rules of a contract market, board of trade, or foreign equivalent, or other financial activities, or (C) membership organization a function of which is to regulate participation of its members in activities listed above." The term "foreign securities authority" is defined in Section 3(a)(50) of the Exchange Act as "any foreign government, or any governmental body or regulatory organization empowered by a foreign government to administer or enforce its laws as they relate to securities matters."

⁵⁶² Proposed Rule 3a71-5 under the Exchange Act. As discussed in Section II.C.3(b) above, the Commission has authority to establish capital and margin requirements only for registered nonbank security-based swap dealers. For treatment of the capital and margin requirements for foreign bank security-based swap dealers, see Prudential Regulator Margin and Capital Proposal, 76 FR at 27564.

address concerns related to competitiveness and overlapping regulations related to entity-level requirements, while still ensuring that registered foreign security-based swap dealers are subject to appropriate regulatory oversight.

Request for Comment

The Commission requests comment on all aspects of the proposed interpretive guidance regarding the proposed provision of substituted compliance for certain requirements in Section 15F of the Exchange Act for foreign security-based swap dealers, including the following:

- What types of conflicts might a foreign security-based swap dealer face if subjected to capital requirements in more than one jurisdiction? In what situations would compliance with more than one capital requirement be difficult or impossible?
- Should the Commission provide specific relief to foreign security-based swap dealers with respect to entity-level requirements? If so, please indicate the specific relief that should be provided and the rationale for providing such relief.
- Would the provision of relief from entity-level requirements undermine the Commission's efforts to set capital requirements to ensure the safety and soundness of security-based swap dealers, as required by Section 15F(e)(2)(C) of the Exchange Act? Why or why not?
- Should the Commission treat margin as an entity-level requirement or a transaction-level requirement? If only a transaction-level requirement, why?
- Should the Commission consider providing relief for foreign security-based swap dealers from the statutory disqualification requirement in Section 15F(b)(6) of the Exchange Act with respect to their transactions with non-U.S. persons? For example, should the Commission permit associated persons of a foreign security-based swap

dealer that are subject to a statutory disqualification to conduct security-based swap activity with non-U.S. persons outside the United States? If so, why?

- The CFTC has proposed an interpretation that categorizes certain entity-level requirements and transaction-level requirements differently when compared to the Commission's proposed approach.⁵⁶³ For example, the CFTC has proposed classifying margin requirements applicable to uncleared swaps as a transaction-level requirement, where the Commission has proposed categorizing margin as an entity-level requirement. Should the Commission adopt portions of the CFTC's approach to categorization? If so, which requirements should be re-categorized and why?
- What would be the market impact of the proposed approach to applying entity-level requirements to registered foreign security-based swap dealers? How would the proposed application of the entity-level requirements affect the competitiveness of U.S. entities in the global marketplace (both in the United States as well as in foreign jurisdictions)? Would the proposed approach place any market participants at a competitive disadvantage or advantage? If so, please explain. Would the proposed approach be a more general burden on competition? If so, please explain. What other measures should the Commission consider to implement the entity-level requirements? What would be the market impacts and competitiveness effects of alternatives to the proposed approach discussed in this release?

⁵⁶³

See CFTC Cross-Border Proposal, 77 FR at 41223-27.

D. Intermediation

1. Introduction

Security-based swap dealers currently use a variety of business models and legal structures to do business with customers in jurisdictions around the world. For instance, many security-based swap dealers with global businesses use local personnel to provide security-based swap services to customers in a particular jurisdiction while booking transactions originated from multiple jurisdictions in a single entity (i.e., a centralized booking model). Some security-based swap dealers also use unique organizational structures to provide local customers with access to market or product specialists in other jurisdictions. As discussed below, commenters have indicated that, in the U.S. market, these scenarios are particularly prevalent in the case of foreign security-based swap dealers seeking access to U.S. customers or providing non-U.S. customers with expertise from employees located in the United States.⁵⁶⁴

In the following discussion, we briefly describe comments received regarding various intermediation models. Throughout this release we use the term “intermediation” generally to refer to origination activity (e.g., solicitation and negotiation of transactions) in connection with a security-based swap transaction.

2. Comment Summary

Commenters stated that foreign security-based swap dealers use different types of business models to service U.S. customers and provide their global customer base with

⁵⁶⁴ See, e.g., IIB Letter at 15 (“Perhaps more commonly, a foreign bank may transact in swaps as a dealer with U.S. customers through a separate U.S. branch, agency, or affiliate that intermediates the transactions as agent for the foreign bank. This is often because, to facilitate strong relationships with U.S. customers, the personnel who solicit and negotiate with U.S. customers and commit a foreign bank to swaps are located in the U.S.”).

specialized information, while at the same time reducing both customer costs and entity risks through centralized netting and risk management of their global security-based swap businesses.⁵⁶⁵ In support of these perceived benefits, commenters have urged the Commission not to apply Title VII to cross-border transactions in a way that would either prohibit or disincentivize the existing security-based swap dealing business models of foreign security-based swap dealers.⁵⁶⁶

A number of commenters recommended that a foreign dealer that engages in security-based swap transactions with U.S. counterparties, but only through U.S. registered swap or

⁵⁶⁵ See, e.g., IIB Letter at 6 (“Globally, there are a number of paradigms under which swap activity is conducted. To achieve the benefits of reduced risk and increased liquidity and efficiency associated with netting and margining on a portfolio basis, foreign banks (like their U.S. domestic counterparts) typically seek to transact with swap counterparties globally, to the extent feasible, through a single, highly creditworthy entity. In many cases, however, the personnel who have relationships with U.S. customers or who manage the market risk of the foreign bank’s swap portfolio are located regionally, outside the jurisdiction in which the foreign bank is domiciled. In some cases, entities other than the foreign bank (such as a U.S. branch, agency, or affiliate) transact with local customers in order to satisfy unique customer documentation, insolvency, tax, regulatory, or other considerations.); Davis Polk Letter I at 2-3 (suggesting that “operating and managing a global swaps business out of a single booking entity presents many advantages from the perspective of foreign banks, customers and supervisors,” including reduction in system risk, maximization of benefits of counterparty netting for customers, and consolidated supervision); Cleary IV at 3-4 (stating that the represented firms “conduct their swap dealing businesses through a variety of structures, based on multiple and in many cases interdependent legal, strategic and business considerations that pre-date Dodd-Frank,” and urging the Commissions to address a number of “common cross-border transaction structures”).

⁵⁶⁶ See, e.g., IIB Letter at 6-7 (“[T]he Commissions should establish a framework for cross-border swap activities that preserves and leverages the strengths of existing market practices and home country supervision and regulation.”); Cleary IV at 3-4 (urging the Commissions to give consideration to a number of common cross-border transaction structures in deciding how to implement Title VII).

security-based swap dealers, should not be subject to security-based swap dealer registration.⁵⁶⁷ One commenter stated that in such situations, the Commission should either not require security-based swap dealer registration of the non-U.S. security-based swap dealer at all, or require a limited registration, whereby the non-U.S. security-based swap dealer would be subject to only capital and related prudential requirements and be permitted to rely on comparable home country regulation.⁵⁶⁸ In situations where a foreign security-based swap dealer uses a U.S. domiciled subsidiary or affiliate as its agent to solicit and negotiate the terms of security-based swap transactions, several commenters suggested that the Commission allow for a bifurcated registration and regulation framework allowing the foreign security-based swap dealer to comply with Title VII's requirements by registering both the foreign dealer and its agent in limited capacities and allocating the compliance responsibilities between the two entities.⁵⁶⁹ Other

⁵⁶⁷ See, e.g., Financial Services Roundtable Letter at 25 (suggesting that “entities that would meet the definition of ‘swap dealer’ based on their non-US activity, but that act in the US only on an intermediated basis through a regulated US swap dealer, should not be subject to US regulation”); Davis Polk Letter II at 4, 7 (discussing reasons to exclude dealing activities with U.S.-registered swap dealers, including because “a swap between a foreign dealer and a U.S. registered swap dealer would be already subject to Title VII by the virtue of the latter’s involvement”).

⁵⁶⁸ See Cleary Letter IV at 3-4 (recommending that the Commission either adopt an approach similar to the broker-dealer registration regime, “under which a non-U.S. swap dealer transacting with U.S. persons . . . intermediated by an affiliated U.S.-registered swap dealer” would not have to register as a swap dealer or a major swap participant, or adopt a limited registration approach whereby “the non-U.S. swap dealer would be subject to U.S. swap dealer registration and regulation solely with respect to the capital and related prudential requirements relevant to its status as a swap counterparty, which requirements could be satisfied through compliance with comparable home country requirements”).

⁵⁶⁹ See, e.g., Société Générale Letter I at 4-6 (suggesting a bifurcated registration model allowing foreign banks to centrally book their U.S. swap and security-based swap business with a registered “Foreign Swap Dealer” who is responsible for obligations associated with a booking entity (e.g., complying with capital requirements), while complying with most of Title VII’s regulations through a U.S. domiciled, registered

commenters remarked that the foreign security-based swap dealer should remain ultimately responsible for ensuring compliance with all the applicable Title VII requirements whether or not the regulated activities were carried out by the foreign security-based swap dealer or its agent.⁵⁷⁰

3. Discussion

The Commission is not at this time proposing any specific rules regarding security-based swap dealing activities undertaken through intermediation. At the same time, we recognize the importance of intermediation, particularly with respect to foreign security-based swap dealers accessing U.S. customers or product specialists located in the United States. Based on the Commission's experience in the securities markets, we expect that many foreign security-based swap dealers will operate within the U.S. market by utilizing their U.S. affiliates or other U.S. entities as agents⁵⁷¹ in the United States, while booking transactions facilitated by such U.S.

“Non-Booking Swap Dealer”); and Davis Polk Letter II at 4-22 (proposing two registration scenarios, including one that would require a foreign bank to register with the Commission solely as a booking center for security-based swap transactions, while a U.S. affiliate of a foreign bank would also register with the Commission, and the foreign bank's obligations under Title VII would be divided between the two registered entities).

⁵⁷⁰ See, e.g., Cleary Letter IV at 12 (recommending a limited designation registration whereby “the branch, department or division of a registrant involved in the regulated swap activity should be responsible for compliance with Dodd-Frank's requirements,” but allowing for the outsourcing of “performance (but not responsibility for due performance) of those requirements to a U.S. affiliate that is registered as an introducing broker, futures commission merchant (“FCM”) and/or securities broker-dealer”); Rabobank Letter at 3 (suggesting that “the non-U.S. branch registrant would use one or more U.S. affiliates as agents in arranging swaps with U.S. persons and would be permitted to delegate certain compliance functions to its U.S. affiliates, although such delegation would not relieve the non-U.S. branch registrant of its ultimate compliance responsibilities”).

⁵⁷¹ The Commission previously proposed new Rule 15Fh-2(d), which would provide that the term “security-based swap dealer” would include, where relevant, an “associated person” of the security-based swap dealer. See External Business Conduct Standards Proposing Release, 76 FR at 42402. Section 3(a)(70) of the Exchange Act, as added by Section 761(a)(6), defines the term “person associated with a security-based swap dealer or major

personnel in a central booking entity located abroad. We preliminarily believe that the approach proposed in this release for the cross-border regulation of security-based swap dealing activity will not impede the use of these types of intermediation business models by foreign security-based swap dealers. More specifically, we believe that the Commission's proposed approach to the application of transaction-level requirements related to Foreign Business⁵⁷² and proposed framework for substituted compliance on entity-level requirements⁵⁷³ should help to address commenter concerns that a foreign security-based swap dealer engaging in Foreign Business would be subject to potentially duplicative and conflicting transaction-level requirements in a foreign jurisdiction with respect to its Foreign Business.

While the foreign security-based swap dealer would remain responsible for ensuring that all relevant Title VII requirements applicable to a given security-based swap transaction are fulfilled, the dealer and its agent(s) may choose to allocate the specific responsibilities such as

security-based swap participant" as "(i) any partner, officer, director, or branch manager of such security-based swap dealer or major security-based swap participant (or any person occupying a similar status or performing similar functions); (ii) any person directly or indirectly controlling, controlled by, or under common control with such security-based swap dealer or major security-based swap participant; or (iii) any employee of such security-based swap dealer or major security-based swap participant." The term does not include, however, any person associated with a security-based swap dealer or major security-based swap participant "whose functions are solely clerical or ministerial." See id.

As the Commission noted, to the extent that a security-based swap dealer acts through, or by means of, an associated person of that security-based swap dealer, the associated person must comply as well with the applicable business conduct standards. See External Business Conduct Standards Proposing Release, 76 FR at 42402-3. In support of this position, the Commission cited Section 20(b) of the Exchange Act, which provides that "[i]t shall be unlawful for any person, directly or indirectly, to do any act or thing which it would be unlawful for such person to do under the provisions of this title or any rule or regulation thereunder through or by means of any other person."

⁵⁷² See Section III.C.4, supra.

⁵⁷³ See Section III.C.5, supra, and Section XI, infra.

taking responsibility that all U.S. external business conduct requirements are complied with, margin is collected and segregated, and required trading records are maintained and available, to be undertaken by each entity depending on the intermediation model it adopts.⁵⁷⁴

Further, although a foreign security-based swap dealer could use an entity that is not a security-based swap dealer to act as its agent, the foreign security-based swap dealer would nonetheless be responsible for ensuring compliance with all the requirements applicable to security-based swap dealers under Title VII (and the federal securities laws) whether or not the regulated activities were carried out by the foreign security-based swap dealer or its non-security-based swap dealer agent.⁵⁷⁵

Request for Comment

The Commission requests comment on all aspects of the proposed approach to intermediation. In addition, the Commission requests comment in response to the following questions:

- Should the Commission revise our proposed approach to address directly the concerns of entities using the intermediation model to access the U.S. market? If so, what type of approach should the Commission use to address these concerns

⁵⁷⁴ The agent, in these circumstances, would need to consider whether it separately would need to register as a security-based swap dealer (if, for example, the agent acted as principal in a security-based swap with the counterparty, and then entered into a back-to-back transaction with the booking entity), a broker (e.g., by soliciting or negotiating the terms of security-based swap transactions), or other regulated entity. Further, the allocation of functions between a foreign security-based swap dealer and a U.S. agent would not affect the aggregation calculation for determining whether the foreign security-based swap dealer exceeded the de minimis threshold. See Section III.B.3(c), supra.

⁵⁷⁵ See note 574, supra.

consistent with the protection of counterparties' interests and the purposes of Title VII?

- Should the Commission adopt a model on intermediation similar to the approach laid out in Rule 15a-6(a)(3) (17 CFR § 240.15a-6(a)(3)) governing foreign broker-dealers, which would permit non-U.S. persons to conduct security-based swap dealing activity within the United States without registering with the Commission if those transactions were intermediated by a registered U.S. security-based swap dealer? If so, how would it work in the security-based swap context, and how would it address Title VII policy concerns?
- What would be the market impact of the proposed approach to intermediation? How would the application of the proposed approach to intermediation affect the competitiveness of U.S. entities in the global marketplace (both in the United States as well as in foreign jurisdictions)? Would the proposed approach place any market participants at a competitive disadvantage or advantage? If so, please explain. Would the proposed approach be a more general burden on competition? If so, please explain. What other measures should the Commission consider to implement the proposed approach to intermediation? What would be the market impacts and competitiveness effects of alternatives to the proposed approach discussed in this release?

E. Registration Application Re-Proposal

1. Introduction

As discussed in Section XI.C below, the Commission is proposing a rule that would create a framework under which the Commission would consider permitting a foreign security-

based swap dealer, where appropriate, to rely on a substituted compliance determination by the Commission with respect to certain of the requirements in Section 15F of the Exchange Act and the rules and regulations thereunder.⁵⁷⁶ In discussing the application of this proposed framework below, the Commission indicated that certain entity-level requirements under Section 15F of the Exchange Act may be candidates for substituted compliance determinations.⁵⁷⁷

The Commission preliminarily believes that the most appropriate time for a foreign security-based swap dealer to notify the Commission of its intention to avail itself of an existing substituted compliance determination⁵⁷⁸ would be at the time the foreign security-based swap dealer files an application to register with the Commission as a security-based swap dealer.⁵⁷⁹

⁵⁷⁶ Proposed Rule 3a71-3(c) under the Exchange Act.

⁵⁷⁷ See Section III.C.5, *supra*.

⁵⁷⁸ The Commission is proposing to establish a separate process whereby foreign security-based swap dealers may request that the Commission make a substituted compliance determination with respect to a particular foreign jurisdiction. See Section XI, *infra*.

⁵⁷⁹ The Commission's Registration Proposing Release does not use the term "foreign security-based swap dealer," but rather references a "nonresident security-based swap dealer." Proposed Rule 15Fb2-4(a) under the Exchange Act defines the term "nonresident security-based swap dealer" as a security-based swap dealer that is incorporated or organized any place that is not in the United States or that has its principal place of business in any place not in the United States. See Registration Proposing Release, 76 FR at 65799-801.

The definition of "nonresident security-based swap dealer" in proposed Rule 15Fb2-4(a) is similar to, but potentially broader than, the definition of "foreign security-based swap dealer" in proposed Rule 3a71-3(a)(3) under the Exchange Act because it uses "or" instead of "and" in the definition. As a result, proposed Rule 15Fb2-4(a) would treat a U.S. corporation as a nonresident person if its principal place of business were outside the United States, whereas proposed Rule 3a71-3(a)(3) would not treat such an entity as a U.S. security-based swap dealer and, therefore, it would not be able to avail itself of substituted compliance determinations applicable to foreign security-based swap dealers.

The Commission preliminarily believes that defining the term "foreign security-based swap dealer" more narrowly for purposes of the proposals in this release is appropriate because proposed Rule 15Fb2-4(a) uses the term "nonresident security-based swap dealer" only for determining whether a nonresident security-based dealer would be

As part of its application, the foreign security-based swap dealer would already be providing the Commission with detailed information in support of its application. The intent of a foreign security-based swap dealer to avail itself of a previously granted substituted compliance determination would be relevant to the Commission's review of such application because it would impact how the Commission will conduct oversight of the security-based swap dealer. In addition, if a security-based swap dealer determines, after it registered with the Commission, that it intends to rely on a substituted compliance determination, proposed Rule 15Fb2-3 would require that it promptly update its application.⁵⁸⁰

Accordingly, the Commission preliminarily believes it is appropriate to require foreign security-based swap dealers to provide additional information in their applications for registration as security-based swap dealers, as described below.

The Commission previously proposed Form SBSE, Form SBSE-A, and Form SBSE-BD for the purpose of registering security-based swap dealers and major security-based swap participants.⁵⁸¹ All of these forms are generally based on Form BD, which is the consolidated

required to appoint an agent for service of process in the United States and provide assurance that the Commission would have prompt access to books and records in the foreign jurisdiction. In proposed Rule 3a71-3(a)(3), by contrast, the definition of "foreign security-based swap dealer" would be used to determine who would be eligible to take advantage of the proposed substituted compliance framework, as well as how customer protection and segregation requirements would be applied. The Commission does not believe that it is appropriate to treat an entity as a foreign security-based swap dealer for these purposes if its principal place of business were outside the United States but it were incorporated in the United States, because of its connection to the U.S. security-based swap market. Nonetheless, the Commission would still want the assurances required of a "nonresident security-based swap dealer" described above, even if the dealer is incorporated in the United States but has a principal place of business outside the United States.

⁵⁸⁰ See Registration Proposing Release, 76 FR at 65822.

⁵⁸¹ See *id.* at 65784.

form used by broker-dealers to register with the Commission, states, and SROs.⁵⁸² Forms SBSE-A and SBSE-BD are shorter forms that have been modified to provide a more streamlined application process for entities that are registered or registering with the CFTC or registered or registering with the Commission as a broker-dealer.⁵⁸³ Each of these forms is designed to be used to gather information concerning a registrant's business operations to facilitate the Commission's initial registration decisions, as well as ongoing examination and monitoring of registration."⁵⁸⁴ While the Commission received four comments on the Registration Proposing Release, only one specifically expressed views on the Forms SBSE, SBSE-A, and SBSE-BD.⁵⁸⁵

2. Discussion

To address the Commission's proposed rule regarding substituted compliance, the Commission is re-proposing Forms SBSE, SBSE-A, and SBSE-BD to add two questions to Form SBSE and Form SBSE-A, add one question to all three Forms, and to modify Schedule F to all the Forms. In addition, we are proposing one new instruction to the Forms, which is unrelated to substituted compliance, to clarify that if an application is not filed properly or completely, it

⁵⁸² See *id.* at 65802.

⁵⁸³ See *id.* at 65804-5.

⁵⁸⁴ See *id.* at 65802.

⁵⁸⁵ See SIFMA Letter II. SIFMA indicated that it appreciated "the Commission's attempts to minimize registration burdens by aligning its proposed registration requirements for SBSDs and MSBSPs with those the CFTC is proposing for swap dealers and major swap participants as well as by creating a streamlined registration process for entities already registered with the Commission or the CFTC," and was "generally pleased that the Commission elected to make its existing broker-dealer registration forms the basis for its proposed registration requirements for SBSDs and MSBSPs" because "[m]arket participants are familiar with these requirements and may, in some cases, be registering broker-dealers as SBSDs." However, SIFMA did object to "several of the required disclosures on proposed Form SBSE," which are substantially similar to disclosures required on Form BD, which it claimed would "impose significant burdens on registrants."

may be delayed or rejected.⁵⁸⁶ Key differences from the originally proposed forms are discussed more fully below. The Commission is not proposing to modify or eliminate any of the other Forms, or any of the rules, proposed in the Registration Proposing Release.

Re-proposed Forms SBSE and SBSE-A would include two new questions, question 3 (which has three parts) and question 6.⁵⁸⁷ The new question 3.A. would ask whether an applicant is a foreign security-based swap dealer that intends to work with the Commission and its primary regulator to have the Commission determine whether the requirements of its primary regulator's regulatory system are comparable to the Commission's, or avail itself of a substituted compliance determination previously granted by the Commission with respect to the requirements of Section 15F of the Exchange Act and the rules and regulations thereunder. If the applicant responds in the affirmative to either part of the question, new question 3.B. would require that the applicant identify the foreign financial regulatory authority that serves as the applicant's primary regulator and for which the Commission has made, or may make, a substituted compliance determination. If the applicant indicates that it is relying on a previously granted substituted compliance determination, new question 3.C. would require the applicant to describe how it satisfies any conditions the Commission may have placed on the use of such substituted compliance determination. New question 3 would elicit basic information from an

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See Instruction B.1.b. on Forms SBSE, SBSE-A, and SBSE-BD.

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The Commission is not proposing to add these questions to the Form SBSE-BD, because that form is only applicable to entities that are already registered as broker-dealers. These firms would not be eligible to rely on a substituted compliance determination because the substituted compliance determination only is with respect to the requirements in Section 15F of the Exchange Act, not the requirements in the Exchange Act to which registered broker-dealers are subject.

applicant to inform the Commission with respect to its intent to rely upon a substituted compliance determination.

New question 6 would ask whether the applicant is a U.S. branch of a non-resident entity. If the applicant responds in the affirmative, the applicant would need to identify the non-resident entity and its location. This question would provide the Commission with information regarding whether the firm would be subject to the rules of the foreign regulator or the rules of one of the U.S. banking regulators, which would, in turn, elicit which rules may be applicable to the entity's U.S. security-based swap business.

Re-proposed Forms SBSE and SBSE-A would also include new question 17, which would be identified as new question 15 in re-proposed Form SBSE-BD. This new question would ask if the applicant is registered with or subject to the jurisdiction of a foreign financial regulatory authority. If the applicant answered this question in the affirmative, it would be directed to provide additional information on Schedule F as discussed below. This question would apply to all applicants, not just foreign security-based swap applicants, and would provide the Commission with information regarding other regulatory schemes that may be applicable to an applicant.

The proposed revisions to Schedule F would divide Schedule F into two sections. Section I would include the full text of the originally proposed Schedule F. Section II would elicit additional information regarding foreign regulators with which the applicant may be registered or that otherwise have jurisdiction over the applicant.

The Commission preliminarily believes that modifying Forms SBSE, SBSE-A, and SBSE-BD (including the changes to Schedule F), as described above, would be appropriate because it would provide foreign security-based swap dealers with a convenient and cost-

effective way of informing the Commission of their intention to rely on or seek a substituted compliance determination, as discussed above. In addition, we believe these modifications to our original proposal would provide the Commission with additional information necessary to make a determination as to whether it is appropriate to grant or institute proceedings to deny registration to a person applying to become a non-resident security-based swap dealer.

Request for Comment

The Commission requests comment on all aspects of the proposed modifications and additions to proposed Forms SBSE, SBSE-A and SBSE-BD (including the proposed changes to Schedule F). The Commission also specifically requests comment on the following:

- Please explain whether Form SBSE and Form SBSE-A are the appropriate places to identify whether an entity is intending to rely on a substituted compliance determination. If not, please explain why and what other method of notifying the Commission might be appropriate as well as when such notification to the Commission should be required to be made.
- Please explain whether Forms SBSE, SBSE-A, and SBSE-BD (and Schedule F) are the appropriate places to identify whether an entity is subject to oversight by a foreign regulator, and if so, which regulators. If so, why? If not, why not?
- Should any additional questions be added to Form SBSE to elicit information related to a registrant's reliance on a substituted compliance determination?
- Should any additional questions be added to Form SBSE-A to elicit information related to a registrant's reliance on a substituted compliance determination?

- Should Form SBSE-BD also be modified to include any of the additional questions the Commission is proposing to include in re-proposed Form SBSE or Form SBSE-A? If so, which questions and why?
- The Commission previously indicated in the Intermediary Definitions Adopting Release that it would consider applications for limited purpose designations from the major security-based swap participant and security-based swap dealer definitions under Rules 3a67-1(b) and 3a71-1(c) under the Exchange Act, respectively,⁵⁸⁸ and requested comment on this topic in the Registration Proposing Release.⁵⁸⁹ Since that

⁵⁸⁸ As we noted in the Intermediary Definitions Adopting Release, 77 FR at 30643-46 and 30696-97, the Commission will consider limited designation applications on an individual basis through analysis of the unique circumstances of each applicant, given that the types of entities that engage in security-based swap transactions are diverse and their organization and activities are varied. Any particular limited designation application will be analyzed in light of the unique circumstances presented by the applicant, and must demonstrate full compliance with the requirements that apply to the type, class, or category of security-based swap, or the activities involving security-based swaps, that fall within the security-based swap dealer or major security-based swap participant designation. A key challenge that any applicant for a limited purpose designation will face is the need to demonstrate that the applicant can comply with the statutory and regulatory requirements applicable to security-based swap dealers or major security-based swap participants while subject to a limited designation. Regardless of the type of limited designation being requested, the Commission will not designate a person as a security-based swap dealer or major security-based swap participant in a limited capacity unless it can demonstrate that it can fully comply with the applicable requirements.

⁵⁸⁹ See Registration Proposing Release, 76 FR at 65795. The Commission received one comment on this topic, from SIFMA (see note 585, *supra*). SIFMA indicated that it “SIFMA strongly believes that the Commission should allow for limited SBSD or MSBSP registration along a number of dimensions.” For instance, SIFMA suggested that the Commission allow entities to separately register individual trading desks, allow an entity to register as an SBSD in one class or type of security-based swap but not another (e.g., “an entity that acts as a dealer in single-name credit default swaps but not total return swaps on single securities should be able to register as an SBSD in the former but not the latter”), and “allow entities to register as an SBSD or MSBSP for their activities with U.S. persons, keeping activities with non-U.S. persons outside the scope of registration and related regulation.”

time, we have adopted and proposed, both jointly with the CFTC and individually, various rules that further clarify the regulations that will be applicable to security-based swap dealers,⁵⁹⁰ and today we propose a substituted compliance framework to potentially address the concerns of foreign security-based swap dealers. Given these developments, are there any situations addressed by previous comments where limited registration designation would no longer be appropriate? Are there any situations, addressed by previous comments or otherwise, where a limited registration designation may be appropriate for security-based swap dealers? If so, in what situations would a limited registration designation be warranted, and how should the registration forms be amended to facilitate such limited registration? If not, why not?

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See, e.g., the Product Definitions Adopting Release, 77 FR 48208, and the Capital, Margin, and Segregation Proposing Release, 77 FR 70214.

from the major security-based swap participant definition, suggesting that as a matter of comity, swap transactions involving foreign central banks as a counterparty,⁵⁹⁸ international financial institutions, and/or foreign SWFs should be excluded from the major participant definitions.⁵⁹⁹

Certain entities managed or controlled by foreign governments also have asked for exemptions or exclusions from Commission registration or the Dodd-Frank Act's substantive requirements. For example, SWFs commented that they believe SWFs should be excluded from the definition of major security-based swap participant and thus the related regulatory obligations.⁶⁰⁰ These entities argued that the Commission should not subject SWFs to registration requirements based on principles of international comity and cooperation and noted that SWFs are typically subject to comparable home country supervision that would render SEC regulation largely duplicative. They also argued that excluding SWFs from the major security-

appropriately the province of the supervisory authorities in the relevant non-U.S. jurisdiction and should, therefore, be excluded from calculations of substantial swap positions"); Milbank Tweed Letter at 3 ("Clearly, the thresholds should not be applied to a non-U.S. participant's transactions with all of its counterparties. Equally, all transactions with U.S. counterparties can reasonably be included. To take account of transactions with non-U.S. counterparties that might meet the 'direct and significant connection' standard, we suggest the Commissions consider including only those transactions by a potential non-U.S. major swap participant that are with non-U.S. registered swap dealers or non-U.S. registered major swap participants.").

⁵⁹⁸ For this purpose, we consider the Bank for International Settlements, in which the Federal Reserve and foreign central banks are members, to be a foreign central bank. See <http://www.bis.org/about/orggov.htm>.

⁵⁹⁹ See, e.g., Norges Bank Letter at 4-5 (recommending exemptions for foreign governments and their agencies); KfW letter at 8 (FPSFIs); World Bank Group Letter II at 1-2 (multilateral development institutions); China Investment Letter at 2 (SWFs); and GIC Letter at 2, 5-6 (SWFs).

⁶⁰⁰ See China Investment Letter at 2-4 (further explaining that exempting SWFs from the definition of MSBSP would not result in reduced transparency, given that the SWF would still have to comply with a number of other Dodd-Frank Act requirements) and GIC Letter at 2, 5-6.

based swap participant definition would not increase systemic risks given that SWFs make long-term investments across diverse asset classes, use swaps or security-based swaps to hedge portfolio risks rather than generate returns, and are more likely to ensure that risk management measures are in place because of SWFs' heightened concerns regarding reputational risk.⁶⁰¹

Another entity, which operates with an explicit government guarantee of its swap and security-based swap obligations, argued that it should be excluded from the major participant definition due to its lack of risk to the market resulting from this government support.⁶⁰²

C. Proposed Approach

In light of the comments received on the application of the major security-based swap participant definition in the cross-border context and the principles discussed above,⁶⁰³ the Commission is proposing a rule and interpretive guidance regarding the application of the major security-based swap participant definition to cross-border activities.

1. In General

The Commission is proposing a rule under which a U.S. person would consider all security-based swap transactions entered into by it, while a non-U.S. person would consider only transactions entered into with U.S. persons,⁶⁰⁴ when determining whether the person falls within the major security-based swap participant definition.⁶⁰⁵ Under this proposed approach, a non-U.S. person would calculate its security-based swap positions under the three prongs of the major

⁶⁰¹ See China Investment Letter at 3-4 and GIC Letter at 3.

⁶⁰² See KfW Letter at 8.

⁶⁰³ See Section II.C, supra.

⁶⁰⁴ Proposed Rule 3a67-10(a)(2) under the Exchange Act (defining the term "U.S. person" by cross-reference to the definition of U.S. person in proposed Rule 3a71-3(a)(7) under the Exchange Act, as discussed in Section III.B.5, supra).

⁶⁰⁵ Proposed Rule 3a67-10(c) under the Exchange Act.

security-based swap participant definition⁶⁰⁶ based solely on its transactions with U.S. persons (including foreign branches of U.S. banks). All security-based swap transactions by a non-U.S. person with other non-U.S. person counterparties, regardless of whether they are conducted within the United States or whether the non-U.S. person counterparties are guaranteed by a U.S. person, would be excluded from the major security-based swap participant analysis.

The proposed rule would use the same definition of “U.S. person” as proposed in the context of foreign security-based swap dealer registration.⁶⁰⁷ As previously discussed, this definition generally follows a territorial approach to defining U.S. person.⁶⁰⁸ The proposed approach to the U.S. person definition is intended to identify individuals or legal persons that, by virtue of their location within the United States or their legal or other relationship with the United States, are likely to impact the U.S. financial market and the U.S. financial system.⁶⁰⁹ Therefore, we preliminarily believe that requiring a non-U.S. person to take into account its security-based swap positions with U.S. persons, as proposed to be defined, for purposes of the major security-based swap participant definition would provide an appropriate indication of the degree of default risk posed by such non-U.S. person’s security-based swap positions to the U.S. financial system, which we view as the focus of the major security-based swap participant definition.⁶¹⁰ Consistent with the rules further defining the definition of major security-based

⁶⁰⁶ See Rule 3a67-1 under the Exchange Act, 17 CFR § 240.3a67-1; see also note 593, *supra*.

⁶⁰⁷ Proposed Rule 3a67-10(a)(2) under the Exchange Act; see also proposed Rule 3a71-3(a)(7) under the Exchange Act, as discussed in Section III.B.5, *supra*.

⁶⁰⁸ See Section III.B.5, *supra*, (discussing the definition of “U.S. person”).

⁶⁰⁹ *Id.*

⁶¹⁰ See Section 3(a)(67) of Exchange Act, 15 U.S.C. 78c(a)(67). In particular, one of the thresholds of the statutory definition of major security-based swap participant focuses on the serious adverse effects on the financial stability of the U.S. banking system or

swap participant adopted in the Intermediary Definitions Adopting Release, such risk to the U.S. financial system would be measured by calculating such non-U.S. person's aggregate outward exposures⁶¹¹ to U.S. persons (that is, what such non-U.S. person owes, or potentially could owe, on its security-based swaps with U.S. persons).⁶¹² If such non-U.S. person's aggregate outward exposures to U.S. persons exceed one of the thresholds set forth in the rules further defining "major security-based swap participant,"⁶¹³ the non-U.S. person would be required to register as a major security-based swap participant.

financial markets as a result of substantial counterparty exposure created by a person's security-based swap positions. See Section 3(a)(67)(A)(ii)(II) of the Exchange Act, 15 U.S.C. 78c(a)(67)(A)(ii)(II). In addition, Section 3(a)(67)(B) of the Exchange Act requires the Commission to define the term "substantial position" in Sections 3(a)(67)(A)(ii)(I) and (III) of the Exchange Act at the threshold that the Commission determines to be prudent for the effective monitoring, management, and oversight of entities that are systemically important or can significantly impact the financial system of the United States. See Section 3(a)(67)(B) of the Exchange Act, 15 U.S.C. 78c(a)(67)(B).

⁶¹¹ See Intermediary Definitions Adopting Release, 77 FR at 30666-71; Rules 3a67-3(b) and (c) under the Exchange Act, 17 CFR § 240.3a67-3(b) and (c).

⁶¹² The determination of whether a security-based swap transaction must be included in a non-U.S. person's major security-based swap participant calculation is based on the U.S. person status of the non-U.S. person's counterparty to such transaction, regardless of whether the counterparty is a security-based swap dealer, end user, CCP, or other market participant. For example, where a non-U.S. person enters into a security-based swap transaction with a security-based swap dealer, and that transaction is submitted for clearing and novated from the dealer to a CCP, the non-U.S. person would look to the U.S. person status of the CCP that became its counterparty as a result of such novation when determining whether the transaction must be included in such non-U.S. person's major security-based swap participant calculation.

⁶¹³ See Rule 3a67-3 and Rule 3a67-5 under the Exchange Act, 17 CFR §§ 240.3a67-3 and 17 CFR § 240.3a67-5 (defining "substantial position" and "substantial counterparty exposure").

Given the focus of the major security-based swap participant definition on the degree of risk to the U.S. financial system,⁶¹⁴ the Commission preliminarily believes that the location in which security-based swap transactions are conducted is not relevant to the calculation of a person's security-based swap positions for purposes of determining such person's status as a major security-based swap participant. Such an approach would differ from the approach we are proposing with respect to the security-based swap dealer definition, where we would count transactions connected with security-based swap dealing activity conducted within the United States toward a potential security-based swap dealer's de minimis threshold even if the transactions were with non-U.S. persons.⁶¹⁵ This difference in approach is driven by the different focuses of the statutory definitions of the terms security-based swap dealer and major security-based swap participant. While the statutory major security-based swap participant definition is focused specifically on risk,⁶¹⁶ the statutory security-based swap dealer definition is focused on, in addition to risk, the nature of the activities undertaken by an entity, its interactions with counterparties, and its role within the security-based swap market.⁶¹⁷ These different statutory emphases lead us to treat major security-based swap participants differently from security-based swap dealers with respect to whether activities conducted within the United States should be counted toward their respective thresholds.

⁶¹⁴ See note 610, supra.

⁶¹⁵ See Section III.B.6, supra.

⁶¹⁶ See note 610, supra.

⁶¹⁷ See note 177 and accompanying text, supra.

In addition, as stated above, the U.S. person definition applies to the entire entity, including its branches and offices that may be located in a foreign jurisdiction.⁶¹⁸ Therefore, under the proposed approach, a non-U.S. person would need to include its security-based swap transactions with foreign branches of U.S. banks when calculating its security-based swap positions for purposes of the major security-based swap participant definition.

Some commenters on the CFTC Cross-Border Proposal have suggested that a non-U.S. person should be allowed to exclude swap transactions with foreign branches of U.S. banks for purposes of determining whether it is a major swap participant because otherwise non-U.S. persons would have a strong incentive to limit or even stop trading with U.S. banks that operate outside the United States via foreign branches.⁶¹⁹ We are mindful of these concerns. However, because foreign branches are not separate legal persons,⁶²⁰ the Commission believes that the potential losses that a U.S. bank would suffer due to a non-U.S. person counterparty's default, and the potential impact on the U.S. banking system and the U.S. financial system generally, would not differ depending on whether the non-U.S. person counterparty entered into the security-based swap with the home office of the U.S. bank or with a foreign branch of the U.S. bank. Therefore, the Commission preliminarily believes that it is appropriate to require a non-U.S. person to include its security-based swap transactions with foreign branches of U.S. banks for purposes of determining its major security-based swap participant status.

By contrast, the Commission preliminarily believes that a non-U.S. person (the "potential non-U.S. person major security-based swap participant") does not need to include its security-

⁶¹⁸ See Section III.B.5, *supra*.

⁶¹⁹ See, e.g., Citigroup Letter at 3.

⁶²⁰ See Section III.B.5, *supra*.

based swap transactions with non-U.S. person counterparties in determining whether it is a major security-based swap participant. As stated above, the focus of the major security-based swap participant definition is on the degree of risk posed by a person's security-based swap positions to the U.S. financial system.⁶²¹ In the case of transactions with non-U.S. person counterparties, the risk that a potential non-U.S. person major security-based swap participant will not pay what it owes (or potentially could owe) under its security-based swaps to its non-U.S. counterparties is not transmitted directly and fully to the U.S. financial system in the way that such risk would be transmitted if the potential non-U.S. person major security-based swap participant engaged in security-based swap transactions with U.S. person counterparties. Instead, the non-U.S. person counterparties bear the direct and full risk of loss.⁶²² We recognize that there may be indirect spillover effects related to the security-based swap positions arising from the activity conducted by a potential non-U.S. person major security-based swap participant and a non-U.S. person counterparty (e.g., a U.S. person that has an ownership interest in such a non-U.S. person counterparty would potentially face losses on the value of its investment in such a non-U.S. person counterparty due to failure of the potential non-U.S. person major security-based swap participant), but the Commission preliminarily believes that the major security-based swap participant tests do not need to address the potential indirect spillover risk to the U.S. financial

⁶²¹ See note 610, *supra*.

⁶²² This is the case even if the non-U.S. person counterparties' obligations under the security-based swaps with the potential non-U.S. person major security-based swap participant are guaranteed by a U.S. person. As discussed in more detail below, the Commission proposes to address the risk posed by a non-U.S. person's security-based swap positions guaranteed by a U.S. person to the U.S. financial system through its treatment of guarantees for purposes of the major security-based swap participant definition. See Section IV.C.2(a), *infra*

system from foreign investments by U.S. persons in non-U.S. persons, or other non-security-based swap activities by U.S. persons with non-U.S. persons.⁶²³

The Commission recognizes that this proposed approach results in different treatment of U.S. and non-U.S. persons under the major security-based swap participant definition (i.e., a non-U.S. person would consider its security-based swap transactions with only U.S. persons, while a U.S. person would consider all of its security-based swap transactions). However, the Commission preliminarily believes that this approach is appropriate in light of the focus in the major security-based swap participant definition on the U.S. financial system. More specifically, the need for separate analysis of U.S. and non-U.S. entities results from the fact that all of a U.S. person's security-based swap transactions are part of and create risk to the U.S. financial system, regardless of whether such entity's counterparties are U.S. persons or non-U.S. persons. The same is not true of non-U.S. persons, however, because the security-based swap transactions entered into by a non-U.S. person with other non-U.S. persons are not fundamentally part of the U.S. financial system, while such non-U.S. person's security-based swap transactions with U.S. persons would directly impact the U.S. financial system. Thus, we preliminarily believe that the statutory major security-based swap participant definition's focus on the U.S. financial system, justifies treating U.S. and non-U.S. persons differently for purposes of the major participant analysis based on the disparate impacts of their security-based swap transactions on the U.S. financial system.

We recognize that a non-U.S. person's transactions with other non-U.S. person counterparties could still have an impact on the U.S. financial system, including where those

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The Commission preliminarily believes that such risk is more appropriately addressed under Titles I and II of the Dodd-Frank Act.

transactions threatened the financial integrity of a non-U.S. person counterparty and such person had significant security-based swap positions with U.S. persons. However, the amount of risk the non-U.S. person poses to the U.S. financial system would most directly stem from the size of its direct positions with U.S. persons. As a result, the Commission preliminarily believes it is appropriate to limit the international application of the major security-based swap participant definition to a non-U.S. person's security-based swaps entered into with U.S. persons.

2. Guarantees

The application of the major security-based swap participant definition to security-based swap positions guaranteed by a parent, other affiliate, or guarantor raises unique issues in the cross-border context. These issues were not addressed in the Intermediary Definitions Adopting Release.⁶²⁴

As a general principle, the Commission and the CFTC did note in the Intermediary Definitions Adopting Release that an entity's security-based swap positions are attributed to a parent, other affiliate, or guarantor for purposes of the major participant analysis to the extent that the counterparties to those positions have recourse to that parent, other affiliate, or guarantor in connection with the position.⁶²⁵ Positions are not attributed in the absence of recourse.⁶²⁶ The

⁶²⁴ In the Intermediary Definitions Adopting Release, the Commissions stated they intended to address guarantees provided to non-U.S. entities, and guarantees by non-U.S. holding companies, in separate releases. See Intermediary Definitions Adopting Release, 77 FR at 30689 n.1134. In this release, we are not altering the interpretive approach with respect to the attribution of guarantees that was adopted by the Commissions in the Intermediary Definitions Adopting Release, but rather we are proposing an interpretive approach that would apply the principles adopted in the Intermediary Definitions Adopting Release in the cross-border context.

⁶²⁵ See Intermediary Definitions Adopting Release, 77 FR at 30689, and the accompanying note 1132 on that page.

Commission and the CFTC further stated that attribution of these positions for purposes of the major participant definitions is intended to reflect the risk focus of the major participant definitions by providing that entities will be regulated as major participants when they pose a high level of risk in connection with the swap and security-based swap positions they guarantee.

The application of these general principles in the cross-border context is discussed below, including the attribution of guaranteed security-based swap positions to U.S. persons and non-U.S. persons, respectively, when they provide guarantees on performance of the security-based swap obligations of other persons, the limited circumstances where attribution of guaranteed security-based swap positions is not required, and operational compliance.

(a) Guarantees Provided by U.S. Persons to Non-U.S. Persons

One cross-border issue that arises from the general approach to guarantees set forth in the Intermediary Definitions Adopting Release is how the attribution of guarantees for purposes of the major security-based swap participant definition would apply to a guarantee provided by a U.S. person for performance on the obligations of a non-U.S. person, such as a U.S. holding company providing a guarantee on the obligations of a foreign subsidiary. As noted in the Intermediary Definitions Adopting Release, the attribution of guaranteed positions for purposes of the major participant definitions is intended to reflect the risk that a guarantor might pose to, and the systemic impact of such risk may impose on, the U.S. financial system as a result of the guarantees that it provides.⁶²⁷ The Commission preliminarily believes that these risk concerns

⁶²⁶ See *id.* As indicated in note 160 above, the term “guarantee” as used in this release refers to a contractual agreement pursuant to which one party to a security-based swap transaction has recourse to its counterparty’s parent, other affiliate, or guarantor with respect to the counterparty’s obligations owed under the transaction.

⁶²⁷ See *id.*

are the same when U.S. persons act as guarantors for foreign persons regardless of whether the underlying security-based swap transactions that they guarantee are entered into with U.S. persons or non-U.S. persons, given that the risk borne by the U.S. person guarantor would not be impacted by the status of the guaranteed non-U.S. person's counterparty as either a U.S. person or non-U.S. person. As a result, the Commission is proposing that, other than in the limited circumstances described below,⁶²⁸ all security-based swaps entered into by a non-U.S. person and guaranteed by a U.S. person be attributed to such U.S. person guarantor for purposes of determining such U.S. person guarantor's major security-based swap participant status, regardless of whether the underlying transaction was entered into with a U.S. person counterparty or non-U.S. person counterparty.⁶²⁹

(b) Guarantees Provided by Non-U.S. Persons to U.S. Persons and Guarantees
Provided by Non-U.S. Persons to Non-U.S. Persons

Another cross-border issue related to the Commission's approach to the attribution of guarantees is how guarantees provided by non-U.S. persons are treated for purposes of the major

⁶²⁸ See Section IV.C.2(c), *infra* (discussing the limited circumstances where attribution of guaranteed security-based swap positions to the guarantor would not apply).

⁶²⁹ In all circumstances where a U.S. person guarantor is required to attribute to itself all security-based swap transactions entered into by the guaranteed non-U.S. person, the guaranteed non-U.S. person would still be required to consider those security-based swap transactions that it enters into with U.S. person counterparties for purposes of determining whether it is a major security-based swap participant pursuant to the proposed Rule 3a67-10(c)(2) under the Exchange Act. See Section IV.C.1, *supra* (discussing proposed Rule 3a67-10(c) under the Exchange Act). Once the guaranteed non-U.S. person becomes a major security-based swap participant and registers with the Commission, the U.S. guarantor would no longer be required to attribute to itself the security-based swap positions entered into by the guaranteed non-U.S. person. See Intermediary Definitions Adopting Release, 77 FR at 30689. This same result would also occur where a guaranteed non-U.S. person becomes subject to capital regulation by the Commission or the CFTC (e.g., a registered major swap participant, swap dealer, security-based swap dealer, futures commission merchant, or broker-dealer). See *id.*

security-based swap participant definition. As previously noted, the statutory major security-based swap participant definition's focus on the accumulation of security-based swap risk by non-U.S. persons is primarily centered on the impact such risk could have on the U.S. financial system.⁶³⁰ Where a non-U.S. person provides a guarantee on performance of the security-based swap obligations of a U.S. person (e.g., a non-U.S. holding company providing a guarantee on performance of the obligations owed by its U.S. subsidiary under security-based swaps entered into by the U.S. subsidiary), the counterparties of such U.S. person would be taking the credit risk of the non-U.S. person guarantor as well as the U.S. person. If the non-U.S. person guarantor defaults, the full amount of risk accumulated under the guaranteed U.S. person's security-based swap positions would impact the U.S. financial system. As a result, subject to the limited circumstances described in the Intermediary Definitions Adopting Release,⁶³¹ a non-U.S. person providing a guarantee on performance of the security-based swap obligations of a U.S. person would attribute to itself all of the U.S. person's security-based swap positions that are guaranteed by the non-U.S. person guarantor for purposes of determining the non-U.S. person guarantor's major security-based swap participant status.⁶³²

By contrast, where a non-U.S. person provides a guarantee on performance of the security-based swap obligations of another non-U.S. person (e.g., a non-U.S. holding company providing a guarantee on performance of the obligations owed by its non-U.S. subsidiary under security-based swaps entered into by the non-U.S. subsidiary), the ultimate counterparty credit

⁶³⁰ See note 610, supra.

⁶³¹ See Intermediary Definitions Adopting Release, 77 FR at 30730 (discussing the limited circumstances where attribution of guaranteed security-based swap positions of a U.S. person to the guarantor would not apply).

⁶³² See note 629, supra.

risk associated with the transaction would generally reside outside of the United States with the non-U.S. guarantor. In this scenario, the potential impact on the U.S. financial system would be limited to transactions entered into by the guaranteed non-U.S. person with U.S. person counterparties. Therefore, the Commission preliminarily believes that, other than in the limited circumstances described below,⁶³³ where a non-U.S. person guarantees performance on the security-based swap transactions of another non-U.S. person, the non-U.S. guarantor need only attribute to itself such guaranteed security-based swap transactions entered into with U.S. person counterparties for purposes of determining its major security-based swap participant status.⁶³⁴

(c) Limited Circumstances Where Attribution of Guaranteed Security-Based Swap Positions Does Not Apply

In addition to setting forth general principles regarding the attribution of guaranteed swap or security-based swap positions to the guarantor for the major participant definitions, the Intermediary Definitions Adopting Release also provided interpretive guidance related to the limited circumstances under which attribution of guaranteed swap or security-based swap

⁶³³ See Section IV.C.2(c), *infra* (discussing the limited circumstances where attribution of guaranteed security-based swap positions of a non-U.S. person to the guarantor would not apply).

⁶³⁴ Where a non-U.S. person guarantor is required to attribute to itself the security-based swap positions entered into by a non-U.S. person that are guaranteed by the first non-U.S. person, the guaranteed non-U.S. person also would be required to consider all security-based swap transactions entered into by itself with U.S. person counterparties for purposes of determining its major security-based swap participant status in accordance with proposed Rule 3a67-10(c)(2) under the Exchange Act. See Section IV.C.1, *supra* (discussing proposed Rule 3a67-10(c) under the Exchange Act). Once the guaranteed non-U.S. person becomes a major security-based swap participant and registers with the Commission, the non-U.S. guarantor would no longer be required to attribute to itself the security-based swap positions entered into by the guaranteed non-U.S. person. See Intermediary Definitions Adopting Release, 77 FR at 30689.

positions is not required.⁶³⁵ Specifically, it stated that even in the presence of a guarantee, it is not necessary to attribute a person's swap or security-based swap positions to a parent or other guarantor if the person already is subject to capital regulation by the Commission or the CFTC (i.e., swap dealers, security-based swap dealers, major swap participants, major security-based swap participants, FCMs, and broker-dealers) or if the person is a U.S. entity regulated as a bank in the United States.⁶³⁶ In providing this interpretive guidance, the Commission and the CFTC explained that the positions of those regulated entities already will be subject to capital and other requirements, making it unnecessary to separately address, via major participant regulations, the risks associated with guarantees of those positions of a regulated entity.⁶³⁷

The Intermediary Definitions Adopting Release did not address the application of the interpretive guidance regarding attribution of guaranteed positions where a guarantee is provided to support a non-U.S. person's performance on the obligations under security-based swaps in the cross-border context. The Commission preliminarily believes that the interpretation jointly adopted by the Commission and the CFTC in the Intermediary Definitions Adopting Release regarding security-based swap positions of a person subject to capital regulation by the CFTC or the Commission should equally apply to a non-U.S. person whose security-based swap positions are guaranteed by another person. Therefore, the Commission is proposing to interpret that it is not necessary to attribute a non-U.S. person's security-based swap positions to a parent or other guarantor if such non-U.S. person already is subject to capital regulation by the Commission or

⁶³⁵ See Intermediary Definitions Adopting Release, 77 FR at 30689.

⁶³⁶ Id. This interpretive guidance applies to both U.S. persons and non-U.S. persons that are subject to registration and regulation in the enumerated categories.

⁶³⁷ See Intermediary Definitions Adopting Release, 77 FR at 30689.

the CFTC (i.e., swap dealers, security-based swap dealers, major swap participants, major security-based swap participants, FCMs and broker-dealers).

In addition, in the cross-border context and with respect to a non-U.S. person, if such non-U.S. person is not subject to capital regulation by the Commission or the CFTC, consistent with the rationale for the approach to attribution of security-based swap positions of a person that is a U.S. entity regulated as a bank in the United States, it would not be necessary to attribute such non-U.S. person's security-based swap positions to its guarantor if such non-U.S. person is subject to capital standards that are consistent with the capital standards such non-U.S. person would have been subject to if such non-U.S. person were a bank subject to the prudential regulators' capital regulation. Therefore, the Commission preliminarily believes that it is not necessary to attribute such non-U.S. person's security-based swap positions to its guarantor for purposes of determining the guarantor's major security-based swap participant status, if such non-U.S. person is subject to capital standards adopted by its home country supervisor that are consistent in all respects with the Capital Accord of the Basel Committee on Banking Supervision (the "Basel Accord").⁶³⁸ This proposed approach also is consistent with the capital standards proposed by the prudential regulators for a foreign bank that is a swap dealer, major swap participant, security-based swap dealer or major security-based swap participant, which require such foreign bank to comply with regulatory capital rules already made applicable to

⁶³⁸ This is consistent with the capital standards of the prudential regulators with respect to foreign banks that are bank holding companies subject to the Federal Reserve Board of Governors' supervision. See § 225.2(r)(3) of the Regulation Y ("For purposes of determining whether a foreign banking organization qualifies under paragraph (r)(1) of this section: (A) A foreign banking organization whose home country supervisor...has adopted capital standards consistent in all respects with the Capital Accord of the Basle Committee on Banking Supervision (Basle Accord) may calculate its capital ratios under the home country standard...."), 12 CFR §225.2(r)(3).

such foreign bank as part of the existing prudential regulatory regime.⁶³⁹ The Commission preliminarily believes that security-based swap positions of a non-U.S. person subject to foreign regulatory capital requirements consistent with the Basel Accord would be subject to risk-based capital requirements that take into account the unique risks (including the credit risk, market risk, and other risks) arising from security-based swap transactions, in such a way as to make it unnecessary to separately address, via major security-based swap participant regulation, the risks associated with guarantees of those security-based swap positions.

(d) Operational Compliance

Finally, the Commission believes that it is necessary to provide interpretive guidance regarding operational compliance and the special issues that may result from the attribution of security-based swap positions to a parent or guarantor. As the Commission and the CFTC noted in the Intermediary Definitions Adopting Release, these include issues regarding the application of the transaction-focused requirements applicable to registered major participants (e.g., certain requirements related to trading records and transaction confirmations), given that the entity that is the direct counterparty to the swap or security-based swap may be better positioned to comply with those requirements.⁶⁴⁰ In the Intermediary Definitions Adopting Release, the Commission and the CFTC stated that “an entity that becomes a major participant by virtue of swaps or security-based swaps directly entered into by others must be responsible for compliance with all

⁶³⁹ See Prudential Regulator Margin and Capital Proposal, 76 FR at 27582 (“The proposed rule generally requires a covered swap entity to comply with regulatory capital rules already made applicable to that covered swap entity as part of its prudential regulatory regime. . . . In the case of a foreign bank or the U.S. branch or agency of a foreign bank, the capital rules that are made applicable to such covered entity pursuant to § 225.2(r)(3) of the Board’s Regulation Y, 12 CFR § 225.2(r)(3)...”).

⁶⁴⁰ Intermediary Definitions Adopting Release, 77 FR at 30689.

applicable major participant requirements with respect to those swaps or security-based swaps (and must be liable for failures to comply), but may delegate operational compliance with transaction-focused requirements to entities that directly are party to the transactions. The entity that is the major participant, however, cannot delegate compliance duties with the entity-level requirements applicable to major participants (e.g., requirements related to registration and capital).⁶⁴¹

The Commission preliminarily believes that the same approach should apply in the cross-border context when the guarantor and the guaranteed person are located in different jurisdictions (e.g., U.S. holding companies that act as guarantors of the security-based swap obligations of their non-U.S. dealing subsidiaries). In each case, the major security-based swap participant may delegate compliance duties for transaction-focused requirements to the entities that are counterparties to the transactions, but the major security-based swap participant would remain responsible for ensuring that the Title VII requirements applicable to such transactions are fulfilled. However, major security-based swap participants must comply with all relevant entity-level requirements themselves that are not transaction-focused, such as registration and capital. Entity-level requirements that have a transaction focus, such as margin, may be delegated to the guaranteed entities that directly are party to the transactions. However, the major security-based swap participants would remain responsible for ensuring compliance with these requirements.

3. Foreign Public Sector Financial Institutions (FPSFIs)

The proposed approach to the cross-border application of the major security-based swap participant definition described above provides a general framework for applying the definition

⁶⁴¹ Id.

to non-U.S. persons. That framework does not separately address questions raised by commenters regarding how the major security-based swap participant definition applies to FPSFIs. Specifically, some commenters requested explicit exclusions from the major security-based swap participant definition for these types of entities.⁶⁴²

We note that FPSFIs encompass a wide range of institutions and organizations, ranging from divisions of foreign central banks, to international financial institutions established under treaties, to multilateral development banks formed, owned, and controlled by sovereign members, to sovereign wealth funds and other investment corporations owned by foreign governments. Some FPSFIs' obligations are guaranteed or backed by foreign governments; others may not be. The purposes and activities of these institutions and organizations vary. For example, some FPSFIs (such as the Bank for International Settlements) provide banking services to foreign central banks who are their members. Some FPSFIs provide credits and grants to promote economic development in developing countries (e.g., multilateral development banks) or distribute funds of regional recovery programs to promote regional economies (e.g., KfW for the European Recovery Program). Other FPSFIs conduct investment activities around the world and their exclusive customers are the foreign governments to which they are linked. Depending on their purposes and activities, FPSFIs may engage in different types of swaps or security-based swaps to various degrees, although the Commission is not aware of data reflecting the nature and amount of such transactions across the FPSFI population. One commenter stated that it enters

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See note 599, supra.

into swaps to manage interest rates and foreign exchange risks but does not use swaps to generate returns.⁶⁴³

Several commenters requested that FPSFIs be excluded from the major security-based swap participant definition. They provided various reasons and basis to support their requests. Some FPSFIs commented that they are subject to exceptionally high risk controls and have extremely strong capital bases and therefore pose no risk to systemic stability.⁶⁴⁴ Others argued that they already are subject to comparable or comprehensive substantive regulation of their respective governments in their home countries and therefore, subjecting them to the major security-based swap participant regulation would create regulatory duplication or conflicts.⁶⁴⁵ One FPSFI argued that it only conducts swap activities with dealers, which would be regulated under Title VII, and therefore it is not necessary to subject it to duplicative regulation and supervision.⁶⁴⁶ Another FPSFI, which operates with an explicit government guarantee of its swap and security-based swap obligations, argued that it should be excluded from the major participant definition due to its lack of risk to the market resulting from this government support.⁶⁴⁷ Intergovernmental organizations, such as multilateral development banks, argued that multilateral development institutions are never subject to national regulations and their privileges and immunities should be fully respected.⁶⁴⁸

⁶⁴³ See China Investment Letter at 3-4. Cf. World Bank Letter II states that “not all multilateral development banks use derivatives in their development operations, or do so only on a limited basis.” See World Bank Letter II at 1 n.1.

⁶⁴⁴ See BIS Letter II at 3 and World Bank Letter I at 7.

⁶⁴⁵ See GIC Letter at 3-4 and KfW Letter at 3 and 8.

⁶⁴⁶ See China Investment Letter at 3-4.

⁶⁴⁷ See KfW Letter at 8.

⁶⁴⁸ See World Bank Letter II at 2-3.

After considering the concerns of these commenters, we recognize that FPSFIs raise unique and complex issues because of the diversity of the special purposes they are serving, their differing governance structures and sources of financial strength, and their supranational, intergovernmental, or sovereign nature. The Commission also recognizes that we have received relatively little information from commenters regarding the types, levels, and natures of security-based swap activity that FPSFIs regularly engage in (although some information has been received regarding their swap transactions) and that, consequently, the Commission has comparatively little basis on which to understand their roles in the security-based swap markets and, as appropriate, exclude them from the major security-based swap participant definition. Therefore, we are not proposing to specifically address the treatment of FPSFIs at this time. Instead, we are soliciting comment to help determine the basis on which it may be appropriate to exclude FPSFIs from the proposed rule regarding application of the major security-based swap participant definition to non-U.S. persons. In particular, we invite public comment regarding the types, levels, and nature of the security-based swap activity that various types of FPSFIs may engage in on a regular basis, the roles of FPSFIs in the security-based swap market, the mitigating factors and reasons that FPSFIs may not pose systemic risk as a result of their security-based swap activity, and whether it would be more appropriate for the Commission to address FPSFI concerns on an individual basis. We also request considerations, information, and data regarding potential definitions of a FPSFI for purposes of the major security-based swap definition. Responses that are supported by empirical data and analysis are encouraged in assisting the Commission in considering whether excluding FPSFIs from the definition of the major security-based swap participant is warranted.

D. Title VII Requirements Applicable to Major Security-Based Swap Participants

1. Transaction-Level Requirements Related to Customer Protection

(a) Overview

As previously noted, the Dodd-Frank Act is generally concerned with the protection of the U.S. financial system and counterparties in the U.S. security-based swap market.⁶⁴⁹ This general principle is particularly relevant to the customer protection, including segregation, requirements in Title VII, which are focused on the protection of the counterparties or customers of security-based swap dealers. As a result, the Commission preliminarily believes that it is not necessary to the objective of Title VII to subject foreign major security-based swap participants to certain of the customer protection requirements in Title VII with respect to their transactions with non-U.S. persons. Accordingly, the Commission is proposing rules that would identify specific transaction-level requirements that would not apply to foreign major security-based swap participants with respect to their transactions with non-U.S. persons.

(b) Proposed Rules

The proposed rules would provide that foreign major security-based swap participants would not be subject, solely with respect to their transactions with non-U.S. persons, to certain of the transaction-level requirements that apply to major security-based swap participants.⁶⁵⁰ Specifically, under the proposed rules registered foreign major security-based swap participants would not have to comply with business conduct standards as described in Section 15F(h) of the Exchange Act, and the rules and regulations thereunder, other than the rules and regulations prescribed by the Commission relating to diligent supervision pursuant to Section

⁶⁴⁹ See note 4, *supra*.

⁶⁵⁰ Proposed Rule 3a67-10(b) and proposed Rule 18a-4(f) under the Exchange Act.

15F(h)(1)(B)⁶⁵¹ and the rules and regulations thereunder, with respect to their transactions with non-U.S. persons.⁶⁵² In addition, under the proposed rules, registered foreign major security-based swap participants that are not registered broker-dealers would not have to comply with requirements related to the segregation of assets held as collateral in Section 3E of the Exchange Act and the rules and regulations thereunder with respect to their transactions with non-U.S. persons.⁶⁵³

Our rationale for this proposed approach to the application of transaction-level requirements for foreign major security-based swap participants is substantially the same as that discussed previously in the context of foreign security-based swap dealers.⁶⁵⁴ This rationale includes our belief that applying these customer protections and segregation requirements to security-based swap transactions with non-U.S. persons outside the United States would not advance the objectives of Title VII to protect the U.S. financial system or U.S. counterparties.

⁶⁵¹ 15 U.S.C. 78o-10(h)(1)(B).

⁶⁵² See Section III.C.3(a)(i), *supra*. As discussed previously, Section 15F(h)(1)(B) requires security-based swap dealers to conform with such business conduct standards relating to diligent supervision as the Commission shall prescribe.

⁶⁵³ See proposed Rule 18a-4(f) under the Exchange Act.

⁶⁵⁴ See generally Section III.C.4(b), *supra*. In addition, all “nonresident major security-based swap participants,” as defined in proposed Rule 15Fb2-4(a) under the Exchange Act, would be required: (1) to appoint and identify to the Commission an agent in the United States (other than the Commission or a Commission member, official or employee) for service of process; (2) to certify that the firm can, as a matter of law, provide the Commission with prompt access to its books and records and can, as a matter of law, submit to onsite inspection and examination by the Commission; and (3) to provide the Commission with an opinion of counsel concurring that the firm can, as a matter of law, provide the Commission with prompt access to its books and records and can, as a matter of law, submit to onsite inspection and examination by the Commission. See proposed Rule 15Fb2-4(b) under the Exchange Act, as discussed in the Registration Proposing Release, 76 FR 65799-801.

At the same time, this approach would preserve customer protections for U.S. person counterparties who would expect to benefit from the protections afforded by Title VII.

2. Entity-Level Requirements

Entity-level requirements in Title VII primarily address concerns relating to the major security-based swap participant as a whole, with a particular focus on safety and soundness of the entity to reduce systemic risk in the U.S. financial system. The most significant entity-level requirements are capital and margin requirements. Because these requirements address the financial, operational, and business integrity of the entity engaged in security-based swap activity, the Commission preliminarily believes that a registered foreign major security-based swap participant should be required to adhere to these standards. As noted above, other requirements that the Commission believes should apply at the entity, rather than the transactional, level include, but are not limited to, risk management procedures, books and records requirements, conflicts of interest systems and procedures, and designation of a chief compliance officer.⁶⁵⁵ These entity-level requirements ensure the safety and soundness of the entire registrant and are thus distinguishable from the transaction-level requirements discussed above, which apply to transactions with individual counterparties and thus may be applied differently based on the U.S. person status of a counterparty.

3. Substituted Compliance

The Commission is not proposing, at this time, to establish a policy and procedural framework under which we would consider permitting compliance by a foreign major security-based swap participant with comparable regulatory requirements in a foreign jurisdiction to substitute for compliance with requirements of the Exchange Act, and the rules and regulations

⁶⁵⁵ See Section III.C.3(b), supra.

thereunder, applicable to major security-based swap participants, as it is proposing to do for foreign security-based swap dealers.⁶⁵⁶

Unlike foreign security-based swap dealers whose primary businesses are in securities, security-based swaps, swaps, banking and other financial and investment banking activities, the non-U.S. persons that may need to register as nonbank major security-based swap participants may engage in a diverse range of business activities different from, and broader than, the activities conducted by broker-dealers or security-based swap dealers (otherwise they may be required to register as a security-based swap dealer and/or broker-dealer) or the activities conducted by banks. For example, as stated in the Capital, Margin and Segregation Proposing Release, persons that may need to register as nonbank major security-based swap participants may engage in commercial activities that require them to have substantial fixed assets to support manufacturing and/or result in them having significant assets comprised of unsecured receivables.⁶⁵⁷ Therefore, it is not clear what types of entity-level regulatory oversight, if any, especially with respect to capital and margin, a foreign major security-based swap participant would be subject to in the foreign regulatory system.

Accordingly, in light of the limited information currently available to us regarding what types of foreign entities may become major security-base swap participants, if any, and the foreign regulation of such entities, we are not, at this time, proposing to extend the proposed policy and procedural framework for substituted compliance to foreign major-security-based swap participants. Nevertheless, we will continue to consider the appropriateness of permitting substituted compliance for major security-based swap participants in light of comments received

⁶⁵⁶ See Section XI.C, *infra*.

⁶⁵⁷ See Capital, Margin, and Segregation Proposing Release, 77 FR at 70315.

on this proposal and market developments more generally and will consider what further steps to take, if any, at adoption. In this regard, we request considerations, information, and data regarding potential foreign major security-based swap participants. Responses that are supported by empirical data and analysis are encouraged in assisting the Commission in considering whether permitting substituted compliance by foreign major security-based swap participants would be warranted.

Request for Comment

The proposed rules and interpretations regarding the application of the major security-based swap participant definition and transaction-level and entity-level requirements to registered major security-based swap participants discussed above represent the Commission's preliminary views. The Commission seeks comment on the proposed rules and interpretations in all aspects. Interested persons are encouraged to provide supporting data and analysis and, when appropriate, suggest modifications to proposed rule text and interpretations. Responses that are supported by data and analysis provide great assistance to the Commission in considering the practicality and effectiveness of the proposed application as well as considering the benefits and costs of proposed requirements. In addition, the Commission seeks comment on the following specific questions:

- Should the major security-based swap participant definition focus only on a non-U.S. person's security-based swap transactions entered into with U.S. persons, or should the major security-based swap participant definition incorporate some or all of a non-U.S. person's other security-based swap transactions? Which transactions? For example, should a non-U.S. person include security-based swap transactions with

non-U.S. person counterparties guaranteed by U.S. persons in such non-U.S. person's major security-based swap participant calculation? Why or why not?

- Should the proposed approach toward determining whether a non-U.S. person should count its security-based swap transactions that are cleared through CCPs be adopted? Why or why not? Should the Commission adopt a different approach to the treatment of security-based swap transactions cleared through CCPs for purposes of the cross-border application of the major security-based swap participant test? If so, how should cleared transactions be treated for purposes of the cross-border application of the major security-based swap participant test?
- Should a non-U.S. person be permitted to exclude its security-based swap transactions entered into with foreign branches of U.S. banks from the calculation for purposes of determining whether it is a major security-based swap participant? Why? If a non-U.S. person's security-based swaps with foreign branches of U.S. banks are not required to be considered in determining such non-U.S. person's major security-based swap participant status, how should the risk (in terms of outward exposures) that such non-U.S. person poses to U.S. banks be addressed?
- Should the Commission permit a non-U.S. person to exclude from its major security-based swap participant calculations its security-based swap positions arising from transactions with the foreign branches of U.S. banks if such non-U.S. person is subject to capital standards adopted by its home country supervisor that are consistent in all respect with the Basel Accord? Are there other conditions or standards the Commission should consider that a non-U.S. person may satisfy or comply with that should allow a non-U.S. person to exclude its security-based swap positions arising

from transactions with foreign branches of U.S. banks from its major security-based swap participant calculation?

- Are there competitiveness concerns related to the proposed different treatment of U.S. persons and non-U.S. persons for purposes of calculating their status under the major security-based swap participant definition? If so, what are these concerns, and how should they be addressed?
- Should the proposed approach towards the attribution of security-based swap positions guaranteed by U.S. persons and non-U.S. persons be altered? What justifications would support an alternate approach?
- Should the Commission adopt the proposed approach to the attribution of guaranteed security-based swap positions whereby the positions of guaranteed entities subject to capital standards adopted by its home country supervisor that are consistent in all respects with the Basel Accord would not need to be attributed? Is Basel Accord capital standard an appropriate standard for determining whether it is not necessary to attribute guaranteed security-based swap positions to a guarantor, or should another standard be used? Is this proposed standard clear, or is additional guidance necessary? In addition to the proposed capital standard, should the Commission's approach to the attribution of guaranteed security-based swap positions also include a requirement that the guaranteed entities be subject to effective capital oversight by its home country supervisor as determined by the Commission in order not to attribute the guaranteed security-based swap positions to the guarantor?
- Are there FPSFIs that would fall within the definition of major security-based swap participant based on the proposed rules and interpretive guidance? If so, should the

Commission provide relief to such FPSFIs? If so, what type of relief, what types of entities should be eligible for such relief, and what factors would justify such relief?

Would it be more appropriate for the Commission to address these concerns on an individual basis?

- Should the Commission adopt the proposed approach to the application of certain customer protection requirements and segregation requirements to foreign major security-based swap participants with respect to their transactions with non-U.S. persons? If so, are there other transaction-level requirements that should be included within this proposed approach?
- Should substituted compliance be provided to foreign major security-based swap participants with respect to entity-level requirements? Transaction-level requirements? If so, how should the Commission make such a determination? In particular, what standard should be used for determining whether existing regulation merits a substituted compliance determination?
- What would be the market impact of the proposed approach to major security-based swap participants? How would the application of the proposed approach affect the competitiveness of U.S. entities in the global marketplace (both in the United States as well as in foreign jurisdictions)? Would the proposed approach place any market participants at a competitive disadvantage or advantage? If so, please explain. Would the proposed approach be a more general burden on competition? If so, please explain. What other measures should the Commission consider to implement the proposed approach to major security-based swap participants? What would be the

market impacts and competitiveness effects of alternatives to the proposed approach
discussed in this release?

V. Security-Based Swap Clearing Agencies

A. Introduction

Title VII of the Dodd-Frank Act adds a number of provisions to the Exchange Act relating to the registration and regulation of clearing agencies that provide clearance and settlement services for security-based swaps.⁶⁵⁸ Such provisions augment the Commission's existing authority to register and regulate clearing agencies in Section 17A of the Exchange Act.⁶⁵⁹ In particular, Section 17A(g) of the Exchange Act, as added by Section 763(b) of the Dodd-Frank Act, requires clearing agencies that use interstate commerce to perform the functions of a clearing agency with respect to security-based swaps to register with the Commission.⁶⁶⁰ Section 17A(k) of the Exchange Act, as added by Section 763(b) of the Dodd-Frank Act, provides the Commission with authority to exempt a security-based swap clearing agency from registration if the Commission determines that the clearing agency is subject to comparable, comprehensive supervision and regulation by the CFTC or the appropriate government authorities in the home country of the clearing agency.⁶⁶¹ The Dodd-Frank Act also added provisions to Section 17A of the Exchange Act relating to voluntary clearing agency

⁶⁵⁸ See Section 763(b) of the Dodd-Frank Act.

⁶⁵⁹ See 15 U.S.C 78q-1 and 17 CFR § 240.17Ab2-1.

⁶⁶⁰ 15 U.S.C. 78q-1(g). Note that Section 929W of the Dodd-Frank Act added another subsection (g) to Section 17A of the Exchange Act. The subsection (g) added by Section 763(b) of the Dodd-Frank Act is the focus of the discussion in this section.

⁶⁶¹ 15 U.S.C. 78q-1(k). The exemptive authority contained in Section 17A(k) of the Exchange Act only pertains to clearing agencies that would be required to register under Section 17A of the Exchange Act for the clearing of security-based swaps. It does not alter the Commission's existing exemptive authority found in Section 17A(b)(1) and Section 36 of the Exchange Act.

registration and the establishment of clearing agency standards.⁶⁶² Finally, Section 17A(j) requires the Commission to adopt rules governing persons that are registered as clearing agencies for security-based swaps.⁶⁶³

Because of the global nature of the security-based swap market, the Commission recognizes that there may be some uncertainty regarding when a foreign security-based swap clearing agency⁶⁶⁴ that provides central counterparty (“CCP”) services⁶⁶⁵ for security-based swaps would be required to register with the Commission as a clearing agency. Accordingly, we are proposing interpretive guidance regarding the application of the registration requirement in Section 17A(g) of the Exchange Act for security-based swap clearing agencies that act as CCPs.⁶⁶⁶ We also address our exemptive authority under Section 17A(k) to exempt a foreign

⁶⁶² Section 17A(h) of the Exchange Act, as added by Section 763(b) of the Dodd-Frank Act, permits a person, in certain cases, to voluntarily register as a clearing agency with the Commission. 15 U.S.C. 78q-1(h). Section 17A(i) of the Exchange Act, as added by Section 763(b) of the Dodd-Frank Act, requires security-based swap clearing agencies to comply with standards established by the Commission. 15 U.S.C. 78q-1(i).

⁶⁶³ 15 U.S.C. 78q-1(j).

⁶⁶⁴ In using the terms “foreign” and “non-resident” in connection with a security-based swap clearing agency, the Commission means a security-based swap clearing agency that is not a U.S. person, as that term is defined in proposed Rule 3a71-3(a)(7) under the Exchange Act, as discussed in Section III.B.5, *supra*. In this regard, the Commission notes that legal persons that have their principal place of business in the United States would be considered “U.S. persons” under the proposed definition regardless of their place of incorporation or organization. *See* proposed Rule 3a71-3(a)(7)(i)(B) under the Exchange Act.

⁶⁶⁵ As discussed more fully below, generally speaking, a CCP is an entity that interposes itself between the counterparties to a securities transaction. *See* 17 CFR § 240.17Ad-22(a)(1).

⁶⁶⁶ In this section, the Commission is proposing interpretive guidance only regarding the registration requirement in Section 17A(g) of the Exchange Act as it applies to clearing agencies that provide CCP services. The Commission is not addressing the registration requirement in Section 17A(b) of the Exchange Act, which was unchanged by the Dodd-Frank Act. The Commission also is not addressing the registration of clearing agencies

security-based swap clearing agency from the registration requirement in Section 17A(g).⁶⁶⁷ In addition, we discuss the potential application of alternative standards to certain foreign clearing agency registrants.

The proposed interpretation discussed below represents the Commission's preliminary views regarding the application of the registration requirement in Section 17A(g) for security-based swap clearing agencies acting as CCPs in the cross-border context. Our proposal reflects a balancing of the principles described above, including, in particular, the goal of the Dodd-Frank Act to address the risk to the U.S. financial system.⁶⁶⁸ We recognize, however, that the proposed interpretation represents one of a number of possible alternative approaches in applying Title VII in the cross-border context. Accordingly, the Commission invites comment regarding all aspects

that provide other types of services for security-based swaps and other securities. Elsewhere, the Commission has provided a temporary exemption from the clearing agency registration requirements to clearing agencies that provide non-CCP types of clearance and settlement services for security-based swaps. See Order Pursuant to Section 36 of the Securities Exchange Act of 1934 Granting Temporary Exemptions from Clearing Agency Registration Requirements under Section 17A(b) of the Exchange Act for Entities Providing Certain Clearing Services for Security-Based Swaps, Exchange Act Release No. 64796 (July 1, 2011). Accordingly, the Commission expects to address clearing agencies that provide non-CCP services in a future release.

⁶⁶⁷ The Commission also has adopted final rules to exempt transactions by CCPs in security-based swaps from all provisions of the Securities Act, other than the anti-fraud provisions in Section 17(a), as well as from Exchange Act registration requirements and provisions of the Trust Indenture Act. See Exemptions for Security-Based Swaps issued by Certain Clearing Agencies, Securities Act Release No. 9308 (Mar. 30, 2012), 77 FR 20536 (Apr. 5, 2012). The exemption is conditioned on the CCP being registered or exempt from registration with the Commission, on the determination that the security-based swap is required to be cleared or that the CCP is permitted to clear it pursuant to its rules, that the security-based swap is sold only to an ECP, and that certain information be made available to a counterparty or to the public.

⁶⁶⁸ See Section II.C, supra. In addition, as noted above, to promote effective and consistent global regulation of swaps and security-based swaps, the Dodd-Frank Act requires the Commission and the CFTC to consult and coordinate with foreign regulatory authorities on the "establishment of consistent international standards" with respect to the regulation of swaps and security-based swaps. Pub. L. No. 111-203 § 752(a).

of the proposal discussed below, including potential alternative approaches. Responses that are supported by data and analysis provide great assistance to the Commission in considering the practicality and effectiveness of the proposed application as well as considering the benefits and costs of proposed requirements.

B. Proposed Title VII Approach

1. Clearing Agency Registration

Section 17A(g) of the Exchange Act, entitled “Registration Requirement,” provides that “[i]t shall be unlawful for a clearing agency, unless registered with the Commission, directly or indirectly to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of a clearing agency with respect to a security-based swap.”⁶⁶⁹ The Commission preliminarily believes that Title VII was intended to apply to clearing agencies that perform clearing agency functions within the United States, regardless of their principal place of business or their place of incorporation or organization.⁶⁷⁰ For reasons discussed below, the proposed interpretive guidance would provide that a security-based swap clearing agency performs the functions of a CCP within the United States if it has a U.S. person as a member.

(a) Clearing Agencies Acting as CCPs

Clearing agencies are broadly defined under the Exchange Act and undertake a variety of functions.⁶⁷¹ One such function is to act as a CCP,⁶⁷² which is an entity that interposes itself

⁶⁶⁹ 15 U.S.C. 78q-1(g).

⁶⁷⁰ See Section II.B, *supra*.

⁶⁷¹ Section 3(a)(23)(A) of the Exchange Act defines the term “clearing agency” to mean any person who: (i) acts as an intermediary in making payments or deliveries or both in connection with transactions in securities; (ii) provides facilities for comparison of data respecting the terms of settlement of securities transactions, to reduce the number of settlements of securities transactions, or for the allocation of securities settlement

between the counterparties to a securities transaction. For example, when a security-based swap contract between two counterparties that are members of a CCP is executed and submitted for clearing, it is typically replaced by two new contracts—separate contracts between the CCP and each of the two original counterparties. At that point, the original counterparties are no longer counterparties to each other. Instead, each acquires the CCP as its counterparty, and the CCP assumes the counterparty credit risk of each of the original counterparties that are members of the CCP. Structured and operated appropriately, CCPs may improve the management of counterparty risk and may provide additional benefits such as multilateral netting of trades.⁶⁷³

Although technology and risk management practices frequently change and vary from CCP to CCP, the following are some of the functions performed by the subset of clearing agencies that are CCPs:⁶⁷⁴

responsibilities; (iii) acts as a custodian of securities in connection with a system for the central handling of securities whereby all securities of a particular class or series of any issuer deposited within the system are treated as fungible and may be transferred, loaned, or pledged by bookkeeping entry, without physical delivery of securities certificates (such as a securities depository); or (iv) otherwise permits or facilitates the settlement of securities transactions or the hypothecation or lending of securities without physical delivery of securities certificates (such as a securities depository). 15 U.S.C. 78c(a)(23)(A).

⁶⁷² See Clearing Agency Standards Adopting Release, 77 FR at 66221 n.17 (“[a]n entity that acts as a CCP for securities transactions is a clearing agency as defined in the Exchange Act and is required to register with the Commission”).

⁶⁷³ See *id.*

⁶⁷⁴ The Commission does not believe that the opening and maintenance of bank accounts or investment accounts in the United States by a CCP that are not directly accessible by members of a security-based swap clearing agency constitutes the performance of functions of a CCP for these purposes. See, e.g., Exchange Act Release No. 39643 (Feb. 11, 1998), 63 FR 8232, 8234 (Feb. 18, 1998) (discussing a foreign unregistered clearing agency’s use of a U.S. depository, which did not in and of itself trigger the registration requirement). In addition, the Commission does not believe that the use of U.S.-based persons to perform services on behalf of a CCP in the ordinary course of business that do

- the extinguishing of a security-based swap contract between two counterparties and the associated novation of it with two new contracts between the CCP and each of the two original counterparties;
- the assumption of counterparty credit risk of members of the CCP through the novated security-based swap contracts;
- the calculation and collection of initial and variation margin during the life of the security-based swap contract;
- the determination of settlement obligations under a security-based swap contract;
- the determination of a default under a security-based swap contract;
- the collection of funds from members for contributions to a clearing fund;
- the implementation of a loss-sharing arrangement among members to respond to a member insolvency or default; and
- the multilateral netting of trades.⁶⁷⁵

In performing these functions, CCPs help facilitate over-the-counter trading, and trading on exchanges and other platforms, through the assumption of counterparty risk by the CCP from the original counterparties. During times of market stress, a CCP would mitigate the potential for a market participant's failure to be transmitted to other market participants, and would increase transparency of the risks borne by its members, as well as confidence of the market participants in the performance of their transactions.⁶⁷⁶

not involve clearing agency functions (e.g., financial guaranties, banking services, or payroll operations) constitutes the performance of functions of a clearing agency.

⁶⁷⁵ See, e.g., CDS Clearing Exemption Orders, note 74, *supra*.

⁶⁷⁶ See Report of the Senate Committee on Banking, Housing, and Urban Affairs regarding The Restoring American Financial Stability Act of 2010, S. Rep. No. 111-176 at 31

Furthermore, the agreements among members and between members and a CCP play a key role in the CCP's performance of the functions of a clearing agency. The Exchange Act permits clearing agencies to deny membership if a person does not meet a clearing agency's financial responsibility, operational capacity, experience and competence standards.⁶⁷⁷ In a scenario where risk is mutualized under loss-sharing arrangements, the strength of the CCP hinges upon the strength of its members. The legal arrangements between a CCP and its members are of significant importance to the operational resilience of the CCP itself.

(b) Proposed Interpretive Guidance

The Commission is proposing interpretive guidance that a security-based swap clearing agency performing the functions of a CCP within the United States would be required to register pursuant to Section 17A(g) of the Exchange Act.⁶⁷⁸ In our preliminary view, a foreign security-based swap clearing agency that provides CCP services, as described above, to a member that is a U.S. person for security-based swaps would be performing the functions of a CCP within the United States and, therefore, would be required to register pursuant to Section 17A(g) of the

(stating that by "mandating the use of central clearinghouses, institutions would become much less interconnected, mitigating risk and increasing transparency."). At the same time, concentrating risk from several counterparties into a CCP could actually introduce risks through the prospect of moral hazard, such as if the costs of imprudent decisions by one clearing member were shifted to other clearing members or to the general public through bail-out of a CCP. *See, e.g.,* Craig Pirrong, "Mutualization of Default Risk, Fungibility, and Moral Hazard: The Economics of Default Risk Sharing in Cleared and Bilateral Markets," University of Houston, Working Paper (2010), available at: http://business.nd.edu/uploadedFiles/Academic_Centers/Study_of_Financial_Regulation/pdf_and_documents/clearing_moral_hazard_1.pdf. Such cost-shifting mechanisms might induce members to take on more risk than they otherwise would in a bilateral setting.

⁶⁷⁷ *See, e.g.,* 15 U.S.C. 78q-1(b)(4); *see also* 17 CFR § 240.17Ad-22(d)(2) (requiring registered clearing agencies to establish, implement, maintain, and enforce written policies and procedures reasonably designed to require participants to meet certain operational capacity standards).

⁶⁷⁸ 15 U.S.C. 78q-1.

Exchange Act. The Commission preliminarily believes that such an approach is consistent with the Dodd-Frank Act's goal of reducing systemic risk in the U.S. financial system.⁶⁷⁹ Foreign security-based swap clearing agencies that provide CCP services to U.S. members could pose a risk to the United States due to the risk mutualization among members of these clearing agencies.⁶⁸⁰ Further, the more complete information about relationships between security-based swap market participants that registration would provide to regulators and the marketplace may help reduce the risk of crises.⁶⁸¹ Accordingly, to address the risk to the U.S. financial system posed by foreign security-based swap clearing agencies with U.S. members, the Commission preliminarily is proposing to require foreign security-based swap clearing agencies that provide CCP services to U.S. members to register pursuant to Section 17A(g) of the Exchange Act.

The Commission anticipates, however, that some U.S. persons may choose to clear transactions at a foreign security-based swap clearing agency on an indirect basis through a correspondent clearing arrangement with a non-U.S. member of the clearing agency.⁶⁸² We preliminarily do not believe that such a correspondent clearing arrangement of a U.S. person with a non-U.S. person member alone would cause the foreign security-based swap clearing

⁶⁷⁹ See note 4, *supra*.

⁶⁸⁰ See, e.g., Clearing Agency Standards Adopting Release, 77 FR at 66267 (stating that “[a]ll clearing agencies that act as CCPs in the United States collect contributions from their members to guaranty funds or clearing funds for the mutualization of losses under extreme but plausible market scenarios”).

⁶⁸¹ See note 676, *supra*.

⁶⁸² Traditionally, the Commission has required registration (or an exemption from registration) as a clearing agency if a foreign clearing agency provides services for U.S. securities directly to U.S. persons. The Commission has not viewed intermediated access by U.S. persons to a foreign clearing agency's services (for example, through a foreign broker) as sufficiently direct to trigger registration requirements. See Proposed Amendments to Rule 15a-6, 73 FR at 39198 (summarizing the Commission's position taken in past exemptive orders).

agency to be required to register with the Commission because the clearing agency's business is conducted directly with its member firms, which in this example would be located outside of the United States. Correspondent clearing arrangements do not pose the same type of direct risk to the U.S. financial system that foreign security-based swap clearing agencies with U.S. members pose because customers, unlike clearing agency members, do not take mutual responsibility for the obligations of the clearing agency.⁶⁸³

2. Exemption from Registration under Section 17A(k)

Section 17A(k) of the Exchange Act, as added by Section 763(b) of the Dodd-Frank Act, provides that the Commission may grant a conditional or unconditional exemption from clearing agency registration for the clearing of security-based swaps if the Commission determines that the clearing agency is subject to comparable, comprehensive supervision and regulation by the CFTC or the appropriate government authorities in the home country of the clearing agency.⁶⁸⁴

The Commission preliminarily believes that it may be appropriate to consider an exemption as an alternative to registration in circumstances where the clearing agency is subject to comparable, comprehensive supervision and regulation by appropriate government authorities in the home country of the clearing agency, and the nature of the clearing agency's activities and performance of functions within the United States suggest that registration is not necessary to achieve the Commission's regulatory objectives. Exemptions that are carefully targeted could help to improve clearing agency supervision overall by allowing the Commission to devote

⁶⁸³ As noted above, the interpretation proposed here applies solely to the registration requirement in Section 17A(g) of the Exchange Act with respect to clearing agencies that provide CCP services for security-based swaps; it does not change the Commission's interpretation of Section 17A(b) of the Exchange Act. See note 666, supra.

⁶⁸⁴ 15 U.S.C. 78q-1(k).

resources most efficiently where U.S. interests are more directly implicated, while reducing duplication of efforts in areas where its interests are aligned with those of other regulators. Section 17A(k) further provides that any such exemption may be subject to appropriate conditions that may include, but are not limited to, requiring the clearing agency to be available for inspection by the Commission and to make available all information requested by the Commission.⁶⁸⁵

The Commission is not at this point specifying how such determinations might be made. The Commission notes that market structure and clearing agency supervision and regulation vary in other jurisdictions, and these variances in combination would affect the Commission's ability to make a determination under Section 17A(k) of the Exchange Act in a particular case, as well as the conditions that would be applied to any exemption. In addition to these factors, differences among individual clearing agencies on matters such as organizational governance, rules for members, and risk management procedures would inform individual exemption determinations.

3. Application of Alternative Standards to Certain Registrants

In addition, the Commission may consider, as an alternative to an exemption from registration, proposing rules that are specific to foreign-based CCPs that are registered with the Commission under Section 17A(g). We believe that this approach is contemplated by Section 17A(i) of the Exchange Act, which permits the Commission to adopt rules for registered CCPs that clear security-based swaps and conform our regulatory standards and supervisory practices

⁶⁸⁵ Id.

to reflect evolving United States and international standards.⁶⁸⁶ This approach may be particularly appropriate where the Commission determines not to grant a general exemption from registration under Section 17A(k) of the Exchange Act, based on consideration of the factors described above, but where consistency with some regulatory standards suggests that a targeted regulatory approach may be warranted.

Request for Comment

The Commission requests comment on all aspects of the proposed interpretation, including the following:

- Should performing the functions of a CCP for only one U.S. person member of the CCP warrant requiring a foreign security-based swap clearing agency to register with the Commission? If not, why not? Further, are there other kinds of activities in the United States or outside the United States that would warrant requiring a CCP to be registered? If so, what are they?
- To what extent might the proposed approach create incentives for foreign CCPs to restrict access to U.S. person members? Please explain.
- Are there any other circumstances where a foreign security-based swap CCP should be required to register with the Commission? For example, is there a circumstance

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Specifically, Section 17A(i) of the Exchange Act, entitled “Standards for Clearing Agencies Clearing Security-Based Swap Transactions”: (i) requires registered clearing agencies that clear security-based swaps to comply with such standards that the Commission may establish by rule; (ii) contemplates that the Commission may conform such standards or its oversight practices to reflect evolving United States and international standards; and (iii) except where the Commission determines otherwise by rule or regulation, confirms that a clearing agency shall have reasonable discretion in establishing the manner in which it complies with any such standards. 15 U.S.C. 78q-1(i).

where a CCP that has no U.S. members but clears security-based swaps with a U.S. security as an underlying security should be required to register with the Commission as a clearing agency? Similarly, is there a circumstance where a CCP that has no U.S. members and does not conduct activities within the United States but that clears security-based swaps for the U.S. customers of its members should be required to register with the Commission as a clearing agency? Would the provision of omnibus or individual segregation of U.S. customer funds affect this analysis? Why or why not? Should a security-based swap CCP that relies on a financial guaranty of a U.S. person in allowing a non-U.S. person to become a member be required to register with the Commission? If not, why not?

- How will Commission registration of, exemption from registration for, or promulgation of alternative standards applicable to registered foreign security-based swap CCPs affect the central clearing of security-based swaps? How would it affect the management of counterparty credit risk? How would it affect systemic risk? What impact would it have on the continued development of the global security-based swap market?
- What factors should the Commission consider in determining whether a foreign security-based swap CCP is subject to comparable, comprehensive supervision and regulation by appropriate government authorities in the home country of the CCP? What level of similarity should be required in order for a home country supervision and regulatory framework to be considered comparable and comprehensive when compared to that of the United States?

- How should the Commission determine the home country of a CCP for purposes of Section 17A(k) of the Exchange Act? Should it be the country in which the CCP is incorporated or organized or the country in which it conducts the principal amount of its clearance and settlement activities?
- What other facts and circumstances should the Commission review in determining whether an exemption may be granted under Exchange Act Section 17A(k)? What terms and conditions should be required in connection with an exemption from registration? For example, should the Commission consider whether a jurisdiction has implemented any international standards, such as the CPSS-IOSCO Principles for Financial Market Infrastructures in its regulatory framework?⁶⁸⁷ In addition, should the existence of a cooperative agreement with the home country be a factor?
- What would be the market impact of the proposed approach to the registration of foreign CCPs? How would the application of the proposed approach affect the competitiveness of U.S. entities in the global marketplace (both in the United States as well as in foreign jurisdictions)? Would the proposed approach place any market participants at a competitive disadvantage or advantage? If so, please explain. Would the proposed approach be a more general burden on competition? If so, please explain. What other measures should the Commission consider to implement the proposed approach? What would be the market impacts and competitiveness effects of alternatives to the proposed approach discussed in this release?

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See CPSS-IOSCO, Principles for Financial Market Infrastructures (Apr. 2012) (“FMI Principles”), available at: <http://www.bis.org/publ/cpss101a.pdf>.

VI. Security-Based Swap Data Repositories

A. Introduction

Under the Dodd-Frank Act, SDRs are intended to play a key role in enhancing transparency in the security-based swap market by retaining complete records of security-based swap transactions, maintaining the integrity of those records, and providing effective access to those records to relevant authorities and the public consistent with their respective information needs.⁶⁸⁸ Title VII provides the Commission with authority to adopt rules governing SDRs.⁶⁸⁹ Using this authority, the Commission has proposed rules governing the SDR registration process, duties, and core principles, including duties related to data maintenance and access by relevant authorities and those seeking to use the SDR's repository services.⁶⁹⁰

As noted above, the security-based swap market is global in scope and transactions often involve counterparties in different jurisdictions.⁶⁹¹ The Commission recognizes that, as a result, there may be uncertainty regarding the application of Section 13(n) of the Exchange Act⁶⁹² and the rules and regulations thereunder (collectively, "SDR Requirements").⁶⁹³ In addition, the Commission is concerned that an overly broad application of the SDR Requirements may unnecessarily restrict global regulators' access to, and sharing of, security-based swap data in various jurisdictions and present difficulties in enhancing transparency in the global security-

⁶⁸⁸ See SDR Proposing Release, 75 FR at 77307.

⁶⁸⁹ See Section 13(n)(9) of the Exchange Act, 15 U.S.C. 78m(n)(9), as added by Section 763(i) of the Dodd-Frank Act.

⁶⁹⁰ See SDR Proposing Release, 75 FR 77306.

⁶⁹¹ See Section II.A, *supra*.

⁶⁹² 15 U.S.C. 78m(n)(9), as added by Section 763(i) of the Dodd-Frank Act.

⁶⁹³ See Section 13(n) of the Exchange Act, 15 U.S.C. 78m(n), as added by Section 763(i) of the Dodd-Frank Act, and proposed Rules 13n-1 to 13n-11 under the Exchange Act.

based swap market.⁶⁹⁴ To address these concerns, and as explained more fully below, the Commission is proposing to limit the application of the SDR Requirements to certain persons that perform the functions of an SDR, including proposing a new rule to provide non-U.S. persons performing the functions of an SDR within the United States with exemptive relief from the SDR Requirements. In addition, to facilitate relevant authorities' access to security-based swap data collected and maintained by Commission-registered SDRs, the Commission is proposing interpretive guidance to specify how SDRs may comply with the notification requirement set forth in Section 13(n)(5)(G) of the Exchange Act⁶⁹⁵ and previously proposed Rule 13n-4(b)(9) thereunder. The Commission also is specifying how the Commission proposes to determine whether a relevant authority is appropriate for purposes of receiving security-based swap data from an SDR. In addition, the Commission is proposing a new rule to provide SDRs with exemptive relief from the indemnification requirement set forth in Section 13(n)(5)(H)(ii) of the Exchange Act⁶⁹⁶ and previously proposed Rule 13n-4(b)(10) thereunder.

In formulating this proposal, the Commission has sought to balance the policy considerations discussed above⁶⁹⁷ and the particular concerns related to security-based swap reporting discussed below. The Commission recognizes that other approaches may exist in achieving the mandate of the Dodd-Frank Act, in whole or in part. Accordingly, the Commission invites comment regarding all aspects of the proposal described below, including

⁶⁹⁴ Cf. Société Générale Letter I at 2 (suggesting that U.S. and EU regulators limit their jurisdiction to the part of the security-based swap business that they can most practically regulate, even if they have jurisdiction over a broader range of that business).

⁶⁹⁵ 15 U.S.C. 78m(n)(5)(G), as added by Section 763(i) of the Dodd-Frank Act.

⁶⁹⁶ 15 U.S.C. 78m(n)(5)(H)(ii), as added by Section 763(i) of the Dodd-Frank Act.

⁶⁹⁷ See Section II.C, *supra* (discussing principles guiding the Commission's proposed approach to applying Title VII in the cross-border context).

potential alternative approaches. Data and comment from market participants and other interested parties regarding the likely effect of the Commission's proposed rules and interpretative guidance as well as potential alternative approaches will be particularly useful to the Commission in evaluating possible modifications to the proposal.

B. Application of the SDR Requirements in the Cross-Border Context

1. Introduction

Section 3(a)(75) of the Exchange Act defines a "security-based swap data repository" to mean "any person that collects and maintains information or records with respect to transactions or positions in, or the terms and conditions of, security-based swaps entered into by third parties for the purpose of providing a centralized recordkeeping facility for security-based swaps."⁶⁹⁸

Section 13(n)(1) of the Exchange Act provides that "[i]t shall be unlawful for any person, unless registered with the Commission, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of a security-based swap data repository."⁶⁹⁹

Although the Commission has previously proposed a rule governing the registration process for SDRs,⁷⁰⁰ which includes requirements for "non-resident security-based swap data reposit[or]s,"⁷⁰¹ the Commission has not explicitly explained under what circumstances in the

⁶⁹⁸ 15 U.S.C. 78c(a)(75), as added by Section 761(a) of the Dodd-Frank Act.

⁶⁹⁹ 15 U.S.C. 78m(n)(1), as added by Section 763(i) of the Dodd-Frank Act.

⁷⁰⁰ See proposed Rule 13n-1 under the Exchange Act.

⁷⁰¹ See proposed Rule 13n-1(a)(2) under the Exchange Act, which defines "non-resident security-based swap data repository" (hereinafter "non-resident SDR") as "(i) [i]n the case of an individual, one who resides in or has his principal place of business in any place not in the United States; (ii) [i]n the case of a corporation, one incorporated in or having its principal place of business in any place not in the United States; or (iii) [i]n the case of a partnership or other unincorporated organization or association, one having its

cross-border context would a person performing the functions of an SDR be required to register with the Commission pursuant to Section 13(n)(1) of the Exchange Act⁷⁰² and previously proposed Rule 13n-1 thereunder, and to comply with the other SDR Requirements.⁷⁰³ As discussed further below, the Commission is proposing interpretative guidance to discuss such circumstances and a new rule to provide exemptive relief from the SDR Requirements.

2. Comment Summary

The Commission received several comment letters concerning the registration and regulation of SDRs in the cross-border context. As a general matter, commenters suggested that the Commission should apply principles of international comity.⁷⁰⁴

principal place of business in any place not in the United States.” Proposed Rule 13n-1(g) under the Exchange Act would require any non-resident SDR applying for registration with the Commission to certify and provide an opinion of counsel that it can, as a matter of law, provide the Commission with prompt access to its books and records and submit to onsite inspection and examination by the Commission.

⁷⁰² 15 U.S.C. 78m(n)(1), as added by Section 763(i) of the Dodd-Frank Act.

⁷⁰³ In addition to the SDR Requirements, the Commission has proposed, and is re-proposing in this release, Regulation SBSR, which, if adopted as re-proposed, would impose certain obligations on SDRs registered with the Commission. See Section VIII, *infra*. In a separate proposal relating to implementation of Section 763(i) of the Dodd-Frank Act (adding Exchange Act Section 13(n)(5)(E), 15 U.S.C. 78m(n)(5)(E)), the Commission has proposed rules that would require SDRs registered with the Commission to collect data related to monitoring the compliance and frequency of end-user clearing exemption claims. See End-User Exception Proposing Release, 75 FR 79992. Because these proposed rules and regulations, on their face, apply only to Commission-registered SDRs, the Commission preliminarily believes that these requirements, if adopted as proposed, would not apply to unregistered SDRs, including those that avail themselves of the SDR Exemption, discussed below.

⁷⁰⁴ See DTCC Letter III at 3 (urging the Commission, in its regulation of SDRs, to aim for regulatory comity); Davis Polk Letter I at 7 (recommending that the Commission work with foreign authorities to permit SDRs in all major jurisdictions to register with the appropriate regulators in each jurisdiction); see also Société Générale Letter I at 2 (suggesting that the Commission consider international comity and public policy goals of derivatives regulation to limit its regulation of swap business); ISDA/SIFMA Letter I at

In addition, two commenters expressed concerns about the potential impact of duplicative registration requirements imposed on SDRs.⁷⁰⁵ Specifically, one of these commenters remarked that the Commission's previously proposed rules governing SDRs "would seem to force a non-resident SDR to be subject to multiple regimes and to the jurisdiction of several authorities" and that the SDR Proposing Release made no "reference to equivalency of regulatory regimes or cooperation with the authorities of the country of establishment of the non-resident SDRs."⁷⁰⁶ To address this concern, the commenter suggested that the Commission adopt a regime under which foreign SDRs would be deemed to comply with the SDR Requirements if the laws and regulations of the relevant foreign jurisdiction were equivalent to those of the Commission and an MOU has been entered into between the Commission and the relevant foreign authority.⁷⁰⁷ The commenter noted that the recommended "regime would have the following advantages: (i) facilitating cooperation among authorities from different jurisdictions; (ii) ensuring the mutual recognition of [SDRs]; and (iii) establishing convergent regulatory and supervisory regimes which is necessary in a global market such as the OTC derivatives one."⁷⁰⁸

Recognizing that some SDRs would function solely outside of the United States and, therefore, would be regulated by an authority in another jurisdiction, commenters suggested possible approaches to the SDR registration regime. One commenter, for example, believed that "a non-U.S. SDR should not be subject to U.S. registration so long as it collects and maintains

18 ("The Commission should consult with foreign regulators before establishing the extra-territorial scope of the rules promulgated under Title VII.").

⁷⁰⁵ See Cleary Letter IV at 31; ESMA Letter.

⁷⁰⁶ ESMA Letter at 1.

⁷⁰⁷ See *id.* at 2.

⁷⁰⁸ *Id.*

information from outside the U.S., even if such information is collected from non-U.S. swap dealer or [major security-based swap participant] registrants.”⁷⁰⁹ Another commenter supported “cross-registration” of SDRs, whereby SDRs in all major jurisdictions may register with the appropriate regulators in each jurisdiction.⁷¹⁰

3. Proposed Approach

In light of the concerns raised by commenters and the policy considerations discussed above,⁷¹¹ the Commission is proposing (i) interpretive guidance regarding the application of the SDR Requirements to U.S. persons that perform the functions of an SDR; and (ii) interpretive guidance regarding the application of the SDR Requirements to non-U.S. persons that perform the functions of an SDR within the United States and a new rule providing exemptive relief from the SDR Requirements for such non-U.S. persons, subject to a condition.

(a) U.S. Persons Performing SDR Functions Are Required to Register with the Commission

Consistent with the approach taken elsewhere in this release,⁷¹² the Commission preliminarily believes that any U.S. person⁷¹³ that performs the functions of an SDR⁷¹⁴ would be

⁷⁰⁹ See Cleary Letter IV at 31.

⁷¹⁰ Davis Polk Letter I at 7 (“Cross-registration of SDRs is not only necessary given the global nature of the swaps market, it also reduces duplicative data reporting. Cross-registration would also facilitate the creation of uniform reporting rules and procedures that would enable easy comparison of transaction data from different jurisdictions.”).

⁷¹¹ See Section II.C, *supra* (discussing principles guiding the Commission’s proposed approach to applying Title VII in the cross-border context).

⁷¹² See Section V.B, *supra*, and Section VII.B, *infra*.

⁷¹³ Under this proposed interpretation, the term “U.S. person” would have the same meaning as set forth in proposed Rule 3a71-3(a)(7) under the Exchange Act, as discussed in Section III.B.5, *supra*. As a practical matter, the Commission preliminarily believes that all non-resident SDRs would likely be non-U.S. persons given the similar distinguishing factors in the definitions of “non-resident security-based swap data repository” and “non-U.S. person.”

required to register with the Commission pursuant to Section 13(n)(1) of the Exchange Act⁷¹⁵ and previously proposed Rule 13n-1 thereunder. The Commission preliminarily believes that requiring U.S. persons that perform the functions of an SDR to register with the Commission and comply with the SDR Requirements, as well as other requirements applicable to SDRs registered with the Commission,⁷¹⁶ is necessary to achieve the policy objectives of Title VII.⁷¹⁷ Requiring U.S. persons that perform the functions of an SDR to be operated in a manner consistent with the Title VII regulatory framework and subject to the Commission's oversight, would, among other things, help ensure that relevant authorities are able to monitor the build-up and concentration of risk exposure in the security-based swap market, reduce operational risk in that market, and increase operational efficiency.⁷¹⁸ As the Commission noted in the SDR Proposing Release,

⁷¹⁴ Generally speaking, the Commission preliminarily believes that the “functions of a security-based swap data repository” include, at a minimum, the core services or functions that are embedded in the statutory definition of a “security-based swap data repository.” See Section 3(a)(75) of the Exchange Act, 15 U.S.C. 78c(a)(75), as added by Section 761(a) of the Dodd-Frank Act (defining “security-based swap data repository” to mean “any person that collects and maintains information or records with respect to transactions or positions in, or the terms and conditions of, security-based swaps entered into by third parties for the purpose of providing a centralized recordkeeping facility for security-based swaps”).

⁷¹⁵ 15 U.S.C. 78m(n)(1), as added by Section 763(i) of the Dodd-Frank Act.

⁷¹⁶ See note 703, *supra*.

⁷¹⁷ See Section II.C, *supra* (discussing principles guiding the Commission's proposed approach to applying Title VII in the cross-border context).

⁷¹⁸ See SDR Proposing Release, 75 FR at 77307 (“The enhanced transparency provided by an SDR is important to help regulators and others monitor the build-up and concentration of risk exposures in the [security-based swap] market In addition, SDRs have the potential to reduce operational risk and enhance operational efficiency in the [security-based swap] market.”).

SDRs themselves are subject to certain operational risks that may impede the ability of SDRs to meet these goals,⁷¹⁹ and the Title VII regulatory framework is intended to address these risks.

(b) Interpretive Guidance and Exemption for Non-U.S. Persons That Perform the Functions of an SDR Within the United States

In the context of the cross-border reporting of security-based swap data, the Commission recognizes that some uncertainty may arise regarding when the SDR Requirements, and other requirements applicable to SDRs registered with the Commission,⁷²⁰ apply to non-U.S. persons that perform the functions of an SDR. The Commission preliminarily believes that a non-U.S. person that performs the functions of an SDR within the United States would be required to register with the Commission, absent an exemption.⁷²¹

In order to provide legal certainty to market participants and address concerns raised by commenters, and consistent with the proposed interpretive guidance discussed above, the Commission is proposing, pursuant to our authority under Section 36 of the Exchange Act,⁷²² an

⁷¹⁹ See *id.* (“The inability of an SDR to protect the accuracy and integrity of the data that it maintains or the inability of an SDR to make such data available to regulators, market participants, and others in a timely manner could have a significant negative impact on the [security-based swap] market. Failure to maintain privacy of such data could lead to market abuse and subsequent loss of liquidity.”).

⁷²⁰ See note 703, *supra*.

⁷²¹ See Section 13(n)(1) of the Exchange Act, 15 U.S.C. 78m(n)(1), as added by Section 763(i) of the Dodd-Frank Act (requiring persons that, directly or indirectly, make use of the mails or any means or instrumentality of interstate commerce to perform the functions of an SDR, to register with the Commission). The Commission recognizes that some non-U.S. persons that perform the functions of an SDR may do so entirely outside the United States and thus are not required to register with the Commission.

⁷²² Section 36 of the Exchange Act authorizes the Commission to conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from certain provisions of the Exchange Act or certain rules or regulations thereunder, by rule, regulation, or order, to the extent that

exemption from the SDR Requirements for non-U.S. persons that perform the functions of an SDR within the United States, subject to a condition. Specifically, the Commission is proposing Rule 13n-12 (“SDR Exemption”), which states as follows: “A non-U.S. person⁷²³ that performs the functions of a security-based swap data repository within the United States shall be exempt from the registration and other requirements set forth in Section 13(n) of the [Exchange] Act . . . and the rules and regulations thereunder, provided that each regulator with supervisory authority over such non-U.S. person has entered into a supervisory and enforcement memorandum of understanding (‘MOU’) or other arrangement with the Commission that addresses the confidentiality of data collected and maintained by such non-U.S. person, access by the Commission to such data, and any other matters determined by the Commission.”⁷²⁴

The Commission preliminarily believes that a non-U.S. person would be performing “the functions of a security-based swap data repository within the United States” if, for example, it enters into contracts, such as user or technical agreements, with a U.S. person to enable the U.S. person to report security-based swap data to such non-U.S. person. As another example, a non-U.S. person would be performing “the functions of a security-based swap data repository within the United States” if it has operations in the United States, such as maintaining security-based swap data on servers physically located in the United States, even if its principal place of

such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors. 15 U.S.C. 78mm.

⁷²³ Proposed Rule 13n-12(a)(1) under the Exchange Act defines “non-U.S. person” to mean any person that is not a U.S. person. Proposed Rule 13n-12(a)(2) under the Exchange Act defines “U.S. person” by cross-reference to the definition of “U.S. person” in proposed Rule 3a71-3(a)(7) under the Exchange Act, as discussed in Section III.B.5 above.

⁷²⁴ Proposed Rule 13n-12(b) under the Exchange Act.

business is not in the United States.⁷²⁵ Given the constant innovation in the market and the fact-specific nature of the determination, it is not possible to provide here a comprehensive discussion of every activity that would constitute a non-U.S. person performing “the functions of a security-based swap data repository within the United States.”

The Commission preliminarily believes that the SDR Exemption is necessary or appropriate in the public interest, and consistent with the protection of investors. Because the reporting requirements of Title VII and re-proposed Regulation SBSR can be satisfied only if a security-based swap transaction is reported to an SDR that is registered with the Commission,⁷²⁶ the Commission preliminarily believes that the primary reason for a person subject to the reporting requirements of Title VII and re-proposed Regulation SBSR to report a security-based swap transaction to an SDR that is not registered with the Commission would likely be to satisfy reporting obligations that it or its counterparty has under foreign law. Such person would still be

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The Commission notes that if a person performing the functions of an SDR has operations in the United States to the extent that such operations constitute a principal place of business, then the person would fall within the proposed definition of “U.S. person.” As proposed, the term “U.S. person” includes a partnership, corporation, trust, or other legal person having its principal place of business in the United States. See Section III.B.5(b)ii, supra. As a result, under the interpretation proposed in Section VI.B.3(a) above, such person would be required to register as an SDR with the Commission.

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The Commission notes that a non-U.S. person that performs the functions of an SDR may choose to register with the Commission as an SDR to enable that person to accept data from persons that are reporting a security-based swap pursuant to the reporting requirements of Title VII and re-proposed Regulation SBSR. See 15 U.S.C. 78m(m)(1)(G) and 78m-1(a)(1), as added by Sections 763(i) and 766(a) of the Dodd-Frank Act and Section VIII, infra (discussing re-proposed Regulation SBSR). The Commission may consider also granting, pursuant to its authority under Section 36 of the Exchange Act, 15 U.S.C. 78mm, exemptions to such non-U.S. person that registers with the Commission from certain of the SDR Requirements on a case-by-case basis. In determining whether to grant such an exemption, the Commission may consider, among other things, whether there are overlapping requirements in the Exchange Act and applicable foreign law.

required to fulfill its reporting obligations under Title VII and re-proposed Regulation SBSR by reporting its security-based swap transaction to an SDR registered with the Commission, absent other relief from the Commission,⁷²⁷ even if the transaction were also reported to a non-U.S. person that relies on the SDR Exemption. The Commission preliminarily believes that this proposed approach to the SDR Requirements appropriately would balance the Commission's interest in having access to security-based swap data involving U.S. persons, while addressing commenters' concerns regarding the potential for duplicative regulatory requirements⁷²⁸ as well as furthering the goals of the Dodd-Frank Act.

The SDR Exemption would be subject to the condition that each regulator with supervisory authority over the non-U.S. person that performs the functions of an SDR within the United States enters into a supervisory and enforcement MOU or other arrangement with the Commission, as specified in proposed Rule 13n-12(b) under the Exchange Act. The Commission anticipates that in determining whether to enter into such an MOU or other arrangement with a relevant authority, the Commission would consider whether the relevant authority would keep data collected and maintained by the non-U.S. person that performs the functions of an SDR within the United States confidential⁷²⁹ and whether the Commission would

⁷²⁷ See discussion of Regulation SBSR in Section VIII, *infra*, and discussion of substituted compliance in Section XI.D, *infra*.

⁷²⁸ See Section VI.B.2, *supra* (summarizing comment letters concerning the registration of SDRs in the cross-border context).

⁷²⁹ The Commission contemplates that the relevant authority would keep data collected and maintained by such non-U.S. person confidential in a manner that is consistent with Section 24 of the Exchange Act and Rule 24c-1 thereunder. See 15 U.S.C. 78x and 17 CFR § 240.24c-1.

have access to data collected and maintained by such non-U.S. person.⁷³⁰ The Commission anticipates that it would consider other matters, including, for example, whether the relevant authority agrees to provide the Commission with reciprocal assistance in securities matters within the Commission's jurisdiction and whether a supervisory and enforcement MOU or other arrangement would be in the public interest.⁷³¹ The Commission preliminarily believes that, in lieu of requiring non-U.S. persons that perform the functions of an SDR within the United States to register with the Commission, the condition in the SDR Exemption is appropriate to address the Commission's interest in having access to security-based swap data involving U.S. persons and U.S. market participants that is maintained by non-U.S. persons that perform the functions of an SDR within the United States and protecting the confidentiality of such security-based swap data involving U.S. persons and U.S. market participants.

Request for Comment

The Commission requests comment on all aspects of the Commission's proposed interpretive guidance and the SDR Exemption, including the following:

⁷³⁰ The Commission contemplates that the Commission's access to data collected and maintained by such non-U.S. person would be in a manner that is consistent with Section 13(n)(5)(D) of the Exchange Act and previously proposed Rule 13n-4(b)(5) thereunder. See 15 U.S.C. 78m(n)(5)(D), as added by Section 763(i) of the Dodd-Frank Act.

⁷³¹ The Commission has previously entered numerous cooperative agreements with foreign authorities. See Cooperative Arrangements with Foreign Regulators, available at: http://www.sec.gov/about/offices/oia/oia_cooparrangements.shtml. Based on the Commission's experience with negotiating MOUs and other agreements with foreign authorities, the Commission believes that the MOU or agreement described in proposed Rule 13n-12(b) could, in many cases, be negotiated in a timely manner based on existing confidentiality and information sharing agreements so that the exemptive relief provided under proposed Rule 13n-12(b) would be available before the registration of an SDR seeking to claim the exemption would be required.

- Is the Commission's proposed interpretive guidance and the SDR Exemption appropriate and sufficiently clear? Why or why not? Do you agree with the Commission's proposed interpretive guidance and SDR Exemption? Is it overly broad or narrow? If so, why? Is there a better alternative?
- Under the Commission's proposed interpretive guidance and SDR Exemption, will SDRs be subject to duplicative regulatory requirements? If so, will the Commission's proposed interpretive guidance and SDR Exemption reduce the costs of compliance with duplicative regulatory requirements? Why or why not?
- How may the Commission's proposed interpretive guidance and SDR Exemption affect the duplicative reporting of security-based swap data? Would the Commission's ability to exercise oversight of our registrants be compromised if it did not have the ability to learn and/or obtain all security-based swap data from non-U.S. persons that perform the functions of an SDR within the United States that have chosen not to register with the Commission and that are not subject to a substituted compliance order? Why or why not?
- Are there any circumstances where a U.S. person performing the functions of an SDR should not be required to register with the Commission? If so, what are those circumstances?
- Should the Commission require all non-U.S. persons that perform the functions of an SDR within the United States to register with the Commission? Why or why not?
- Non-U.S. persons that perform the functions of an SDR within the United States may rely on the SDR Exemption. Are there any circumstances where non-U.S. persons that perform the functions of an SDR within the United States should be required to

register with the Commission? If so, what are those circumstances? Do any of the following facts and circumstances, either individually or in combination, warrant requiring non-U.S. persons that perform the functions of an SDR within the United States to register with the Commission: maintaining security-based swap data pertaining to a U.S. person or U.S. financial product; facilitating or supporting in the United States the submission of security-based swap data by U.S. persons; having any operations within the United States; entering into contracts, such as user or technical agreements, in order to accept security-based swap data from U.S. persons? If so, which one(s) and why? If not, why not? What types of activities and SDR functions performed within the United States do not warrant requiring a non-U.S. person that performs the functions of an SDR within the United States to be registered with the Commission? What if, for example, a non-U.S. person that performs the functions of an SDR within the United States accepts only data from persons that are "U.S. persons" solely because they are foreign branches of U.S. persons?

- Does the proposed definition of "U.S. person" or "non-U.S. person" in the SDR Exemption need to be clarified or modified? If so, which terms and how should they be defined?
- Do you agree with the proposed condition in the SDR Exemption? Why or why not? Should the condition include additional requirements? If so, what requirements would be appropriate? Are the Commission's estimates of the time required to establish an MOU reasonable? Why or why not? Should the condition apply only to certain non-U.S. persons that perform the functions of an SDR within the United States? Please explain. Should the condition apply if, for example, the only

connection to the United States by a non-U.S. person that performs the functions of an SDR within the United States is that it maintains a back-up server physically located in the United States? Should the condition apply only to non-U.S. persons that perform the functions of an SDR within the United States that collect security-based swap data from a reporting side that includes at least one counterparty that is a U.S. person?

- Do you believe that most, if not all, non-U.S. persons that perform the functions of an SDR within the United States will maintain at least some security-based swap data involving U.S. persons or U.S. market participants? Why or why not?
- Is the Commission's reference in the SDR Exemption to a "non-U.S. person that performs the functions of a security-based swap data repository" sufficiently clear? If not, what is a better alternative? Should the Commission replace, for example, "non-U.S. person" with "non-resident security-based swap data repository," as defined in previously proposed Rule 13n-1(a)(2) under the Exchange Act, instead? Why or why not? Are there circumstances that would be covered by using "non-U.S. person that performs the functions of a security-based swap data repository" in the SDR Exemption rather than using "non-resident security-based swap data repository that performs the functions of a security-based swap data repository" in the SDR Exemption, and vice versa? If so, what circumstances and does it matter for practical purposes?
- Is the SDR Exemption's reference to "within the United States" sufficiently clear? What are the implications of this reference in the SDR Exemption?

- Are there any other factors that the Commission should consider in our interpretive guidance or the SDR Exemption, but that are not addressed above? If so, please explain.
- What would be the market impact of proposed approach to the registration of SDRs? How would the application of proposed approach affect the competitiveness of U.S. entities in the global marketplace (both in the United States as well as in foreign jurisdictions)? Would the proposed approach place any market participants at a competitive disadvantage or advantage? If so, please explain. Would the proposed approach be a more general burden on competition? If so, please explain. What other measures should the Commission consider to implement the proposed approach? What would be the market impacts and competitiveness effects of alternatives to the proposed approach discussed in this release?

C. Relevant Authorities' Access to Security-Based Swap Information and the Indemnification Requirement

Section 13(n)(5)(G) of the Exchange Act⁷³² and previously proposed Rule 13n-4(b)(9) thereunder provide that an SDR shall on a confidential basis, pursuant to Section 24 of the Exchange Act, and the rules and regulations thereunder, upon request, and after notifying the Commission of the request ("Notification Requirement"), make available all data obtained by the SDR, including individual counterparty trade and position data, to each appropriate prudential regulator, the Financial Stability Oversight Council, the CFTC, the Department of Justice, the Federal Deposit Insurance Corporation and any other person that the Commission determines to be appropriate, including, but not limited to, foreign financial supervisors (including foreign

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15 U.S.C. 78m(n)(5)(G), as added by Section 763(i) of the Dodd-Frank Act.

futures authorities), foreign central banks, and foreign ministries. Further, Section 13(n)(5)(H) of the Exchange Act⁷³³ and previously proposed Rule 13n-4(b)(10) provide that before sharing information with any entity described in Section 13(n)(5)(G)⁷³⁴ or previously proposed Rule 13n-4(b)(9),⁷³⁵ respectively, an SDR must obtain a written agreement from the entity stating that the entity shall abide by the confidentiality requirements described in Section 24 of the Exchange Act,⁷³⁶ and the rules and regulations thereunder, relating to the information on security-based swap transactions that is provided; in addition, the entity shall agree to indemnify the SDR and the Commission for any expenses arising from litigation relating to the information provided under Section 24 of the Exchange Act⁷³⁷ and the rules and regulations thereunder (“Indemnification Requirement”).

The Commission believes that the goals of Sections 13(n)(5)(G) and 13(n)(5)(H) of the Exchange Act⁷³⁸ are, among other things, to obligate SDRs to make available security-based swap information to relevant authorities and maintain the confidentiality of such information. More broadly, the goal of the Dodd-Frank Act is, among other things, to promote the financial stability of the U.S. by improving accountability and transparency in the financial system.⁷³⁹

⁷³³ 15 U.S.C. 78m(n)(5)(H), as added by Section 763(i) of the Dodd-Frank Act.

⁷³⁴ 15 U.S.C. 78m(n)(5)(G), as added by Section 763(i) of the Dodd-Frank Act.

⁷³⁵ Proposed Rules 13n-4(b)(9) and (10) essentially repeat the requirements of Sections 13(n)(5)(G) and (H) of the Exchange Act, respectively, with the exception of the addition in proposed Rule 13n-4(b)(9) of the Federal Deposit Insurance Corporation to the relevant authorities specified in Section 13(n)(5)(G) of the Exchange Act.

⁷³⁶ 15 U.S.C. 78x.

⁷³⁷ Id.

⁷³⁸ 15 U.S.C. 78m(n)(5)(G) and (H), as added by Section 763(i) of the Dodd-Frank Act.

⁷³⁹ See note 4, supra.

As discussed further below, the Commission recognizes that the Indemnification Requirement raises a number of concerns, including, among other things, the inability of certain relevant authorities to provide, as a matter of law or practice, an open-ended indemnification agreement and the possibility of security-based swap data being fragmented among trade repositories globally if foreign authorities establish trade repositories in their jurisdictions to ensure access to data that they need to perform their regulatory mandates and legal responsibilities.⁷⁴⁰

In this section, the Commission will first describe the alternatives to the Notification Requirement and Indemnification Requirement that were discussed in the SDR Proposing Release. The Commission will then summarize the comments received, primarily in response to the SDR Proposing Release. Finally, the Commission will discuss our proposed interpretive guidance regarding relevant authorities' access to security-based swap information and our proposed exemptive relief from the Indemnification Requirement.

1. Information Sharing under Sections 21 and 24 of the Exchange Act

In the SDR Proposing Release, the Commission highlighted two alternative ways for relevant authorities to obtain data maintained by SDRs directly from the Commission (rather than directly from SDRs) without providing an indemnification agreement.⁷⁴¹ Specifically, the Commission noted that there is existing independent authority in the Exchange Act for certain domestic and foreign authorities to obtain data maintained by SDRs directly from the Commission (rather than directly from SDRs) pursuant to Sections 21(a) and 24(c) of the

⁷⁴⁰ See Section VI.C.3(c), *infra*.

⁷⁴¹ See SDR Proposing Release, 75 FR at 77319.

Exchange Act⁷⁴² in certain circumstances and without application of the Indemnification Requirement.⁷⁴³

Section 21(a)(2) of the Exchange Act⁷⁴⁴ provides that the Commission may provide assistance to a foreign securities authority. The term “foreign securities authority” is broadly defined in Section 3(a)(50) of the Exchange Act⁷⁴⁵ to include “any foreign government, or any governmental body or regulatory organization empowered by a foreign government to administer or enforce its laws as they relate to securities matters.” The Commission may provide assistance under Section 21(a)(2) of the Exchange Act⁷⁴⁶ to the foreign securities authority in connection with an investigation being conducted by the foreign securities authority to determine whether any person has violated, is violating, or is about to violate any laws or rules relating to securities matters that the authority administers or enforces. Section 21(a)(2) further provides that, as part of this assistance, the Commission may conduct an investigation to collect information and evidence pertinent to the foreign securities authority’s request for assistance.⁷⁴⁷ The

⁷⁴² 15 U.S.C. 78u(a) and 15 U.S.C. 78x(c).

⁷⁴³ Section 13(n)(5)(H) of the Exchange Act, 15 U.S.C. 78m(n)(5)(H), as added by Section 763(i) of the Dodd-Frank Act. See SDR Proposing Release, 75 FR at 77319. The Indemnification Requirement does not apply to requests for information made pursuant to Sections 21(a) and 24(c) of the Exchange Act. Further, since relevant authorities requesting information under these provisions would go directly to the Commission, the Notification Requirement would also be inapplicable. Thus, these requirements would not apply to requests by relevant authorities for security-based swap data when the Commission is exercising its independent statutory authority to assist relevant authorities pursuant to Section 21(a) or 24(c) of the Exchange Act.

⁷⁴⁴ 15 U.S.C. 78u(a)(2).

⁷⁴⁵ 15 U.S.C. 78c(a)(50).

⁷⁴⁶ 15 U.S.C. 78u(a)(2).

⁷⁴⁷ Section 21(a)(2) of the Exchange Act requires that, in considering whether to provide assistance to a foreign securities authority, the Commission determine whether the requesting authority has agreed to provide reciprocal assistance in securities matters to

Commission believes that Section 21(a)(2) provides the Commission with independent authority to assist foreign securities authorities in certain circumstances by, for example, collecting security-based swap data from an SDR and providing such authorities with the data.

Pursuant to Section 24(c) of the Exchange Act⁷⁴⁸ and Rule 24c-1 thereunder,⁷⁴⁹ the Commission may share nonpublic information⁷⁵⁰ in our possession with, among others, any “federal, state, local, or foreign government, or any political subdivision, authority, agency or instrumentality of such government . . . [or] a foreign financial regulatory authority.”⁷⁵¹

Because the Exchange Act provides the Commission with the statutory authority to share information in our possession with other authorities, the Commission is of the view that if security-based swap transaction data is in our possession, then it may share this information with other authorities. In this regard, the Commission notes that the indemnification requirement set forth in Section 13(n)(5)(H)(ii) of the Exchange Act⁷⁵² does not apply to the Commission, and

the United States, and whether compliance with the request would prejudice the public interest of the United States.

⁷⁴⁸ 15 U.S.C. 78x(c).

⁷⁴⁹ 17 CFR § 240.24c-1.

⁷⁵⁰ Under Rule 24c-1 under the Exchange Act, the term “nonpublic information” means “records, as defined in Section 24(a) of the [Exchange] Act, and other information in the Commission’s possession, which are not available for public inspection and copying.” 17 CFR § 240.24c-1.

⁷⁵¹ Section 3(a)(52) of the Exchange Act defines “foreign financial regulatory authority” to mean “any (A) foreign securities authority, (B) other governmental body or foreign equivalent of a self-regulatory organization empowered by a foreign government to administer or enforce its laws relating to the regulation of fiduciaries, trusts, commercial lending, insurance, trading in contracts of sale of a commodity for future delivery, or other instruments traded on or subject to the rules of a contract market, board of trade, or foreign equivalent, or other financial activities, or (C) membership organization a function of which is to regulate participation of its members in activities listed above.” 15 U.S.C. 78c(a)(52).

⁷⁵² 15 U.S.C. 78m(n)(5)(H)(ii).

would be inapplicable to the Commission's provision of security-based swap data to relevant authorities pursuant to our independent authority in Section 24(c) of the Exchange Act.⁷⁵³

2. Comment Summary

Four commenters submitted comments relating to relevant authorities' access to security-based swap information, three of which were in response to the SDR Proposing Release and one of which was in response to a joint public roundtable regarding the cross-border application of Title VII held by the Commission and the CFTC on August 1, 2011.⁷⁵⁴ Commenters were generally supportive of relevant authorities having access to security-based swap data maintained by SDRs when such access is within the scope of the authorities' mandate, but these commenters expressed particular concerns relating to the Indemnification Requirement and relevant authorities' unfettered access to security-based swap data.

As a general matter, one commenter stated that an SDR should be able to provide: (i) enforcement authorities with necessary trading information; (ii) regulatory agencies with counterparty-specific information about systemic risk based on trading activity; (iii) aggregate trade information on market-wide activity and aggregate gross and net open interest for publication; and (iv) real-time reporting from SB SEFs and bilateral counterparties and related dissemination.⁷⁵⁵ The same commenter supported relevant authorities' access to reports from SDRs that are scheduled on a regular basis or triggered by certain events, and believed that the Commission's regulatory model regarding regulatory access should be "location agnostic, without preferential access for [a] prudential regulator, except to perform its prudential

⁷⁵³ 15 U.S.C. 78x(c).

⁷⁵⁴ See Cleary Letter IV at 30-31; DTCC Letter I at 2 and III at 22-23; ESMA Letter at 2; MFA Letter I at 3.

⁷⁵⁵ DTCC Letter IV at 5.

duties.”⁷⁵⁶ The commenter also believed that “it is important to preserve [the] spirit of cooperation and coordination between regulators around the world” in the context of ensuring global regulators’ access to security-based swap data.⁷⁵⁷

Two commenters concurred with the Commission’s statements in the SDR Proposing Release that relevant authorities will likely be unable to agree to provide SDRs and the Commission with indemnification, as required by Section 13(n)(5)(H)(ii) of the Exchange Act prior to receiving security-based swap data maintained by SDRs.⁷⁵⁸ One of these commenters described the Indemnification Requirement as contravening the purpose of SDRs by diminishing transparency if regulators are not allowed to have ready access to information and thereby jeopardizing market stability.⁷⁵⁹ Specifically, the commenter believed that the Indemnification Requirement should not apply where relevant authorities are carrying out their regulatory responsibilities, in accordance with international agreements and while maintaining the confidentiality of data provided to them.⁷⁶⁰ Recognizing that the Indemnification Requirement is mandated by the Dodd-Frank Act, however, the commenter suggested that in order to ensure

⁷⁵⁶ DTCC Letter III at 12.

⁷⁵⁷ Id. at 12 (discussing the spirit of cooperation and coordination between regulators in the context of implementation of guidance provided by the ODRF regarding global regulators’ access to security-based swap data maintained by a trade repository in the United States).

⁷⁵⁸ See DTCC Letter I at 3; Cleary Letter IV at 31; see also SDR Proposing Release, 75 at 77318-19 (“With respect to the indemnification provision, the Commission understands that regulators may be legally prohibited or otherwise restricted from agreeing to indemnify third parties, including SDRs as well as the Commission. The indemnification provision could chill requests for access to data obtained by SDRs, thereby hindering the ability of others to fulfill their regulatory mandates and responsibilities.”).

⁷⁵⁹ See DTCC Letter I at 3 (discussing how the Indemnification Requirement would result in the reduction of information accessible to regulators on a timely basis and would greatly diminish regulators’ ability to carry out oversight functions).

⁷⁶⁰ DTCC Letter III at 12.

consistent application of the requirement and to “minimize any disruption to the global repository framework,” the Commission should provide model indemnification language for all SDRs to use.⁷⁶¹ Further, the commenter believed that “any indemnity should be limited in scope to minimize the potential reduction in value of registered SDRs to the regulatory community.”⁷⁶²

In discussing the Indemnification Requirement, another commenter reiterated the notion that relevant authorities must ensure the confidentiality of security-based swap data provided to them.⁷⁶³ The commenter believed that the Indemnification Requirement “undermines the key principle of trust according to which exchange of information [among relevant authorities] should occur.”⁷⁶⁴ Thus, the commenter recommended that the Commission’s rules help streamline the Indemnification Requirement for an “efficient exchange of information.”⁷⁶⁵

One commenter voiced concerns about unfettered access to security-based swap information by regulators, including foreign financial supervisors, foreign central banks, and foreign ministries, beyond their regulatory authority and mandate.⁷⁶⁶ This commenter was concerned that the statutory language incorporated in previously proposed Rule 13n-4(b)(9), which provides that in addition to the entities specifically listed in the rule, an SDR could make available data to “any other person that the Commission determines to be appropriate,” is vague and could result in an SDR providing access to persons without proper authority.⁷⁶⁷ The

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Id.

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Id.

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ESMA Letter at 2.

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Id.

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Id.

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MFA Letter I at 3.

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Id. at 4.

commenter suggested that the Commission adopt an approach similar to the CFTC's proposed Rule 49.17(d),⁷⁶⁸ and that the Commission and the CFTC "endeavor to adopt similar procedures to control regulator requests for security-based swap information."⁷⁶⁹

3. Proposed Guidance and Exemptive Relief

Consistent with the goals of the Dodd-Frank Act⁷⁷⁰ and the purposes of SDRs,⁷⁷¹ and after considering the comments received to date, the Commission is proposing additional guidance regarding relevant authorities' access to security-based swap information and proposing exemptive relief from the Indemnification Requirement. For the reasons discussed further below, the Commission preliminarily believes that our proposed guidance and exemption from the Indemnification Requirement is necessary or appropriate to, among other things, further the goals of the Dodd-Frank Act and the purposes of SDRs while preserving the confidentiality of the security-based swap information maintained by SDRs, as necessary. The Commission

⁷⁶⁸ As adopted, CFTC Rule 49.17(d) requires any "Appropriate Domestic Regulator" or "Appropriate Foreign Regulator" requesting access to swap data obtained and maintained by a swap data repository to first file a request for access with the swap data repository and certify the statutory authority for such request. The swap data repository then must promptly notify the CFTC of such request and the swap data repository subsequently would provide access to the requested swap data. CFTC Rule 49.17(b)(1) defines "Appropriate Domestic Regulator" and CFTC Rule 49.17(b)(2) provides that "Appropriate Foreign Regulators" are those that have an existing memorandum of understanding with the CFTC or otherwise as determined through an application process. See CFTC Final Rule, Swap Data Repositories: Registration Standards, Duties and Core Principles, 76 FR 54538 (Sept. 1, 2011) ("CFTC SDR Adopting Release").

⁷⁶⁹ MFA Letter I at 4.

⁷⁷⁰ Dodd-Frank Act, Pub. L. No. 111-203 at Preamble (goals include promoting "the financial stability of the United States by improving accountability and transparency in the financial system").

⁷⁷¹ See SDR Proposing Release, 75 FR at 77307 (stating that "SDRs are intended to play a key role in enhancing transparency in the [security-based swap] market by . . . providing effective access to [security-based swap transaction] records to relevant authorities . . .").

also preliminarily believes that our proposed guidance and exemption will, as one commenter suggested, help provide for an “efficient exchange of information.”⁷⁷²

(a) Notification Requirement

Section 13(n)(5)(G) of the Exchange Act requires an SDR, upon request, to “make available all data obtained by the SDR, including individual counterparty trade and position data,” to certain specified relevant authorities, as well as “other persons that the Commission determines to be appropriate.”⁷⁷³ However, the SDR may make such data available only “after notifying the Commission of the request.”⁷⁷⁴ The Commission preliminarily believes that an SDR can fulfill its obligation to notify “the Commission of the request” under Section 13(n)(5)(G) of the Exchange Act⁷⁷⁵ and previously proposed Rule 13n-4(b)(9) by notifying the Commission, upon the initial request for security-based swap data by a relevant authority, of the request for security-based swap data from the SDR, and maintaining records of the initial request and all subsequent requests.⁷⁷⁶ The Commission would consider the notice provided and records

⁷⁷² See ESMA Letter at 2.

⁷⁷³ Section 13(n)(5)(G) of the Exchange Act, 15 U.S.C. 78m(n)(5)(G), as added by Section 763(i) of the Dodd-Frank Act (specifying each appropriate prudential regulator, the Financial Stability Oversight Council, the CFTC, and the Department of Justice); see also proposed Rule 13n-4(b)(9) under the Exchange Act (adding the Federal Deposit Insurance Corporation).

⁷⁷⁴ Section 13(n)(5)(G) of the Exchange Act, 15 U.S.C. 78m(n)(5)(G), as added by Section 763(i) of the Dodd-Frank Act; see also proposed Rule 13n-4(b)(9) under the Exchange Act.

⁷⁷⁵ 15 U.S.C. 78m(n)(5)(G), as added by Section 763(i) of the Dodd-Frank Act.

⁷⁷⁶ Pursuant to previously proposed Rule 13n-7(b) under the Exchange Act, the SDR would be required to maintain records of the initial request and all subsequent requests, including details of any on-line access by relevant authorities to security-based swap data maintained by the SDR, by such relevant authority. See proposed Rule 13n-7(b) under the Exchange Act (requiring, among other things, keeping at least one copy of all documents required under the Exchange Act and records made or received by the SDR in

maintained as satisfying the Notification Requirement.⁷⁷⁷ The Commission preliminarily believes that this approach is an efficient way for an SDR to satisfy its statutory notification obligation.⁷⁷⁸

(b) Determination of Appropriate Regulators

Section 13(n)(5)(G) of the Exchange Act requires an SDR, upon request, to “make available all data obtained by the [SDR], including individual counterparty trade and position data,” to certain specified relevant authorities, as well as “each appropriate prudential regulator” and “other persons that the Commission determines to be appropriate,” including, but not limited to, foreign financial supervisors (including foreign futures authorities), foreign central banks, and foreign ministries.⁷⁷⁹ The Commission contemplates that a relevant authority will be able to request that the Commission make a determination that the relevant authority is appropriate for

the course of its business as such for not less than five years, and promptly furnishing such documents to any representative of the Commission upon request).

⁷⁷⁷ One commenter stated that “regulators want direct electronic access to data in SDRs where that data is needed to fulfill regulatory responsibilities” rather than access “by request, with notice to another regulatory authority.” See DTCC Letter III at 11-12. The Commission preliminarily believes that SDRs can provide direct electronic access to relevant authorities under its interpretation. In such a case, the SDR would have to provide the Commission with actual notification upon the initial time that the relevant authority accesses the SDR’s security-based swap data, and retain records of any electronic access by the relevant authority.

⁷⁷⁸ As discussed in the SDR Proposing Release, an SDR must keep its notifications to the Commission and requests by relevant authorities confidential. See SDR Proposing Release, 75 FR at 77318. Failure by an SDR to treat such notifications and requests confidential could render ineffective or could have adverse effects on the underlying basis for the requests. See *id.* If, for example, a regulatory use of the data is improperly disclosed, such disclosure could possibly signal a pending investigation or enforcement action, which could have detrimental effects. See *id.*

⁷⁷⁹ 15 U.S.C. 78m(n)(5)(G), as added by Section 763(i) of the Dodd-Frank Act. See also proposed Rule 13n-4(b)(9) under the Exchange Act.

requesting security-based swap data from an SDR. The Commission preliminarily believes that it will make such a determination through the issuance of a Commission order.

In making such a determination, the Commission expects that we would consider a variety of factors, and our order may include, among other things, conditions on determining that a relevant authority is appropriate for purposes of receiving security-based swap data directly from SDRs. The Commission preliminarily believes that such determination will likely be conditioned on a supervisory and enforcement MOU or other arrangement between the Commission and the relevant authority.⁷⁸⁰ Given the necessity of maintaining the confidentiality of the proprietary and highly sensitive data maintained by an SDR, such an MOU or arrangement⁷⁸¹ would be designed to protect the confidentiality of the security-based swap data provided to the relevant authority by an SDR.⁷⁸² The Commission anticipates that in determining whether to enter into such an MOU or other arrangement with a relevant authority, the Commission may consider whether, among other things, the relevant authority needs

⁷⁸⁰ Similarly, the CFTC requires “appropriate foreign regulator[s]” to have an MOU or similar type of arrangement with the CFTC or, as determined by the CFTC on a case-by-case basis. CFTC Rule 49.17(b)(2), 17 CFR § 49.17(b)(2).

⁷⁸¹ This MOU or other arrangement is separate from the written agreement under Section 13(n)(5)(H)(i) of the Exchange Act and previously proposed Rule 13n-4(b)(10) thereunder, both of which require the SDR to receive a written agreement from each relevant authority pertaining to the confidentiality of the security-based swap transaction information that is provided by the SDR. The MOU or other arrangement is between the Commission and the relevant authority, whereas the written agreement is between the SDR and the relevant authority.

⁷⁸² The CFTC requires certain foreign regulators “to provide sufficient facts and procedures to permit the [CFTC] to analyze whether the [foreign regulator] employs appropriate confidentiality procedures and to satisfy itself that the information will be disclosed only as permitted by Section 8(e) of the [Commodity Exchange Act].” CFTC Rule 49.17(b)(2), 17 CFR § 49.17(b)(2). The Commission expects that the relevant authority will need to provide to the Commission similar information before the Commission will enter into the MOU or other arrangement.

security-based swap information from an SDR to fulfill its regulatory mandate or legal responsibilities and the relevant authority agrees to protect the confidentiality of the security-based swap information provided to it. The Commission preliminarily believes that this MOU or arrangement could also satisfy the condition in proposed Rule 13n-4(d)(3) for an SDR to avail itself of the Indemnification Exemption, which is discussed below.⁷⁸³

In addition, the Commission preliminarily believes that in making the determination, it would be reasonable for the Commission to consider whether the relevant authority has a legitimate need for access to the security-based swaps maintained by an SDR in order to help safeguard such information.⁷⁸⁴ Confirming that the relevant authority has a legitimate need could reduce the risk of unauthorized disclosure, misappropriation, or misuse of security-based swap data. In this regard, the Commission would be furthering the objectives of the Dodd-Frank Act, which created a number of protections for proprietary and highly sensitive data, including “individual counterparty trade and position data,” maintained by an SDR.⁷⁸⁵ The Commission, therefore, preliminarily believes that a reasonable approach for our determination of an

⁷⁸³ See Section VI.C.3(c), *infra*.

⁷⁸⁴ See MFA Letter I at 3 (voicing concerns about unfettered access to security-based swap information by regulators, including foreign financial supervisors, foreign central banks, and foreign ministries, beyond their regulatory authority and mandate).

⁷⁸⁵ See Section 13(n)(5)(G) of the Exchange Act, 15 U.S.C. 78m(n)(5)(G), as added by Section 763(i) of the Dodd-Frank Act (directing SDRs to provide data, including individual counterparty trade and position data, on a confidential basis only to circumscribed list of authorities or other persons that the Commission determines to be appropriate); Section 13(n)(5)(H)(i) of the Exchange Act, 15 U.S.C. 78m(n)(5)(H)(i), as added by Section 763(i) of the Dodd-Frank Act (requiring that, prior to an SDR sharing such information, the SDR must receive a written agreement from each entity stating that the entity shall abide by certain confidentiality requirements); and Section 13(n)(5)(F) of the Exchange Act, 15 U.S.C. 78m(n)(5)(F), as added by Section 763(i) of the Dodd-Frank Act (requiring SDRs to maintain the privacy of any and all security-based swap transaction information that they receive from a security-based swap dealer, counterparty, or any other registered entity).

appropriate authority is for the Commission to consider the scope of the relevant authority's regulatory mandate and legal responsibilities. The Commission preliminarily believes that our consideration of these factors will further the Dodd-Frank Act's objective to safeguard security-based swap data and should address a commenter's concerns over unfettered access to such proprietary data.⁷⁸⁶ The Commission also anticipates considering, among other things, whether the relevant authority agrees to provide the Commission with reciprocal assistance in securities matters within the Commission's jurisdiction, and whether such a determination would be in the public interest. The Commission may take into account any other factors as the Commission determines are appropriate in making our determination.

In addition, the Commission preliminarily believes that it is not necessary to prescribe by rule—as one commenter suggested⁷⁸⁷—a specific process such as the one proposed by the CFTC⁷⁸⁸ that sets forth criteria for relevant authorities and the SDR to use in order to facilitate relevant authorities' access to security-based swap data maintained by the SDR. The Commission preliminarily believes that our determination of an appropriate authority, pursuant to the process described above, represents a reasonable approach to provide appropriate access by relevant authorities, while at the same time providing safeguards against access by persons

⁷⁸⁶ See MFA Letter I at 3.

⁷⁸⁷ See MFA Letter I at 4 (suggesting that the Commission adopt an approach similar to the CFTC's proposed Rule 49.17(d)).

⁷⁸⁸ See CFTC Notice of Proposed Rulemaking: Swap Data Repositories, 75 FR 80898 (Dec. 23, 2010). The CFTC has since adopted CFTC Rule 49.17(d), 17 CFR § 49.17(d), which does not include several of its proposed requirements, such as requiring relevant authorities to detail the basis for their requests. See CFTC SDR Adopting Release, 76 FR 54538.

without proper authority.⁷⁸⁹ The Commission also preliminarily believes that SDRs should have the flexibility to consider whether to provide relevant authorities with access to requested security-based swap data.⁷⁹⁰ The Commission preliminarily believes that a specific rule that delineates a process governing relevant authorities' access requests, as suggested by the commenter, would limit the flexibility of SDRs in considering whether to provide relevant authorities with access to requested security-based swap data.

The Commission contemplates that, in our sole discretion, we would determine whether to grant or deny a request for a determination that the relevant authority is appropriate for purposes of requesting security-based swap data from an SDR.⁷⁹¹ In addition, the Commission could revoke our determination at any time.⁷⁹² For example, the Commission may revoke a determination or request additional information from a relevant authority to support continuation

⁷⁸⁹ See MFA Letter I at 4 (voicing concern that vague standard could result in an SDR providing access to persons without proper authority).

⁷⁹⁰ The Commission preliminarily believes that an SDR's consideration of whether to provide relevant authorities with access to requested security-based swap data is implicitly subsumed in an SDR's statutory duty to maintain the privacy of security-based swap information that it receives. See Section 13(n)(5)(F) of the Exchange Act, 15 U.S.C. 78m(n)(5)(F), as added by Section 763(i) of the Dodd-Frank Act; see also proposed Rule 13n-4(b)(8) under the Exchange Act (requiring SDRs to maintain the privacy of any and all security-based swap transaction information that the SDR receives from a security-based swap dealer, counterparty, or certain registered entity) and proposed Rule 13n-9 under the Exchange Act (requiring an SDR to protect the privacy of security-based swap transaction information that the SDR receives by, among other things, establishing safeguards, policies, and procedures that are reasonably designed to protect such information and that address, without limitation, the SDR limiting access to confidential information, material, nonpublic information, and intellectual property).

⁷⁹¹ The Commission may issue a determination order that is for a limited time.

⁷⁹² As a general matter, the Commission provides a list of MOUs and other arrangements on its website, which is one way for an SDR to monitor and determine whether a relevant authority has entered into an applicable MOU or other arrangement. The MOUs and other arrangements can be found at the following link:
http://www.sec.gov/about/offices/oia/oia_cooparrangements.shtml.

of the determination if a relevant authority fails to keep confidential security-based swap data provided to it by an SDR.

(c) Option for Exemptive Relief from the Indemnification Requirement

i. Impact of the Indemnification Requirement

As noted above, Section 13(n)(5)(G) of the Exchange Act⁷⁹³ and previously proposed Rule 13n-4(b)(9) thereunder provide that an SDR shall on a confidential basis, pursuant to Section 24 of the Exchange Act, and the rules and regulations thereunder, upon request, and after notifying the Commission of the request, make available all data obtained by the SDR to each appropriate prudential regulator, the Financial Stability Oversight Council, the CFTC, the Department of Justice, the Federal Deposit Insurance Corporation and any other person that the Commission determines to be appropriate. Section 13(n)(5)(H)(ii) of the Exchange Act requires that before an SDR shares security-based swap information with a relevant authority requesting such information from the SDR, the relevant authority must “agree to indemnify the security-based swap data repository and the Commission for any expenses arising from litigation relating to the information provided under section 24 [of the Exchange Act].”⁷⁹⁴ Based on the Commission’s understanding that certain relevant authorities may be unable to agree to indemnify any SDR and the Commission, the Commission preliminarily believes that the Indemnification Requirement could significantly frustrate the purpose of Section 13(n)(5)(G) of the Exchange Act⁷⁹⁵ by preventing SDRs from making available security-based swap information to relevant authorities.

⁷⁹³ 15 U.S.C. 78m(n)(5)(G), as added by Section 763(i) of the Dodd-Frank Act.

⁷⁹⁴ 15 U.S.C. 78m(n)(5)(H)(ii), as added by Section 763(i) of the Dodd-Frank Act.

⁷⁹⁵ 15 U.S.C. 78m(n)(5)(G), as added by Section 763(i) of the Dodd-Frank Act.

As stated in the SDR Proposing Release, “under the Dodd-Frank Act, SDRs are intended to play a key role in enhancing transparency in the [security-based swap] market by retaining complete records of [security-based swap] transactions, maintaining the integrity of those records, and providing effective access to those records to relevant authorities and the public in line with their respective information needs.”⁷⁹⁶ Commenters⁷⁹⁷ as well as relevant authorities, however, have expressed concerns about how the Indemnification Requirement would contravene the purposes of the Dodd-Frank Act, and more specifically, the statutory purposes of SDRs.⁷⁹⁸ The Commission preliminarily believes that the Indemnification Requirement should not be applied rigidly so as to frustrate such purposes.

Specifically, the Commission recognizes that certain domestic authorities, including some of those expressly identified in Section 13(n)(5)(G) of the Exchange Act⁷⁹⁹ and the Commission, cannot, as a matter of law, provide an open-ended indemnification agreement. For example, the Antideficiency Act prohibits certain U.S. federal agencies from obligating or

⁷⁹⁶ SDR Proposing Release, 75 FR at 77307.

⁷⁹⁷ See, e.g., Cleary Letter IV at 31 (“[T]he indemnification requirement could be a significant impediment to effective regulatory coordination, since non-US regulators may establish parallel requirements for U.S. regulators to access swap data reported in their jurisdictions.”); DTCC Letter I at 3 (discussing how the Indemnification Requirement would result in the reduction of information accessible to regulators on a timely basis and would greatly diminish regulators’ ability to carry out oversight functions); ESMA Letter at 2 (noting that the Indemnification Requirement “undermines the key principle of trust according to which exchange of information [among relevant authorities] should occur”).

⁷⁹⁸ See, e.g., DTCC Letter IV at 5 (noting that SDRs should be able to provide, among other things, enforcement authorities with necessary trading information and regulatory agencies with certain counterparty-specific information). As stated above, the Commission believes that the goal of Sections 13(n)(5)(G) and 13(n)(5)(H) of the Exchange Act is, among other things, to obligate SDRs to make available security-based swap information to relevant authorities, provided that the confidentiality of the information is preserved.

⁷⁹⁹ 15 U.S.C. 78m(n)(5)(G), as added by Section 763(i) of the Dodd-Frank Act.

expending federal funds in advance or in excess of an appropriation, apportionment, or certain administrative subdivisions of those funds (e.g., through an unlimited or unfunded indemnification).⁸⁰⁰ Similarly, the Commission understands that foreign authorities may also be prohibited under applicable foreign laws from satisfying the Indemnification Requirement.⁸⁰¹ As such, the Commission agrees with three commenters' views that the Indemnification Requirement could hinder the ability of relevant authorities to fulfill their regulatory mandates and legal responsibilities.⁸⁰²

Moreover, the Commission understands from foreign authorities that their regulatory regimes will require them to have direct access to data maintained by trade repositories, including SDRs registered with the Commission, in order to fulfill their regulatory mandates and legal responsibilities.⁸⁰³ Many foreign regulators⁸⁰⁴ and market participants have indicated, however, that because foreign authorities cannot, as a matter of law or practice, comply with the

⁸⁰⁰ 31 U.S.C. 1341, 1517(a).

⁸⁰¹ See Cleary Letter IV at 31; DTCC Letter I at 3; ESMA Letter at 2.

⁸⁰² See Cleary Letter IV at 31; DTCC Letter I at 3; ESMA Letter at 2.

⁸⁰³ For example, in the case of Europe, under European Market Infrastructure Regulation ("EMIR"), trade repositories established in third countries that provide services to entities established in the European Union must apply for recognition by ESMA, which conditions its approval on, among other things, "[European] Union authorities, including ESMA, hav[ing] immediate and continuous access" to information in such trade repositories. Regulation No. 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, 2012 O.J. (L 201) 1, 49.

⁸⁰⁴ See CFTC and SEC, Joint Report on International Swap Regulation (Jan. 31, 2012) (noting that the indemnification provisions have "caused concern among foreign regulators, some of which have expressed unwillingness to register or recognize [a swap data repository] unless [they are] able to have direct access to necessary information" and that foreign regulators "are considering the imposition of a similar requirement that would restrict the CFTC's and SEC's access to information at [trade repositories] abroad").

Indemnification Requirement, the practical effect of having an open-ended indemnification requirement may be the fragmentation of security-based swap data across multiple SDRs, as foreign authorities establish trade repositories in their jurisdictions to ensure access to data that they need to perform their regulatory mandates and legal responsibilities.⁸⁰⁵ Such fragmentation may lead to duplicative reporting requirements in multiple jurisdictions, higher reporting costs for market participants, and less transparency in the security-based swap market.⁸⁰⁶ In light of these concerns, the Commission preliminarily believes that an exemption from the Indemnification Requirement may be necessary or appropriate, as a practical matter, to minimize fragmentation of security-based swap data that could otherwise be consolidated and reduce duplicative reporting requirements.⁸⁰⁷

ii. Proposed Rule 13n-4(d): Indemnification Exemption

The Commission is proposing, pursuant to our authority under Section 36 of the Exchange Act,⁸⁰⁸ a tailored exemption from the Indemnification Requirement. To avoid a result that could significantly frustrate the purpose of Section 13(n)(5)(G) and the purpose of SDRs, the Commission preliminarily believes that the Indemnification Exemption is necessary or

⁸⁰⁵ See Section XV.H.2(b)iii, *infra* (discussing the potential effects of fragmentation of security-based swap data among trade repositories across multiple jurisdictions).

⁸⁰⁶ See, e.g., Cleary Letter IV at 31 (The Indemnification Requirement “could be a significant impediment to effective regulatory coordination, since non-U.S. regulators may establish parallel requirements for U.S. regulators to access swap data reported in their jurisdictions”).

⁸⁰⁷ The Commission preliminarily believes that the Indemnification Requirement does not apply when an SDR is registered with the Commission and is also registered or licensed with a foreign authority and that authority is obtaining security-based swap information directly from the SDR pursuant to that foreign authority’s regulatory regime.

⁸⁰⁸ 15 U.S.C. 78mm (providing the Commission with general exemptive authority . . . “to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors”).

appropriate in the public interest, and is consistent with the protection of investors,⁸⁰⁹ particularly given that the exemption is narrowly tailored and could be applied in only limited circumstances.

Specifically, the Commission is proposing Rule 13n-4(d) (“Indemnification Exemption”), which states as follows: “A registered security-based swap data repository is not required to comply with the indemnification requirement set forth in Section 13(n)(5)(H)(ii) of the [Exchange] Act and [Rule 13n-4(b)(9) thereunder] with respect to disclosure of security-based swap information by the security-based swap data repository if: (1) [a]n entity described in [Rule 13n-4(b)(9)] requests security-based swap information from the security-based swap data repository to fulfill a regulatory mandate and/or legal responsibility of the entity; (2) [t]he request of such entity pertains to a person or financial product subject to the jurisdiction, supervision, or oversight of the entity; and (3) [s]uch entity has entered into a supervisory and enforcement memorandum of understanding or other arrangement with the Commission that addresses the confidentiality of the security-based swap information provided and any other matters as determined by the Commission.”

In proposing the Indemnification Exemption, the Commission is mindful of the comments received. The Commission intends for the Indemnification Exemption to—as one commenter suggested—“preserve [the] spirit of cooperation and coordination between regulators around the world” in the context of ensuring global regulators’ access to security-based swap data.⁸¹⁰ By identifying specific conditions that are applicable to requests by any relevant authority, the Commission also intends for the Indemnification Exemption to be—as one

⁸⁰⁹ 15 U.S.C. 78mm.

⁸¹⁰ See DTCC Letter III at 12 (discussing implementation of guidance provided by the ODRF regarding global regulators’ access to security-based swap data maintained by a trade repository in the United States).

commenter suggested—“location agnostic,”⁸¹¹ whereby relevant authorities are treated similarly regardless of whether they are domestic authorities or foreign authorities.⁸¹² In addition, the Indemnification Exemption is consistent with one commenter’s suggestion that the Commission should not apply the Indemnification Requirement where relevant authorities are carrying out their regulatory responsibilities, in accordance with international agreements and while maintaining the confidentiality of data provided to them.⁸¹³ In order for an SDR to share security-based swap information with a relevant authority without an indemnification agreement, the three proposed conditions specified in the Indemnification Exemption, as discussed further below, must be met.

First, the relevant authority’s request for security-based swap information from an SDR must be for the purpose of fulfilling the relevant authority’s regulatory mandate and/or legal responsibility. The Commission preliminarily believes that this condition is aligned with the Dodd-Frank Act’s requirements to protect security-based swap information, including proprietary and highly sensitive data, maintained by an SDR from unauthorized disclosure, misappropriation, or misuse of security-based swap information.⁸¹⁴ In particular, the

⁸¹¹ See DTCC Letter III at 12 (suggesting that the Commission’s regulatory model regarding regulatory access should be “location agnostic”).

⁸¹² The Commission intends for the Indemnification Exemption to provide relief for both foreign authorities and domestic authorities that require access to security-based swap data maintained by SDRs in order to fulfill a regulatory mandate or legal responsibility. The Commission preliminarily believes that an SDR may rely on the Indemnification Exemption in connection with requests from relevant authorities, including SROs, registered futures associations, and international financial institutions.

⁸¹³ See DTCC Letter III at 12.

⁸¹⁴ See Section 13(n)(5)(F) of the Exchange Act, 15 U.S.C. 78m(n)(5)(F), as added by Section 763(i) of the Dodd-Frank Act (requiring SDRs to maintain the privacy of any and all security-based swap transaction information that they receive from a security-based swap dealer, counterparty, or any other registered entity); Section 13(n)(5)(G) of the

Commission preliminarily believes that this condition is consistent with an SDR's statutory duty to maintain the privacy of security-based swap information that it receives.⁸¹⁵ In complying with its duty to maintain the privacy of security-based swap information, an SDR would need to determine when it can or cannot provide security-based swap information to others. The Commission preliminarily believes that, for the limited purposes of satisfying the Indemnification Exemption, it is appropriate for the SDR to include in its consideration of whether to provide security-based swap information to relevant authorities whether a relevant authority's specific request for security-based swap information is indeed within its regulatory mandate or legal responsibilities before the SDR provides the information to the relevant authority.⁸¹⁶ Finally, the Commission notes that establishing such a condition in the

Exchange Act, 15 U.S.C. 78m(n)(5)(G), as added by Section 763(i) of the Dodd-Frank Act (directing SDRs to provide data, including individual counterparty trade and position data, on a confidential basis only to circumscribed list of authorities or other persons that the Commission determines to be appropriate); and Section 13(n)(5)(H)(i) of the Exchange Act, 15 U.S.C. 78m(n)(5)(H)(i), as added by Section 763(i) of the Dodd-Frank Act (requiring that, prior to an SDR sharing such information, the SDR must receive a written agreement from each entity stating that the entity shall abide by certain confidentiality requirements).

⁸¹⁵ See Section 13(n)(5)(F) of the Exchange Act, 15 U.S.C. 78m(n)(5)(F), as added by Section 763(i) of the Dodd-Frank Act; see also proposed Rule 13n-4(b)(8) under the Exchange Act (requiring SDRs to maintain the privacy of any and all security-based swap transaction information that the SDR receives from a security-based swap dealer, counterparty, or certain registered entity) and proposed Rule 13n-9 under the Exchange Act (requiring an SDR to protect the privacy of security-based swap transaction information that the SDR receives by, among other things, establishing safeguards, policies, and procedures that are reasonably designed to protect such information and that address, without limitation, the SDR limiting access to confidential information, material, nonpublic information, and intellectual property).

⁸¹⁶ The Commission preliminarily believes that in complying with an SDR's statutory privacy duty, the SDR has the flexibility to consider whether to provide relevant authorities with access to requested security-based swap data and will most likely decide that it is reasonable to consider whether a relevant authority's request for security-based

Indemnification Exemption is consistent with guidelines that one commenter indicated that it followed on a voluntary basis in providing relevant authorities with access to security-based swap information.⁸¹⁷

Second, the relevant authority's request must pertain to a person or financial product subject to that authority's jurisdiction, supervision, or oversight. If, for instance, the relevant authority requests information on a security-based swap that pertains to a counterparty or underlier that is subject to the authority's jurisdiction, supervision, or oversight, then this condition to the Indemnification Exemption would be satisfied. The Commission preliminarily believes that the person or financial product need not be registered or licensed with the authority in order for this condition to be satisfied. Similar to the first condition of the Indemnification Exemption, the Commission preliminarily believes that this condition is aligned with the Dodd-Frank Act's requirements to protect security-based swap information, including proprietary and highly sensitive data, maintained by an SDR from unauthorized disclosure, misappropriation, or misuse of security-based swap information.⁸¹⁸ In particular, the Commission preliminarily believes that the second condition is consistent with an SDR's statutory duty to maintain the privacy of security-based swap information that it receives.⁸¹⁹ In complying with its duty to

swap information is within its regulatory mandate or legal responsibilities before the SDR provides the information.

⁸¹⁷ See DTCC Letter III at 12 (stating that it "routinely provides [swap] transaction data to U.S. regulators (and ... routinely provides data related to [swap] transactions in the U.S. by U.S. persons on European underlyings to European regulators), as contemplated by the ODRF" guidelines that provide guidance on relevant authorities' information needs and level of access to data); see also DTCC Letter IV at 7-8.

⁸¹⁸ See Sections 13(n)(5)(F), (G), and (H)(i) of the Exchange Act, 15 U.S.C. 78m(n)(5)(F), (G), and (H)(i), as added by Section 763(i) of the Dodd-Frank Act.

⁸¹⁹ See Section 13(n)(5)(F) of the Exchange Act, 15 U.S.C. 78m(n)(5)(F), as added by Section 763(i) of the Dodd-Frank Act; see also proposed Rule 13n-4(b)(8) under the

maintain the privacy of security-based swap information, an SDR would need to determine when it can or cannot provide security-based swap information to others. The Commission preliminarily believes that, for the limited purposes of satisfying the Indemnification Exemption, it is appropriate for the SDR to include in its consideration of whether to provide security-based swap information to relevant authorities whether a relevant authority's specific request pertains to a person or financial product that is subject to the authority's jurisdiction, supervision, or oversight.⁸²⁰ Finally, the Commission notes that establishing such a condition in the Indemnification Exemption is consistent with guidelines that one commenter indicated that it followed on a voluntary basis in providing relevant authorities with access to security-based swap information.⁸²¹

Third, the requesting relevant authority must enter into a supervisory and enforcement MOU or other arrangement with the Commission that addresses the confidentiality of the

Exchange Act (requiring SDRs to maintain the privacy of any and all security-based swap transaction information that the SDR receives from a security-based swap dealer, counterparty, or certain registered entity) and proposed Rule 13n-9 under the Exchange Act (requiring an SDR to protect the privacy of security-based swap transaction information that the SDR receives by, among other things, establishing safeguards, policies, and procedures that are reasonably designed to protect such information and that address, without limitation, the SDR limiting access to confidential information, material, nonpublic information, and intellectual property).

⁸²⁰ The Commission preliminarily believes that in complying with an SDR's statutory privacy duty, the SDR has the flexibility to consider whether to provide relevant authorities with access to requested security-based swap data and will most likely decide that it is reasonable to consider whether a relevant authority's request for security-based swap information pertains to a person or financial product that is subject to the authority's jurisdiction, supervision, or oversight before the SDR provides the information.

⁸²¹ See DTCC Letter III at 12 (stating that it "routinely provides [swap] transaction data to U.S. regulators (and . . . routinely provides data related to [swap] transactions in the U.S. by U.S. persons on European underlyings to European regulators), as contemplated by the ODRF" guidelines that provide guidance on relevant authorities' information needs and level of access to data); see also DTCC Letter IV at 7-8.

security-based swap information provided and any other matters as determined by the Commission.⁸²² For those entities not expressly identified in Section 13(n)(5)(G) of the Exchange Act⁸²³ or the rules thereunder, such an MOU or other arrangement can be entered into during the Commission's determination process, as discussed in Section VI.C.3(b) above. On the other hand, entities expressly identified in Section 13(n)(5)(G) of the Exchange Act and the rules thereunder, which are not subject to the Commission's process to determine appropriate regulators, would need to enter into such an MOU or other arrangement to satisfy this condition of the Indemnification Exemption. The Commission anticipates that in determining whether to enter into such a supervisory and enforcement MOU or other arrangement with a relevant authority, the Commission will consider whether, among other things, the relevant authority needs security-based swap information from an SDR to fulfill its regulatory mandate or legal responsibilities; the relevant authority agrees to protect the confidentiality of the security-based swap information provided to it; the relevant authority agrees to provide the Commission with reciprocal assistance in securities matters within the Commission's jurisdiction; and a supervisory and enforcement MOU or other arrangement would be in the public interest.

The Commission preliminarily believes that the third condition in the Indemnification Exemption is—as one commenter suggested—an effective way to streamline the Indemnification

⁸²² As a general matter, the Commission provides a list of MOUs and other arrangements on its website, which is one way for an SDR to monitor and determine whether a relevant authority has entered into an applicable MOU or other arrangement for purposes of satisfying the third condition of the Indemnification Exemption. The MOUs and other arrangements can be found at the following link:
http://www.sec.gov/about/offices/oia/oia_cooparrangements.shtml.

⁸²³ 15 U.S.C. 78m(n)(5)(G), as added by Section 763(i) of the Dodd-Frank Act.

Requirement for an “efficient exchange of information.”⁸²⁴ The Commission also preliminarily believes that the third condition in the Indemnification Exemption is appropriate to help protect the confidentiality of the security-based swap data provided to relevant authorities, and also to further the purposes of the Dodd-Frank Act. In this regard, the Commission preliminarily believes that where a relevant authority cannot agree to indemnification, a supervisory and enforcement MOU or other arrangement, which a relevant authority can legally enter into, may be a reasonable alternative because, similar to an indemnification agreement, a supervisory and enforcement MOU or other arrangement would serve as another mechanism to protect the confidentiality of security-based swap data provided to a relevant authority by committing the authority to maintain such confidentiality.⁸²⁵ In light of the confidentiality agreement required under Section 13(n)(5)(H)(i) of the Exchange Act and previously proposed Rule 13n-4(b)(10)⁸²⁶ as well as the importance of maintaining good relations and trust among relevant authorities, the Commission also preliminarily believes that a relevant authority will have strong incentives to take reasonable measures and precautions to comply with its obligation to protect the confidentiality of the security-based swap information received from an SDR. In lieu of

⁸²⁴ See ESMA Letter at 2 (recommending an MOU between the Commission and relevant authorities to address duplicative regulatory regimes and facilitate cooperation among authorities from different jurisdictions).

⁸²⁵ See 15 U.S.C. 8325(a), as added by Section 752 of the Dodd-Frank Act (providing that the Commission and foreign regulators “may agree to such information-sharing arrangements as may be deemed to be necessary or appropriate in the public interest . . .”).

⁸²⁶ As stated above, the MOU or other arrangement is separate from the written agreement under Section 13(n)(5)(H)(i) of the Exchange Act and previously proposed Rule 13n-4(b)(9) thereunder stating that the relevant authority shall abide by the confidentiality requirements described in Section 24 of the Exchange Act relating to the information on security-based swap transactions that is provided by the SDR. The MOU or other arrangement is between the Commission and the relevant authority, whereas the written agreement is between the SDR and the relevant authority.

providing an indemnification agreement, a supervisory and enforcement MOU or other arrangement would provide an SDR and the Commission with an additional layer of protection in maintaining the confidentiality of security-based swap information shared by the SDR.⁸²⁷

For the reasons stated above, the Commission preliminarily believes that the Indemnification Exemption is a reasonable alternative to the Indemnification Requirement. The Commission recognizes, however, that a supervisory and enforcement MOU or other arrangement would not necessarily provide SDRs that invoke the exemption with the same level of protection that an indemnification agreement would provide (i.e., coverage for any expenses arising from litigation relating to information provided to a relevant authority) and thus, an SDR may prefer the benefits of the Indemnification Requirement rather than rely on the Indemnification Exemption. Therefore, under the Commission's proposed exemption, an SDR would have the option to require an indemnification agreement from a relevant authority should the SDR choose to do so rather than rely on the Indemnification Exemption.

The Commission expects that where an SDR seeks to obtain an indemnification agreement from a relevant authority, the SDR should negotiate in good faith an indemnification agreement. In this regard, the Commission agrees with one commenter's view that "any indemnity should be limited in scope"⁸²⁸ and expects that an SDR will not unreasonably hinder

⁸²⁷ The Commission notes that the MOU or other arrangement would not constitute a waiver on the part of the Commission or SDR to pursue legal action against a relevant authority and liability, if any, will be determined in accordance with applicable law. The Commission also does not interpret the indemnification as extending to an SDR's own wrongful acts.

⁸²⁸ See DTCC Letter III at 12.

the ability of relevant authorities to obtain security-based swap information from the SDR.⁸²⁹

Regarding the same commenter's suggestion that the Commission provide model indemnification language,⁸³⁰ the Commission does not believe that it is appropriate to prescribe by rule specific language that an SDR would be required to use when requesting indemnification from relevant authorities. Because such language could vary on a case-by-case basis depending on various factors, such as the laws applicable to the relevant authority, the Commission preliminarily believes that it is appropriate to allow for flexibility in negotiation of an indemnification agreement.

Request for Comment

The Commission requests comment on all aspects of the proposed guidance, interpretation, and the Indemnification Exemption, including the following:

- Is the Commission's proposed interpretation of the Notification Requirement appropriate and sufficiently clear? Why or why not? Is it overly broad or narrow? If so, why? Does the Commission's proposed interpretation provide the Commission with sufficient information to fulfill our responsibilities?
- Should the Commission require SDRs to provide the Commission with actual notice of all of requests for security-based swap data by relevant authorities? Why or why not? If so, what should such notice include? Why?

⁸²⁹ For example, the Commission does not expect that an indemnification agreement would include a provision requiring a relevant authority to indemnify the SDR from the SDR's own wrongful or negligent acts.

⁸³⁰ See DTCC Letter III at 12.

- What would be the advantage of requiring SDRs to provide actual notice to the Commission of requests for security-based swap data by relevant authorities before making the data available to the relevant authorities?
- With regard to the Notification Requirement, should the Commission adopt a rule that is consistent with the approach taken by the CFTC in its Rule 49.17(d)(4), 17 CFR § 49.17(d)(4), which requires a swap data repository to promptly notify the CFTC regarding any request received by an appropriate foreign or domestic regulator to gain access to the swap data maintained by such swap data repository? Why or why not?
- Should the Commission provide an exemption from the Notification Requirement similar to the Indemnification Exemption? Why or why not? For example, should proposed Rule 13n-4(d) be revised to begin with “[a] registered security-based swap data repository is not required to comply with the notification requirements set forth in Section 13(n)(5)(G) of the Act and paragraph (b)(9) of this section and the indemnification requirement set forth in Section 13(n)(5)(H)(ii) of the Act and paragraph (b)(10) of this section . . .”? Why or why not?
- Should the Commission propose a rule with regard to the application of the Notification Requirement? Why or why not? If so, what should the rule stipulate?
- In determining whether a person is appropriate to obtain security-based swap data from SDRs, should the Commission establish the process set forth in this release for persons to request a Commission determination? Why or why not? Should the Commission make such a determination by order? Why or why not? Should the Commission delegate this determination to the staff? Why or why not?

- In determining whether a person is appropriate to obtain security-based swap data from SDRs, should the Commission require a supervisory and enforcement MOU or other arrangement? Why or why not? If so, what matters should be addressed in the MOU or other arrangement? What factors should the Commission take into consideration when determining whether to enter into an MOU or other arrangement with the person?
- In determining whether a person is appropriate to obtain security-based swap data from SDRs, does the Commission need to understand the scope of a relevant authority's regulatory mandate or legal responsibilities? Why or why not? What other factors should the Commission take into account in making such a determination?
- Should the Commission's process for determining whether a person is appropriate to obtain security-based swap data from SDRs be memorialized in a rule? If so, what should the rule stipulate?
- Should the Commission require by rule or in our determination orders that SDRs not provide relevant authorities with access to security-based swap data beyond their regulatory mandates or legal responsibilities? Why or why not? Should the Commission adopt a process such as the one adopted by the CFTC in its Rule 49.17(d), 17 CFR § 49.17(d), which requires certain regulators seeking to gain access to the swap data maintained by a swap data repository to certify that they are acting within the scope of their jurisdiction?

- Are there any reasons why the Commission should determine a person appropriate to obtain security-based swap data from one or more SDRs, but not all SDRs? If so, what are they?
- Should the Commission, when it determines that a person is appropriate to obtain security-based swap data from SDRs, include limitations on such determination? Why or why not? For example, should the Commission limit the determination to a certain period of time or to certain individual persons at a relevant authority?
- Under what circumstances should the Commission be able to revoke our determination order? Under what circumstances would it be appropriate for the Commission to request a relevant authority to provide additional information in order to maintain such a determination?
- Should the Commission provide additional clarification with respect to how parties comply with the confidentiality requirements in Section 24 of the Exchange Act? In what aspect would clarification be helpful?
- Is the Commission's proposed interpretation of the Indemnification Requirement appropriate and sufficiently clear? Should the Commission interpret the Indemnification Requirement more broadly or narrowly? If so, explain.
- Should the Commission interpret the Indemnification Requirement to be limited to the liability that a relevant authority otherwise would have to an SDR pursuant to the laws applicable to that relevant authority, such as the Federal Tort Claims Act, which is applicable to domestic authorities?
- Is the Commission's Indemnification Exemption appropriate and sufficiently clear? If not, what would be a better alternative? Please also explain the costs and benefits

of any alternative, including how the alternative would be consistent with and further the goals of Title VII.

- Is the Indemnification Exemption overly broad or narrow? If so, what would be a better alternative? Please also explain the costs and benefits of any alternative, including how the alternative would be consistent with and further the goals of Title VII.
- Are there ways to narrowly tailor the Indemnification Exemption further without hindering a relevant authority's ability to obtain security-based swap data information from SDRs?
- Should the SDRs have the option to require a relevant authority to provide an indemnification agreement even if the three conditions in the Indemnification Exemption can be satisfied? Why or why not? Does providing SDRs with such an option raise any competitiveness concerns?
- If the Commission were to modify the Indemnification Exemption so that SDRs do not have the option to require an indemnification agreement pursuant to Section 13(n)(5)(H)(ii) of the Exchange Act even if the three conditions in the exemption are satisfied, would this be appropriate and consistent with the Indemnification Requirement?
- What is the likelihood of an SDR not availing itself of the Indemnification Exemption even if the three conditions are met? Are there any measures that the Commission should take to address or mitigate this scenario? Are there any restrictions that the Commission should impose on an SDR that requires an indemnification agreement even if it can avail itself of the Indemnification Exemption?

- Should an SDR be required to make and keep records of its decision to rely on the Indemnification Exemption?
- Are the Indemnification Exemption and the Commission's proposed interpretive guidance sufficient to address the possibility that SDRs may be registered with ESMA and national regulators at the European Union ("EU") member state level will obtain security-based swap information from ESMA? Are there any regulatory regime or circumstances that the Commission should take into consideration that is not addressed by the Indemnification Exemption or the Commission's interpretive guidance? Please explain.
- Will organizations such as FINRA and other self-regulatory organizations, the National Futures Association, the IMF, and the International Bank for Reconstruction and Development be able to meet the three conditions of the Indemnification Exemption? Why or why not? If not, should the Indemnification Exemption be modified to explicitly exempt such organizations from the Indemnification Requirement? Why or why not? If so, which organizations and why?
- Does the Indemnification Exemption adequately address the concerns of relevant authorities with respect to the Indemnification Requirement? Are there any circumstances that would warrant an exemption from the Indemnification Requirement, but that would not satisfy all the conditions in the Indemnification Exemption? If so, how could the Indemnification Exemption be modified and narrowly tailored to capture such circumstances so as not to have the effect of nullifying the Indemnification Requirement?

- Is it appropriate to provide SDRs with the flexibility to determine, on a case-by-case basis, whether a relevant authority that is requesting security-based swap information is acting within the scope of its regulatory mandate or legal responsibilities? Why or why not?
- Should the Commission impose any additional requirements on SDRs to confirm that a relevant authority is requesting security-based swap information for the purpose of fulfilling its regulatory mandate or legal responsibilities? For example, should the Commission prescribe, as a condition in the Indemnification Exemption, that the SDR obtain a written confirmation from the requesting relevant authority that it is acting within its regulatory mandate or legal responsibilities?
- Should the Commission impose any additional requirements on SDRs to confirm that a relevant authority is requesting security-based swap information that pertains to a person or financial product subject to the jurisdiction, supervision, or oversight of the authority? For example, should the Commission prescribe, as a condition in the Indemnification Exemption, that the SDR obtain a written confirmation from the requesting relevant authority that its request pertains to a person or financial product subject to the jurisdiction, supervision, or oversight of the authority?
- Would an MOU between the Commission and a relevant authority in lieu of an indemnification agreement provide protection of security-based swap information shared with the relevant authority comparable to that of an indemnification agreement? If not, why not?

- Should the Commission specify in the Indemnification Exemption any other matters that may be in a supervisory and enforcement MOU or other arrangement? If so, what?
- On January 25, 2012, the European Commission proposed reforms to strengthen online privacy rights and to modernize the principles set forth in the EU's 1995 Data Protection Directive ("EU Directive") to protect personal data. Will the EU Directive affect the ability of SDRs to provide security-based swap data to other relevant authorities, including the Commission? If so, please explain. Will the EU Directive affect the ability of the EU and its member countries to provide reciprocal assistance in securities matters, as contemplated by the supervisory and enforcement MOU or other arrangement discussed above? If so, please explain.
- Should the Commission impose any additional conditions in the Indemnification Exemption? If so, what? Are there any conditions in the Indemnification Exemption that the Commission should not require? If so, what conditions and why?
- For the purpose of satisfying the Indemnification Exemption, should an SDR be required to maintain policies and procedures setting forth how to determine (i) whether security-based swap information being requested is needed to fulfill a regulatory mandate and/or legal responsibility of the requesting entity, (ii) whether a relevant authority's requests pertain to a person or financial product subject to the authority's jurisdiction, supervision, or oversight, or (iii) whether the requesting relevant authority has entered into a supervisory and enforcement MOU or other arrangement with the Commission? To the extent such policies and procedures require each requesting relevant authority to provide a written representation with

respect to one or more of the conditions in the Indemnification Exemption, should such written representations be considered sufficient to satisfy the relevant conditions in the Indemnification Exemption?

- Are there better ways that the Commission could address the Indemnification Requirement besides the Indemnification Exemption that would be consistent with and further the goals of Title VII? Please explain the costs and benefits of any alternative.
- What is the likely impact of the Indemnification Exemption on the security-based swap market? Would the Indemnification Exemption potentially promote or impede the establishment of SDRs?
- Is the Commission's proposed interpretation of how the Indemnification Requirement applies to SDRs dually registered with the Commission and a foreign regulator appropriate and sufficiently clear? If not, why not? Should the Commission apply the Indemnification Requirement when an SDR is registered with the Commission and is also registered or licensed with a foreign authority and that foreign authority is obtaining information from the SDR pursuant to its regulatory regime? Why or why not? Should there be any additional conditions in such instances? If so, what conditions and why?
- Should the Commission provide guidance on what it means for a "person or financial product" to be "subject to [an] authority's jurisdiction, supervision, or oversight"? Why or why not?
- What would be the market impact of the proposed approach to providing an exemption from the Indemnification Requirement? How would the proposed

application of the Indemnification Requirement, including the proposed exemption, affect the competitiveness of U.S. entities in the global marketplace (both in the United States as well as in foreign jurisdictions)? Would the proposed approach place any market participants at a competitive disadvantage or advantage? If so, please explain. Would the proposed approach be a more general burden on competition? If so, please explain. What other measures should the Commission consider to implement the Indemnification Requirement? What would be the market impacts and competitiveness effects of alternatives to the proposed approach discussed in this release?

VII. Security-Based Swap Execution Facilities

A. Introduction

As discussed throughout this release, the market for security-based swaps is global in scope, with transactions in security-based swaps often involving counterparties in different jurisdictions. The Commission recognizes that, as a result, there may be uncertainty regarding the application of our proposed SB SEF registration requirements for a security-based swap market whose principal place of business is outside of the United States. The Commission believes, therefore, that guidance and clarification on the application of our proposed registration requirements would be useful with respect to security-based swap markets operating in the cross-border context.

Under the Dodd-Frank Act, new Section 3D(a)(1) of the Exchange Act provides that “no person may operate a facility for the trading or processing of security-based swaps, unless the facility is registered as a security-based swap execution facility or as a national securities exchange under this section.”⁸³¹ In our release proposing rules governing SB SEFs,⁸³² the Commission expressed the view that the registration requirement of Section 3D(a)(1) would apply only to a facility that meets the definition of “security-based swap execution facility” in Section 3(a)(77) of the Exchange Act.⁸³³ The SB SEF Proposing Release, however, did not

⁸³¹ 15 U.S.C. 78c-4(a)(1).

⁸³² See SB SEF Proposing Release, 76 FR 10948. The proposed rules governing SB SEFs are contained in proposed Regulation SB SEF.

⁸³³ See SB SEF Proposing Release, 76 FR at 10949 n.10. Section 3(a)(77) of the Exchange Act defines “security-based swap execution facility” to mean “a trading system or platform in which multiple participants have the ability to execute or trade security-based swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate commerce, including any trading facility, that

explicitly address the circumstances under which a foreign⁸³⁴ security-based swap market would be required to register with the Commission under Section 3D of the Exchange Act.⁸³⁵ As discussed below, the Commission herein proposes to interpret when the registration requirements of Section 3D of the Exchange Act would apply to a foreign security-based swap market.⁸³⁶ The Commission also discusses below the circumstances under which it may consider granting an exemption from registration for a foreign security-based swap market.

The proposed interpretations described below represent the Commission's proposed approach to applying the SB SEF registration requirements to foreign security-based swap markets. We recognize that other approaches may achieve the goals of the Dodd-Frank Act, in whole or in part. Accordingly, we invite comment regarding all aspects of the proposal described below, and each proposed interpretation contained therein, including potential alternative approaches. Data and comment from market participants and other interested parties regarding the likely effect of each proposed interpretation and potential alternative approaches would be particularly useful to the Commission in evaluating modifications to the proposals.

(A) facilitates the execution of security-based swaps between persons and (B) is not a national securities exchange." 15 U.S.C. 78c(a)(77).

⁸³⁴ In using the terms "foreign" and "non-resident" in connection with a security-based swap market, the Commission intends that these terms refer to a security-based swap market that is not a U.S. person.

⁸³⁵ In the SB SEF Proposing Release, the Commission contemplated that non-resident persons may apply for registration as a SB SEF. In this regard, the Commission proposed Rule 801(f) of Regulation SB SEF, which would require any non-resident person applying for registration as a SB SEF to certify and provide an opinion of counsel that it can, as a matter of law, provide the Commission with prompt access to its books and records and submit to onsite inspection and examination by representatives of the Commission. See SB SEF Proposing Release, 76 FR at 11001.

⁸³⁶ Entities that do not meet the definition of SB SEF may nonetheless be required to register in another capacity under the Exchange Act.

B. Registration of Foreign Security-Based Swap Markets

As noted above, in our SB SEF Proposing Release, the Commission expressed the view that the registration requirement of Section 3D(a)(1) would apply only to a facility that meets the definition of “security-based swap execution facility” in Section 3(a)(77) of the Exchange Act.⁸³⁷ A “security-based swap execution facility” is defined as “a trading system or platform in which multiple participants have the ability to execute or trade security-based swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate commerce, including any trading facility, that (A) facilitates the execution of security-based swaps between persons and (B) is not a national securities exchange.”⁸³⁸

As outlined further below, the Commission preliminarily believes that, when evaluating whether a foreign security-based swap market would have to register under Section 3D(a)(1), activities by the foreign security-based swap market that provide U.S. persons, or non-U.S. persons located in the United States, the ability to directly execute or trade security-based swaps on the foreign security-based swap market or facilitate the execution or trading of security-based swaps by U.S. persons, or non-U.S. persons located in the United States, on the foreign security-based swap market should be considered.⁸³⁹ The Commission also preliminarily believes that, if a foreign security-based swap market takes affirmative actions to induce the execution or trading of security-based swaps on its market by U.S. persons, or non-U.S. persons located in the United States, including by inducing such execution or trading through marketing its services relating to the ability to execute or trade security-based swaps on its market to U.S. persons, or non-U.S.

⁸³⁷ See note 833 and accompanying text, supra.

⁸³⁸ 15 U.S.C. 78c(a)(77).

⁸³⁹ See id. Non-U.S. persons located in the United States could include, for example, U.S. branches of foreign entities.

persons located in the United States, or otherwise initiating contact with such persons for the purpose of inducing such execution or trading, then those activities could be viewed as facilitating the execution or trading of security-based swaps on its market and could cause the foreign security-based swap market to fall within the scope of the registration requirements of Section 3D of the Exchange Act.

The Commission believes that it would be useful to provide some discussion of the types of activities that it preliminarily believes would place a foreign security-based swap market within the scope of Section 3D of the Exchange Act under the Commission's proposed interpretation. Given the constant innovation of trading mechanisms and methods, as well as technological and communication developments, however, it would not be possible to provide a comprehensive, final discussion of every activity for which a foreign security-based swap market would be considered to be providing U.S. persons or non-U.S. persons located in the United States the ability to execute or trade security-based swaps, or to be facilitating the execution or trading of security-based swaps, on its market, thereby triggering the requirement to register as a SB SEF under Section 3D(a)(1).

The Commission preliminarily believes that when a foreign security-based swap market provides U.S. persons, or non-U.S. persons located in the United States, with the direct ability to trade or execute security-based swaps on the foreign security-based swap market by accepting bids and offers made by one or more participants on the foreign security-based swap market, then such market would be required to register as a SB SEF. The Commission notes that a foreign security-based swap market could grant such direct access to U.S. persons, and non-U.S. persons located in the United States, through a variety of means, such as (i) providing proprietary electronic screens, market terminals, monitors or other devices for trading security-based swaps

on its market; (ii) granting direct electronic access to the foreign security-based swap market's trading system or network, including by providing data feeds or codes for use with software operated through the computer of a U.S. person, or non-U.S. person located in the United States, or by allowing such persons to access the foreign security-based swap market through third-party service vendors or public networks (such as the Internet); or (iii) allowing its members or participants to provide U.S. persons or non-U.S. persons located in the United States with direct electronic access to trading in security-based swaps on the foreign security-based swap market.

The Commission also preliminarily believes that, if a foreign security-based swap market were to grant membership or participation in the foreign security-based swap market to U.S. persons, or non-U.S. persons located in the United States, which would provide such persons with the ability to directly execute or trade security-based swaps by accepting bids and offers made by one or more participants on the foreign security-based swap market, then such market would be required to register as a SB SEF.

Although the Commission preliminarily believes that the foregoing activities are the types of activities that would warrant application of the registration requirement of Section 3D, the Commission emphasizes that these activities are not intended to be an exclusive or exhaustive discussion of all the activities that could trigger the registration requirements of Section 3D by a foreign security-based swap market. In addition, as trading and communication mechanisms and methods evolve, other activities that aim at providing U.S. persons, or non-U.S. persons located in the United States, the ability to directly execute or trade security-based swaps by accepting bids and offers made by multiple participants on a foreign security-based swap market, or that aim to facilitate the execution or trading of security-based swaps by U.S. persons or non-U.S. persons located in the United States on a trading platform or system operated by a

foreign security-based swap market, could cause a foreign security-based swap market to fall within the ambit of the registration requirements of Section 3D.⁸⁴⁰

The Commission anticipates that some U.S. persons or non-U.S. persons located in the United States may choose to transact on a foreign security-based swap market on an indirect basis through a non-U.S. person that is not located in the United States and that is a member or participant of a foreign security-based swap market. The Commission preliminarily believes that, to the extent that the U.S. person, or non-U.S. person located in the United States, initiates the contact and the foreign security-based swap market does not attempt to solicit such business, such a transaction would not on its own warrant requiring the foreign security-based swap market to register under Section 3D of the Exchange Act.⁸⁴¹ However, as discussed above, to the extent that a foreign security-based swap market initiates contacts with U.S. persons or non-U.S. persons located in the United States to induce or facilitate the execution or trading of security-based swaps by such persons on its market, such activity would trigger the requirement to register under Section 3D.⁸⁴²

The Commission also anticipates that, given the global nature of the security-based swap business, a foreign security-based swap market could, at some point, seek to enter into a business

⁸⁴⁰ In the alternative, the foreign security-based swap market could elect to apply for registration as a national securities exchange. See 15 U.S.C. 78f.

⁸⁴¹ The U.S. person or non-U.S. person located in the United States may, however, be required to register as a broker under Section 15(a)(1) of the Exchange Act. See 15 U.S.C. 78o(a)(1).

⁸⁴² For example, if a foreign security-based swap market were to allow its members or participants to provide U.S. persons, or non-U.S. persons located in the United States with direct electronic access to trading in security-based swaps on the foreign security-based swap market, this access would be considered direct access by a U.S. person, or a non-U.S. person located in the United States and, as noted above, would require the foreign security-based swap market to register.

combination with a registered SB SEF. Under the Commission's proposed interpretation, such business combination also could trigger the registration requirements of Section 3D of the Exchange Act for the foreign security-based swap market, depending on the nature and extent of integration of the entities' operations and activities. In this regard, the Commission's experience in recent years with national securities exchanges that have engaged in cross-border combinations may be illustrative for these purposes. Several national securities exchanges in recent years have entered into transactions to combine under common ownership with certain non-U.S. markets, such as NYSE Group, Inc.'s transaction with Euronext N.V. to form NYSE Euronext in 2007;⁸⁴³ Eurex Frankfurt AG's acquisition of the International Securities Exchange, LLC in 2007;⁸⁴⁴ and The Nasdaq Stock Market, Inc.'s transaction with Borse Dubai Limited to form NASDAQ OMX Group, Inc. in 2008.⁸⁴⁵ In each case, the U.S. and the foreign markets, under their respective parent companies, generally have continued to operate as separate legal entities, maintained separate liquidity pools in their respective jurisdictions without integrating trading interest among markets under common ownership, and continued to be regulated subject to their own home country's requirements. Similarly, a registered SB SEF and a foreign security-based swap market could come under common ownership but continue to be separate legal entities, maintain separate liquidity pools for their security-based swap businesses without integrating trading interest among affiliated markets, and be separately regulated in their own home jurisdictions. However, if a registered SB SEF and foreign security-based swap market were to integrate their security-based swap trading facilities, for example, by the foreign

⁸⁴³ See Exchange Act Release No. 55293 (Feb. 14, 2007), 72 FR 8033 (Feb. 22, 2007).

⁸⁴⁴ See Exchange Act Release No. 56955 (Dec. 13, 2007), 72 FR 71979 (Dec. 19, 2007).

⁸⁴⁵ See Exchange Act Release No. 57099 (Jan. 4, 2008), 73 FR 1901 (Jan. 10, 2008).

security-based swap market providing direct access to the SB SEF's participants, or by the foreign security-based swap market and the registered SB SEF integrating their liquidity pools,⁸⁴⁶ under the Commission's proposed interpretation, such actions would trigger the registration requirements of Section 3D of the Exchange Act for the foreign security-based swap market because the market would then be operating a facility for trading security-based swaps within the United States.

C. Registration Exemption for Foreign Security-Based Swap Markets

The prior section discusses when a foreign security-based swap market would be required to register as a SB SEF under Section 3D of the Exchange Act. The Commission recognizes, however, that the security-based swap market is global in nature and therefore one or more foreign security-based swap markets may seek relief from the Commission to allow some of the activities discussed above that would trigger the SB SEF registration requirement to continue without the foreign security-based swap market having to register as a SB SEF under Section 3D of the Exchange Act.

Following the publication of the SB SEF Proposing Release, the Commission received comments from the public expressing concerns about the implications of the proposed rules and the requirements of Section 3D of the Exchange Act for foreign security-based swap markets and

⁸⁴⁶ An integrated trading pool for security-based swaps would indicate that there is a unitary market for the security-based swaps. In such a scenario, persons with direct access to or membership in the registered SB SEF effectively would have the same direct access or membership privileges in the foreign security-based swap market by virtue of their access to the integrated trading pool, and thus would have the ability to directly execute or trade security-based swaps on the foreign security-based swap market.

the global markets for security-based swaps generally.⁸⁴⁷ Several commenters urged the Commission to work with foreign regulators to develop harmonized rules for the trading of security-based swaps.⁸⁴⁸ Some commenters believed that harmonization or flexibility with regard to foreign security-based swap markets would help reduce the risk of regulatory arbitrage.⁸⁴⁹ One commenter stated that such harmonization would reduce the burdens of duplicative or conflicting requirements that could be faced by security-based swap markets operating in multiple jurisdictions.⁸⁵⁰

Although a number of foreign jurisdictions are in the process of developing standards for the regulation of security-based swaps and security-based swap markets, at this time few foreign jurisdictions have enacted legislation or adopted standards for the regulation of security-based swap markets.⁸⁵¹ The Commission, however, is in discussions with its foreign counterparts to explore steps toward harmonizing standards for such regulation in the future.⁸⁵² In the meantime, the Commission is considering how best to address commenters' concerns about the risks of regulatory arbitrage and duplicative regulatory burdens on security-based swap markets

⁸⁴⁷ See, e.g., Thomson Letter at 3-4, Blackrock Letter at 12-13, Bloomberg Letter at 6-7, ISDA/SIFMA II Letter at 2, WMBAA Letter at 10-11, Cleary Letter III at 4, and Cleary Letter IV at 5, 13.

⁸⁴⁸ See Thomson Letter, BlackRock Letter, ISDA/SIFMA Letter II, and WMBAA Letter.

⁸⁴⁹ See Thomson Letter, Bloomberg Letter, and WMBAA Letter.

⁸⁵⁰ See Bloomberg Letter.

⁸⁵¹ See FSB Progress Report April 2013 at 1 (“While progress has been made in moving [OTC derivatives] markets towards centralized infrastructure, less than half of the FSB member jurisdictions currently have legislative and regulatory frameworks in place to implement the G20 commitments and there remains significant scope for increases in trade reporting, central clearing and exchange and electronic platform trading in global OTC derivatives markets.”).

⁸⁵² See Section I.C, *supra*.

that operate on a cross-border basis, in a manner consistent with the requirements of the Dodd-Frank Act and the federal securities laws generally.

The Commission preliminarily believes that it may be appropriate to consider an exemption as an alternative approach to SB SEF registration depending on the nature or scope of the foreign security-based swap market's activities in, or the nature or scope of the contacts the foreign security-based swap market has with, the United States. Exemptions that are carefully tailored to achieve the objectives of Section 3D could help to improve security-based swap market supervision overall by allowing the Commission to focus our resources on areas where it has a substantial interest, while reducing duplication of efforts in areas where our interests are aligned with those of other regulators.

The Commission could exempt from the registration requirements of Section 3D a foreign security-based swap market that is subject to comparable, comprehensive supervision and regulation under appropriate governmental authorities in its home country.⁸⁵³ The availability of such an exemption could serve to reduce any potential duplicative regulatory burdens faced by security-based swap markets that operate on a cross-border basis and that otherwise would be required to register both in the United States and in a non-U.S. jurisdiction.

Before the Commission would consider issuing an exemption from the registration requirements of Section 3D for a particular foreign security-based swap market, the Commission could consider whether the foreign security-based swap market is subject to comparable, comprehensive supervision and regulation by the appropriate governmental authorities in its home country, as compared to the supervision and regulation of SB SEFs under the Dodd-Frank

⁸⁵³ Any such exemption would be issued by order pursuant to the Commission's authority under Section 36 of the Exchange Act. 15 U.S.C. 78mm.

Act and the Commission's implementing regulations. This process could include a review of the foreign jurisdiction's laws, rules, regulatory standards and practices governing the foreign security-based swap market and would entail consultation and cooperation with the foreign security-based swap market's home country governmental authorities.

The Commission expects that any such registration exemption could be subject to appropriate conditions that could include, but not be limited to, requiring a foreign security-based swap market to certify that it would provide the Commission with prompt access to its books and records, including, for example, data relating to orders, quotes, and transactions, as well as provide an opinion of counsel that, as a matter of law, it is able to provide such access. The Commission also could require, as a condition to receiving an exemption from registration, that a foreign security-based swap market would appoint an agent for service of process in the United States who is not an employee or official of the Commission. These potential conditions would be consistent with the proposed requirements for non-resident registered SB SEFs⁸⁵⁴ and would allow the Commission to exercise, as necessary or appropriate, supervisory oversight of a foreign security-based swap market that receives an exemption from Section 3D's registration requirements. The Commission also could require that, before issuing an exemption from registration, the Commission and the appropriate financial regulatory authority or authorities in the foreign security-based swap market's home jurisdiction enter into a MOU that addresses the oversight and supervision of that market.

In certain cases, the Commission also could require, as a condition to granting such an exemption, that a foreign security-based swap market meet some of the requirements applicable

⁸⁵⁴ See SB SEF Proposing Release, 76 FR at 11001, proposed Rule 801(f), and proposed Form SB SEF.

to registered SB SEFs. Such a condition may be useful where the Commission is unable to make a determination regarding the broader comparability of the home jurisdiction's regulation and supervision, but where there is comparability with respect to some of the requirements applicable to registered SB SEFs and to a foreign security-based swap market (or class of security-based swap markets) in its home country. Therefore, the terms and conditions of any exemption that the Commission may grant to a foreign security-based swap market (or class of security-based swap markets) could depend on the degree to which the foreign jurisdiction's laws, rules, regulatory standards, and practices governing security-based swaps "compare" to those of the United States.

In considering the above, the Commission may consider any requirements of the home country that would conflict with the requirements applicable to SB SEFs under the Dodd-Frank Act. For example, Section 3D of the Exchange Act seeks to ensure fair and open access to SB SEFs by requiring that a SB SEF establish and enforce rules that include means to provide market participants with impartial access to the market.⁸⁵⁵ The Commission also could consider whether a home country regulator imposes a regulation or policy limiting fair and open access to its security-based swap markets.

The Commission notes that security-based swap market structure and security-based swap market supervision and regulation could vary in other jurisdictions and could affect the Commission's ability to make a comparability determination. In addition, such differences in supervision and regulation would necessitate that each exemption request be reviewed on a jurisdiction-by-jurisdiction basis by the Commission. The conditions to any such exemption also

⁸⁵⁵ 15 U.S.C. 78c-4(d)(2)(B).

would be based on the differences in the market structure and supervisory regime in the jurisdiction under consideration in comparison to U.S. oversight of SB SEFs.

As noted above, few foreign jurisdictions have adopted a comprehensive framework for the regulation of security-based swap markets and the Commission has not yet adopted rules governing SB SEFs. Thus, the Commission believes that it is premature to specify the precise criteria that the Commission may use for our evaluation and comparison of the regulatory and supervision programs for foreign security-based swap markets, should the Commission choose to consider exempting from registration as a SB SEF a foreign security-based swap market that becomes subject to regulation in its home country at a future date. Nonetheless, the Commission believes that it is useful now to elicit comment from interested persons regarding our proposed approach, should it choose to consider providing such an exemption.

The Commission preliminarily believes that the proposed approach, which may condition any exemption for a foreign security-based swap market on the existence of comparable, comprehensive supervision and regulation under the appropriate financial regulatory authority or authorities in the foreign security-based swap market's home country, should provide comparable regulatory oversight and supervision as that afforded by the Commission's regulation and supervision of SB SEFs. The standard of "comparability" discussed above should allow the Commission sufficient flexibility to make exemption determinations based on the similarity of the requirements and practices of the foreign jurisdiction's regulatory program governing security-based swaps. In this regard, the Commission preliminarily believes that the comparability standard could extend not only to the written laws and rules of the foreign jurisdiction, but also to the jurisdiction's comprehensive supervision and regulation of its security-based swap markets, including the jurisdiction's oversight of its markets and

enforcement of its laws and rules. The breadth of the proposed comparability standard (i.e., to consider actual practices as well as written laws and rules) could help ensure that the regulatory protections provided in the foreign jurisdiction's security-based swap markets are substantially realized by sufficiently vigorous supervision and enforcement.

Finally, as discussed below,⁸⁵⁶ the Commission proposes to permit substituted compliance, under certain circumstances, with respect to the mandatory trade execution requirement in Section 3C(h)(1) of the Exchange Act, if the Commission finds that a foreign-based security-based swap market (or class of security-based swap markets) is subject to comparable, comprehensive supervision and regulation by a foreign financial regulatory authority in such foreign jurisdiction.⁸⁵⁷ While the proposed comparability standard for our granting an exemption from SB SEF registration could be similar to the proposed comparability standard for a substituted compliance determination with respect to the mandatory trade execution requirement, which is discussed below, the factors that the Commission could find relevant to a comparability determination with respect to SB SEF registration would not necessarily be the same factors that it would consider when making a comparability determination with respect to mandatory trade execution. This is because Section 3D of the Exchange Act is focused on the registration of SB SEFs and compliance by registered SB SEFs with the 14 enumerated core principles governing SB SEFs,⁸⁵⁸ whereas Section 3C(h)(1) of the Exchange Act is focused on the circumstances where execution of a security-based swap on a SB

⁸⁵⁶ See Section XI.F, infra.

⁸⁵⁷ See proposed Rule 3Ch-2 under the Exchange Act.

⁸⁵⁸ See 15 U.S.C. 78c-4.

SEF (or an exchange) is required.⁸⁵⁹ However, the Commission solicits comment on the appropriateness or feasibility of our proposed approach.

Request for Comment

The Commission generally requests comment on the discussion regarding SB SEFs, including the following:

- The Commission requests comment on all aspects of our discussion regarding when a foreign security-based swap market would be required to register as a SB SEF under Section 3D and on the non-exhaustive discussion of the types of activities, noted above, that would trigger registration of the foreign security-based swap market as a SB SEF. The Commission also requests comment on all aspects of our proposal to consider requests for an exemption from SB SEF registration for a foreign security-based swap market under certain circumstances.
- The Commission seeks commenters' views on the potential impact of applying the proposed SB SEF registration requirements to foreign security-based swap markets that engage in activities that would require such markets to register as a SB SEF. Are there aspects of the proposed SB SEF rules and registration requirements that present issues for foreign security-based swap markets that would be required to register as a SB SEF? If so, please explain in detail.
- The Commission requests commenters' views on whether the non-exhaustive discussion of the types of activities, noted above, which would trigger the application of Section 3D registration requirements to a foreign security-based swap market, is

⁸⁵⁹ See 15 U.S.C. 78c-3(h)(1).

appropriate to aid foreign security-based swap markets in assessing whether they would be required to register as a SB SEF. Are there other activities that foreign security-based swap markets currently engage in that should be evaluated for consideration as to whether those activities would trigger Section 3D registration requirements? If so, please describe those activities in detail. Are there specific items set forth in the non-exhaustive discussion of the types of activities noted above or any other specific activities engaged in by foreign security-based swap markets that should not trigger Section 3D registration requirements? If so, commenters should describe those activities in detail and explain their rationale. Does the proposed interpretation regarding the application of Section 3D and the proposed non-exhaustive discussion of the types of activities provide sufficient guidance for a foreign security-based swap market to assess whether it would have to register, or seek an exemption from registration, as a SB SEF? If not, what kind of further guidance would be helpful for making that determination? Does the proposed approach provide sufficient guidance to a foreign security-based swap market that may seek an exemption? If not, what kind of further guidance would be helpful?

- The Commission seeks comment on the appropriateness of the proposed interpretation that the registration requirements of Section 3D should be triggered by certain activities directed at “U.S. persons, or non-U.S. persons located in the United States.” Are the categories of persons captured by this proposed approach too broad? Too narrow? Please specify and explain. For example, foreign branches would be included by the proposed approach, such that a foreign security-based swap market’s provision of direct access or participation in its market to a foreign branch, or

activities facilitating execution or trading of security-based swaps on its market by such a foreign branch, would trigger the Section 3D registration requirement. Do commenters agree with this approach? If not, why not? What would be a better approach? If so, how so?

- The Commission requests comment on what would be the appropriate circumstances under which the Commission should consider granting an exemption from the registration requirements of Section 3D. Should the Commission consider granting an exemption from registration for a foreign security-based swap market when the nature or scope of its activities in the United States are limited? If so, why? Or should the Commission also consider granting an exemption for a foreign security-based swap market when the nature or scope of its activities in the United States are more extensive? Why or why not? What would be the advantages and disadvantages of either approach? What would be the appropriate criteria for the Commission to apply when it considers whether to grant an exemption from the registration requirements of Section 3D? Please specify and explain.
- The Commission seeks comment on whether the proposed standard of comparability is an appropriate standard for the Commission to determine whether to grant an exemption from Section 3D's registration requirements for a foreign security-based swap market. Should a different standard be used? If so, what should be the standard and why? Should it be stricter or more lenient than the proposed standard? If it should be stricter or more lenient, in what respects and in what manner? Why or why not? As proposed, when making a comparability determination, the Commission would look not just at the rules of a foreign jurisdiction, but also at the

comprehensiveness of the supervision and regulation by the appropriate governmental authorities of that jurisdiction. Is the Commission's holistic approach to making a comparability determination appropriate? Why or why not? Comment also is requested regarding whether the Commission should put in place a more detailed standard for granting an exemption, for example, by providing specific criteria that the Commission would look to in determining whether there is comparable, comprehensive regulation and supervision of a foreign security-based swap market by the appropriate financial regulatory authority or authorities in the home country. If so, what criteria should the Commission include and why? Commenters also are requested to explain how the Commission should develop such criteria in the absence of existing regulations in other jurisdictions at the present time. Are there specific procedures or comparability considerations that commenters believe that the Commission would find useful to incorporate in our proposed exemption approach at this time? If so, please describe. What would be the advantages of adopting such measures now? What would be the disadvantages of adopting such measures now?

- The Commission solicits comment on the appropriateness or feasibility of distinguishing between the comparability determination for purposes of an exemption from registration as a SB SEF and for purposes of substituted compliance for the mandatory trade execution requirement. Should the Commission consider the same factors in making a comparability determination for mandatory trade execution and a comparability determination for SB SEF registration? If so, what factors would be relevant and appropriate to both determinations? Please describe. What factors, if any, would only be relevant or appropriate to a comparability determination for SB

SEF registration or a comparability determination for mandatory trade execution, respectively? Please describe.

- The Commission seeks comment on the proposed process for granting an exemption from Section 3D's registration requirements for a foreign security-based swap market. Is the process explained in a sufficiently clear manner? Does the process provide foreign security-based swap markets with an efficient method for obtaining exemptions? If not, what aspects of the process would be burdensome for foreign security-based swap markets? Are there other ways to streamline the exemption process? Please describe.
- What would be the market impact of the proposed approach to the registration of foreign security-based swap markets? How would the proposed application of the SB SEF registration requirement affect the competitiveness of U.S. entities in the global marketplace (both in the United States as well as in foreign jurisdictions)? Would the proposed approach place any market participants at a competitive disadvantage or advantage? If so, please explain. Would the proposed approach be a more general burden on competition? If so, please explain. What other measures should the Commission consider to implement the proposed approach to the registration of foreign security-based swap markets? What would be the market impacts and competitiveness effects of alternatives to the proposed approach discussed in this release?

VIII. Regulation SBSR—Regulatory Reporting and Public Dissemination of Security-Based Swap Information

A. Background

Section 13A(a)(1) of the Exchange Act⁸⁶⁰ provides that all security-based swaps that are not accepted for clearing shall be subject to regulatory reporting. Section 13(m)(1)(G) of the Exchange Act⁸⁶¹ provides that each security-based swap (whether cleared or uncleared) shall be reported to a registered SDR, and Section 13(m)(1)(C) of the Exchange Act⁸⁶² generally provides that transaction, volume, and pricing data of all security-based swaps shall be publicly disseminated in real time, except in the case of block trades.⁸⁶³ On November 19, 2010, the Commission proposed Regulation SBSR to implement these requirements.⁸⁶⁴

Rule 908 of Regulation SBSR as initially proposed was designed to clarify the application of Regulation SBSR to cross-border security-based swaps. Proposed Rule 908(a) would require a security-based swap to be reported and publicly disseminated if the security-based swap: (i) has at least one counterparty that is a U.S. person; (ii) was executed in the United States or through any means of interstate commerce; or (iii) was cleared through a registered clearing agency having its principal place of business in the United States. Proposed Rule 908(b) provided that, notwithstanding any other provision of Regulation SBSR, no

⁸⁶⁰ 15 U.S.C. 78m-1(a)(1).

⁸⁶¹ 15 U.S.C. 78m(m)(1)(G).

⁸⁶² 15 U.S.C. 78m(m)(1)(C).

⁸⁶³ Section 13(m)(1)(E) of the Exchange Act, 15 U.S.C. 78(m)(1)(E), provides that, with respect to cleared security-based swaps, the rule promulgated by the Commission related to public dissemination shall contain provisions that “specify the criteria for determining what constitutes a large notional security-based swap transaction (block trade) for particular market and contracts” and “specify the appropriate time delay for reporting large notional security-based swap transactions (block trades) to the public.”

⁸⁶⁴ See Regulation SBSR Proposing Release, 75 FR 75208.

counterparty to a security-based swap would incur any obligation under Regulation SBSR unless it is: (i) a U.S. person; (ii) a counterparty to a security-based swap executed in the United States or through any means of interstate commerce; or (iii) a counterparty to a security-based swap cleared through a clearing agency having its principal place of business in the United States. Thus, under the Commission's initial proposal, a security-based swap—wherever it is executed or cleared—would be required to be reported pursuant to Regulation SBSR if at least one counterparty were a U.S. person. Furthermore, a security-based swap—even if both counterparties were non-U.S. persons—would be required to be reported if the security-based swap were executed in the United States or through any means of interstate commerce, or cleared through a clearing agency having its principal place of business in the United States.

Rule 901(a)(1), as initially proposed, also provided that, where only one counterparty to a security-based swap is a U.S. person, the U.S. person would be the “reporting party” (i.e., the party that incurs the duty to report the security-based swap pursuant to Regulation SBSR). Rule 901(a)(3), as initially proposed, provided that, where neither counterparty to a security-based swap that must be reported is a U.S. person, the counterparties must select which of them would be the reporting party.

To date, the Commission has received 48 comment letters specifically in response to proposed Regulation SBSR, many of which raised issues relating to the cross-border aspects of the proposal. The Commission has received other letters that, while not specifically referencing proposed Regulation SBSR, raised cross-border issues that are germane to proposed Regulation SBSR.⁸⁶⁵ In response to these comments—which are described further herein—and upon further consideration of issues related to cross-border security-based swap transactions across all of the

⁸⁶⁵ All such letters are cited in Appendix D.

various areas of Title VII, the Commission is proposing various modifications to proposed Regulation SBSR, particularly Rule 908 thereof, which address cross-border transactions.

One significant modification being proposed here would take into account situations in which a U.S. person, although not a “direct counterparty,” as defined below, to a security-based swap, guarantees the performance of one of the direct counterparties. As discussed above,⁸⁶⁶ the Commission is proposing to apply various Title VII provisions to the security-based swap transactions of non-U.S. persons that are guaranteed by U.S. persons—including the regulatory reporting and public dissemination requirements of Regulation SBSR, as discussed below.⁸⁶⁷ A second significant modification is to propose a “substituted compliance” regime. As explained in more detail below, the Commission is now proposing a framework that would allow certain Title VII requirements to be satisfied by compliance with the rules of a foreign jurisdiction rather than the specific requirements under U.S. rules. Below, the Commission describes the circumstances under which compliance with the rules of such a foreign jurisdiction could, under re-proposed Regulation SBSR, be “substituted” for compliance with the specific regulatory reporting and public dissemination requirements of Regulation SBSR.⁸⁶⁸

A number of new definitions are being added to re-proposed Rule 900 in light of the changes being proposed.⁸⁶⁹ For example, new paragraph (g) of Rule 900 would define the term “counterparty” to mean “a person that is a direct counterparty or indirect counterparty of a

⁸⁶⁶ See Section II.B.2(d), *supra*.

⁸⁶⁷ See Sections VIII.C and VIII.D, *infra*.

⁸⁶⁸ See Section XI.D, *infra*.

⁸⁶⁹ In some cases, a definition used in Rule 900 would cross-reference a term defined elsewhere in the Commission’s Title VII rules. In other cases, a definition might be specific to Regulation SBSR and not be used elsewhere in the Commission’s Title VII rules.

security-based swap.” A direct counterparty would be “a person that enters directly with another person into a contract that constitutes a security-based swap.” An indirect counterparty would be “a person that guarantees the performance of a direct counterparty to a security-based swap or that otherwise provides recourse to the other side for the failure of the direct counterparty to perform any obligation under the security-based swap.” Although a guarantor is not a direct counterparty to the security-based swap, the duties to be performed under the security-based swap, and thus the risks associated with the security-based swap, ultimately fall to the guarantor.⁸⁷⁰ Therefore, the Commission preliminarily believes that it is appropriate to deem a guarantor to be a counterparty to the security-based swap for purposes of the regulatory reporting requirements of Title VII and the rules proposed thereunder. As discussed in detail below, the concept of “reporting party” used in Regulation SBSR as initially proposed would be replaced by the newly proposed term “reporting side,” to reflect the fact that reporting obligations could attach to both direct and indirect counterparties.⁸⁷¹

The Commission has received and continues to consider comments on the Regulation SBSR Proposing Release that address areas other than those relating to cross-border security-based swap activity. In this release, the Commission is re-proposing only changes relating to cross-border security-based swap activity, technical and conforming changes necessitated by these larger revisions, and certain other minor changes that would help to clarify these re-

⁸⁷⁰ See Section II.B.2(d), *supra*.

⁸⁷¹ Re-proposed Rule 900(ee) would define “side” as “a direct counterparty and any indirect counterparty that guarantees the direct counterparty’s performance of any obligation under a security-based swap.” Re-proposed Rule 900(cc) would define “reporting side” as “the side of a security-based swap having the duty to report information in accordance with [Regulation SBSR] to a security-based swap data repository, or if there is no security-based swap data repository that would receive the information, to the Commission.”

proposed revisions (such as numbering each definition in re-proposed Rule 900, so that each defined term can more readily be identified). Changes to Regulation SBSR in other areas could, if appropriate, be addressed in a future release.⁸⁷²

Regulation SBSR, as re-proposed today, represents the Commission's preliminary views regarding the application of Title VII's provisions relating to regulatory reporting and public dissemination of cross-border security-based swap transactions, and how those provisions would apply to non-U.S. persons who act in capacities regulated under the Dodd-Frank Act. The Commission invites comment regarding all aspects of the approaches taken by the Commission and each provision of re-proposed Regulation SBSR, including potential alternative approaches. In particular, data and comment from market participants and other interested parties regarding the likely effect of each re-proposed rule regarding application of a specific Title VII requirement, the effect of such proposed application in the aggregate, and potential alternative approaches will be particularly useful to the Commission in evaluating possible modifications to re-proposed Regulation SBSR.

B. Modifications to the Definition of "U.S. Person"

Rule 900 of re-proposed Regulation SBSR contains a revised definition of "U.S. person." As initially proposed, "U.S. person" was defined as "a natural person that is a U.S. citizen or U.S. resident or a legal person that is organized under the corporate laws of any part of the United States or has its principal place of business in the United States." Two persons who

⁸⁷² For example, the Commission in the Regulation SBSR Proposing Release did not propose how to define a "block trade." As noted in Regulation SBSR Proposing Release, the Commission intends to do so in a separate proposal. See Regulation SBSR Proposing Release, 75 FR at 75228.

commented specifically on the Regulation SBSR proposal⁸⁷³ argued that “U.S. person” as used in the Commission’s Title VII rules should have the same definition as in Regulation S.⁸⁷⁴

Proposed Regulation SBSR was the only one of the Commission’s proposals for implementing Title VII to propose to use and define the term “U.S. person.” Because the Commission is now addressing cross-border issues across multiple Title VII rules, the Commission has given further thought to the definition of “U.S. person” as initially proposed in Regulation SBSR. The Commission now believes that using a single definition of “U.S. person” in all Title VII rulemaking would promote consistency and transparency in understanding and complying with these various rules. However, as described above,⁸⁷⁵ the Commission preliminarily believes that the Regulation S definition of “U.S. person” is not appropriate for Title VII rules. Proposed Rule 900(pp) would define “U.S. person” to have the same meaning as in proposed Rule 3a71-3(a)(7) under the Exchange Act.⁸⁷⁶

Under both the proposed and re-proposed definitions of “U.S. person,” a natural person resident in the United States would be a U.S. person, as would a legal person that is organized or incorporated under the laws of the United States or having its principal place of business in the United States. Furthermore, under both definitions, a foreign branch of a U.S. person would not be recognized as having an existence separate from the U.S. person.⁸⁷⁷ The proposed rule also

⁸⁷³ See Cleary Letter III at 2, 6-9; Davis Polk Letter I at note 6 (arguing that using the existing Regulation S definition, rather than creating a new definition, “would avoid confusion and also provide consistency of application”).

⁸⁷⁴ 17 CFR § 230.901 *et seq.*

⁸⁷⁵ See Section III.B.10, *supra*.

⁸⁷⁶ See Section III.B.5, *supra*.

⁸⁷⁷ See Regulation SBSR Proposing Release, 75 FR at 75240 (“The Commission intends for this proposed definition [of U.S. person] to include branches and offices of U.S.

would cover partnerships, trusts, and other legal persons, as set forth in proposed Rule 3a71-3(a)(7) under the Exchange Act. The re-proposed definition of “U.S. person” also would clarify certain situations that were not specifically addressed in the initial proposal. For example, the initially proposed definition of “U.S. person” did not address whether—and, if so, when—an account would be considered a U.S. person. The re-proposed definition would provide that an account, whether discretionary or non-discretionary, of a U.S. person would be a U.S. person.

New paragraph (q) of re-proposed Rule 900 would define the term “non-U.S. person” as a person that is not a U.S. person.

Request for Comment

The Commission requests comment on all aspects of the re-proposed definition of “U.S. person” in Regulation SBSR. In particular:

- Should the definition of “U.S. person” in Regulation SBSR be consistent with that proposed for the Commission’s other Title VII rules? Why or why not? If so, what should that definition be and why? Would having a different definition of “U.S. person” in Regulation SBSR create ambiguity or conflict with other Title VII rules being issued by the Commission? If not, why not?

C. Additional Modifications to Scope of Regulation SBSR

1. Revisions to Proposed Rule 908(a)

Rule 908(a), as initially proposed, provided that a security-based swap would be subject to regulatory reporting and public dissemination under Regulation SBSR if the security-based

persons”). See also Section III.B.5(b)ii, *supra* (proposing that an entity’s status as a U.S. person would be determined at the legal-entity level and thus apply to the entire legal entity, including any foreign operations such as branches that are part of the U.S. legal entity).

swap: (i) has at least one counterparty that is a U.S. person; (ii) is executed in the United States or through any means of interstate commerce; or (iii) is cleared through a registered clearing agency having its principal place of business in the United States. Thus, Rule 908(a), as originally proposed, would not impose reporting or public dissemination requirements in connection with a security-based swap solely because the obligations of one of the direct counterparties is guaranteed by a U.S. person. As noted above, the re-proposed definition of “U.S. person”—like the initially proposed definition—would not treat a direct counterparty that is guaranteed by a U.S. person as itself, solely due to the existence of the guarantee, a U.S. person. However, as noted below, the Commission is concerned about instances where—because of a guarantee extended by a U.S. person—the risk of a transaction resides in the United States, even if the direct counterparties of the transaction are domiciled outside the United States. Thus, upon further consideration, the Commission is now proposing to apply Title VII’s regulatory reporting requirements to security-based swaps having at least one counterparty, whether direct or indirect, that is a U.S. person.

Guarantees provided by U.S. persons to their foreign affiliates or other non-U.S. persons could have the effect of concentrating significant risks within the United States that may rise to the systemic level. If a U.S. person guarantees the performance of a non-U.S. person, the financial resources of that U.S. person could be called upon to satisfy the contract. This activity is capable of posing risks to the stability of the U.S. financial system. The Commission preliminarily believes that, if it does not require regulatory reporting of security-based swaps that are guaranteed by U.S. persons, in addition to security-based swaps having a U.S. person direct counterparty, the Commission and other federal financial regulators would be less likely to detect the build-up of potentially significant risks within individual institutions or more widespread

systemic risks to the U.S. financial system. The Dodd-Frank Act is intended to promote the financial stability of the United States by, among other things, reducing risks to the U.S. financial system by allowing regulators better access to necessary market data.⁸⁷⁸

In addition, the Commission is now proposing to require regulatory reporting of all security-based swaps entered into by non-U.S. person security-based swap dealers and major security-based swaps participants, wherever they may be executed.⁸⁷⁹ This is a change from how the initial proposal applied to a security-based swap executed by a non-U.S. person security-based swap dealer or major security-based swap participant. Under the initial proposal, such a security-based swap would not be required to be reported solely based on an entity's status as a security-based swap dealer or major security-based swap participant, unless the security-based swap was executed in the United States or through any means of interstate commerce, or was cleared by a clearing agency having its principal place of business in the United States.

A non-U.S. person security-based swap dealer or major security-based swap participant generally would be subject to all rules applicable to security-based swap dealers or major security-based swaps participants, regardless of its principal place of business or where it is organized.⁸⁸⁰ Having access to all of the security-based swap transactions entered into by a security-based swap dealer or major security-based swap participant is an important aspect of

⁸⁷⁸ See, e.g., S. Comm. on Banking, Hous., & Urban Affairs, The Restoring American Financial Stability Act of 2010, S. Rep. No. 111-176, at 32 (“As a key element of reducing systemic risk and protecting taxpayers in the future, protections must include comprehensive regulation and rules for how the OTC derivatives market operates. Increasing the use of central clearinghouses, exchanges, appropriate margining, capital requirements, and reporting will provide safeguards for American taxpayers and the financial system as a whole”) (emphasis added); note 4, supra.

⁸⁷⁹ See re-proposed Rule 908(a)(1)(iii) of Regulation SBSR.

⁸⁸⁰ See Sections III.C and IV.D, supra.

understanding its compliance with the applicable Title VII requirements, including without limitation, compliance with the capital, margin, and other applicable entity-level and transaction-level requirements. The Commission notes that Section 15F(f)(1)(a) of the Exchange Act provides that each registered security-based swap dealer and major security-based swap participant shall make such reports as are required by the Commission, by rule or regulation, regarding the transactions and financial condition of the registered security-based swap dealer or major security-based swap participant.⁸⁸¹ Therefore, the Commission is now proposing to require that all security-based swaps of all security-based swap dealers and major security-based swap participants, regardless of where such security-based swaps are executed or where these entities have their principal place of business or are organized, be subject to regulatory reporting to a registered SDR.⁸⁸²

To reflect these changes and to reincorporate other provisions that are not being substantially revised, the Commission is re-proposing Rule 908(a) as follows. The rule would be divided into two subparagraphs, (1) and (2), which would address regulatory reporting and public dissemination, respectively. Specifically, re-proposed Rule 908(a)(1) would provide that a security-based swap transaction would be subject to regulatory reporting if:

- (i) The security-based swap is a transaction conducted within the United States;

⁸⁸¹ 15 U.S.C. 78o-8(f)(1)(A). The Commission further notes that Section 15F(f)(2) of the Exchange Act, 15 U.S.C. 78o-8(f)(2), requires the Commission to “adopt rules governing reporting and recordkeeping for security-based swap dealers and major security-based swap participants.”

⁸⁸² As discussed below, however, the Commission is proposing that certain security-based swaps of non-U.S. person security-based swap dealers and major security-based swap participants would not be subject to public dissemination. In addition, certain security-based swaps that would otherwise be subject to regulatory reporting and public dissemination under Regulation SBSR could qualify for substituted compliance. See Section XI.D, infra.

(ii) There is a direct or indirect counterparty that is a U.S. person on either side of the transaction;

(iii) There is a direct or indirect counterparty that is a security-based swap dealer or major security-based swap participant on either side of the transaction; or

(iv) The security-based swap is cleared through a clearing agency having its principal place of business in the United States.

Re-proposed Rule 908(a)(1)(i) would preserve the principle from the original proposal that a security-based swap would be subject to regulatory reporting if it is executed in the United States.⁸⁸³ As noted above,⁸⁸⁴ the concept of a security-based swap transaction being solicited, negotiated, executed, or booked in the United States has been integrated into the new term “transaction conducted within the United States,” which also is being used in other Title VII proposals of the Commission. Proposed Rule 3a71-3(a)(5) under the Exchange Act would define “transaction conducted within the United States” as “a security-based swap transaction that is solicited, negotiated, executed, or booked within the United States, by or on behalf of either counterparty to the transaction, regardless of the location, domicile, or residence status of either counterparty to the transaction.”⁸⁸⁵

The Commission received no comments that specifically addressed our use of the phrase “through any means of interstate commerce” in three places in Regulation SBSR, as initially

⁸⁸³ See Rule 908(a)(2) of Regulation SBSR, as originally proposed.

⁸⁸⁴ See Section III.B.6, *supra*.

⁸⁸⁵ See note 308, *supra* (explaining that the word “counterparty” as used within this term has the same meaning as “direct counterparty” in re-proposed Rule 900(j) of Regulation SBSR).

proposed.⁸⁸⁶ However, upon further consideration, the Commission is concerned that this language could unduly require a security-based swap to be reported if it had only the slightest connection with the United States. Therefore, the Commission has decided to delete the phrase “through any means of interstate commerce” from re-proposed Regulation SBSR. Instead, the Commission is proposing to require reporting of a security-based swap that falls within the definition of “transaction conducted within the United States,” which would describe more precisely the nature of the activities in the United States that could result in a security-based swap becoming subject to Regulation SBSR. The Commission generally believes that security-based swaps that are solicited, negotiated, executed, or booked within the United States—by or on behalf of either counterparty to the transaction, and regardless of the location, domicile, or residence status of either counterparty to the transaction—generally should be subject to Regulation SBSR.

Re-proposed Rule 908(a)(1)(ii)—which would require regulatory reporting of any security-based swap if there is a direct or indirect counterparty that is a U.S. person on either side of the transaction—embodies the principle in the initial proposal that a security-based swap, wherever executed, must be reported if it has at least one counterparty that is a U.S. person. This revised prong, however, also would apply the reporting requirement to any security-based swap, wherever executed, that has at least one indirect counterparty⁸⁸⁷ that is a U.S. person, even when no direct counterparty is a U.S. person. The original proposal, because it did not include

⁸⁸⁶ See Rules 900 (definition of “participant”), 908(a), and 908(b) of Regulation SBSR, as initially proposed.

⁸⁸⁷ “Indirect counterparty” would be defined as “a guarantor of a direct counterparty’s performance of any obligation under a security-based swap.” See re-proposed Rule 900(o) of Regulation SBSR.

guarantors as counterparties, would not have required regulatory reporting in such case. As discussed above, the Commission now preliminarily believes that—to satisfy Congressional intent that security-based swaps be subject to regulatory reporting, thereby informing the Commission and other financial regulators of potential systemic risks—any security-based swap having at least one direct counterparty that is a U.S. person should be reported. The Commission also preliminarily believes that, because guarantees extended by U.S. persons create risk to the U.S. financial system, regulatory reporting of security-based swaps should extend to any security-based swap transaction in which one or both direct counterparties is guaranteed by a U.S. person. In the absence of regulatory reporting of such security-based swaps, the Commission's ability to detect and analyze potentially significant sources of risk to the U.S. financial system could be limited.

Re-proposed Rule 908(a)(1)(iii) would, for reasons described above, require regulatory reporting of any security-based swap executed by a security-based swap dealer or major security-based swap participant, regardless of the entity's place of domicile and regardless of the place of execution.

Re-proposed Rule 908(a)(1)(iv) would preserve the principle from the original proposal that a security-based swap would be subject to regulatory reporting if it is cleared through a clearing agency having its principal place of business in the United States.⁸⁸⁸ As noted in the Regulation SBSR Proposing Release, the Commission preliminarily believes that, if a security-based swap is cleared by a clearing agency having its principal place of business in the United States, U.S. regulators should have access to information regarding the security-based swap

⁸⁸⁸ See Rule 908(a)(3) of Regulation SBSR, as originally proposed.

through a registered SDR.⁸⁸⁹ This approach is premised on the view that, when a security-based swap is cleared through a clearing agency, the initial transaction is novated and two new transactions take its place, with the clearing agency becoming the seller to the buyer and the buyer to the seller. If the clearing agency is located within the United States, the new transactions necessarily would be executed within the United States.⁸⁹⁰

While subparagraph (1) of re-proposed Rule 908(a) would address when a security-based swap would be subject to regulatory reporting, subparagraph (2) would address when a security-based swap would be subject to public dissemination. Re-proposed Rule 908(a)(2) would provide that a security-based swap shall be subject to public dissemination if:

- (i) The security-based swap is a transaction conducted within the United States;
- (ii) There is a direct or indirect counterparty that is a U.S. person on each side of the transaction;
- (iii) At least one direct counterparty is a U.S. person (except in the case of a transaction conducted through a foreign branch⁸⁹¹);
- (iv) One side includes a U.S. person and the other side includes a non-U.S. person that is a security-based swap dealer; or
- (v) The security-based swap is cleared through a clearing agency having its principal place of business in the United States.

⁸⁸⁹ See Regulation SBSR Proposing Release, 75 FR at 75240.

⁸⁹⁰ See *id.* (noting that the concept of being “executed in the United States or through any means of interstate commerce” includes being cleared through a clearing agency having its principal place of business in the United States).

⁸⁹¹ The term “foreign branch” would be defined in re-proposed Rule 900(n) of Regulation SBSR to cross-reference the definition in proposed Rule 3a71-3(a)(1) under the Exchange Act. See Section III.B.7, *supra*, for a definition of that term.

The Commission notes that Section 13(m)(1)(B) of the Exchange Act⁸⁹² “authorize[s] the Commission to make security-based swap transaction and pricing data available to the public in such form and at such times as the Commission determines appropriate to enhance price discovery.” Re-proposed Rule 908(a)(2) reflects the Commission’s revised preliminary determination regarding an appropriate way to enhance price discovery in the U.S. market for security-based swaps. As noted below, since issuing the Regulation SBSR Proposing Release, the Commission has obtained and analyzed more extensive data regarding the overlap between the U.S. market and the global market for security-based swaps.⁸⁹³ These data suggest that a vast majority of security-based swap transactions directly involved at least one non-U.S. domiciled counterparty.⁸⁹⁴ Furthermore, these transactions frequently may be conducted with one direct counterparty located in one jurisdiction with the other direct counterparty located in another jurisdiction, further suggesting that no easy distinction can be made between the U.S. market and foreign or global markets. The Commission is concerned that limiting the application of Title VII’s public dissemination requirement only to transactions that are wholly conducted within the United States or to transactions where both direct counterparties are U.S. persons would significantly reduce the potential benefits of post-trade transparency in the security-based swap market. The Commission stated in the Regulation SBSR Proposing Release that, “[b]y reducing information asymmetries, post-trade transparency has the potential to lower transaction costs, improve confidence in the market, encourage participation by a larger number of market

⁸⁹² 15 U.S.C. 78m(m)(1)(B).

⁸⁹³ See Section XIV.F.2(d)ii, infra.

⁸⁹⁴ See Section II.A.1, supra.

participants, and increase liquidity in the [security-based swap] market.”⁸⁹⁵ The Commission also noted that, “[i]n other markets, greater post-trade transparency has increased competition among market participants and reduced transaction costs.”⁸⁹⁶

Re-proposed Rule 908(a)(2) eliminates use of the term ‘interstate commerce’ and instead incorporates the new concept of “transaction conducted within the United States,” which is being used throughout the Commission’s proposed Title VII cross-border rules, to help delineate precisely the types of security-based swap transactions that would be subject to public dissemination under Regulation SBSR. Furthermore, re-proposed Rule 908(a)(2) is designed to achieve the goal of improving the transparency, fairness, and efficiency of the U.S. security-based swap market, as reflected in Section 13(m)(1)(B) of the Exchange Act. Re-proposed Rule 908(a)(2) also is designed, as far as practicable, to minimize competitive disparities that might result under the proposed public dissemination regime, as well as to minimize incentives for market participants to structure their operations for the purpose of evading Regulation SBSR.⁸⁹⁷ Each individual subparagraph of re-proposed Rule 908(a)(2) is discussed below.

⁸⁹⁵ Regulation SBSR Proposing Release, 75 FR at 75224.

⁸⁹⁶ Id. at 75225 (citing studies of the impact of TRACE (Trade Reporting and Compliance Engine) on the corporate bond market).

⁸⁹⁷ We preliminarily believe that the proposed approach with respect to regulatory reporting and public dissemination is not being applied to persons who are “transact[ing] a business in security-based swaps without the jurisdiction of the United States,” within the meaning of Section 30(c). See Sections II.B.2(a) - II.B.2(d), supra. However, the Commission also preliminarily believes that the proposed approach with respect to regulatory reporting and public dissemination is necessary or appropriate to help prevent the evasion of the particular provisions of the Exchange Act that were added by the Dodd-Frank Act that are being implemented by the approach and prophylactically will help ensure that the purposes those provisions of the Dodd-Frank Act are not undermined. See Section II.B.2(e), supra; see also Section II.B.2(d), supra.

For example, if the reporting requirements do not apply to transactions among non-U.S. persons that receive guarantees from U.S. persons and foreign branches of U.S. banks,

Re-proposed Rule 908(a)(2)(i), similar to re-proposed Rule 908(a)(1)(i), generally would preserve the principle from the original proposal that a security-based swap would be subject to public dissemination if it were executed in the United States.⁸⁹⁸ That concept has been integrated into the new term “transaction conducted within the United States,” which also is being used in the Commission’s other Title VII proposals.

Re-proposed Rule 908(a)(2)(ii) would provide that a security-based swap would be subject to public dissemination if there is a direct or indirect counterparty that is a U.S. person on each side of the transaction. Under the initial proposal, a security-based swap involving two non-U.S. person direct counterparties, but where each direct counterparty is guaranteed by a U.S. person, would not be required to be publicly disseminated. The Commission now preliminarily believes that, where U.S. persons have an interest on both sides of the transaction, even if indirectly, the transaction generally should be viewed as part of the U.S. security-based swap market and, as such, should be subject to Title VII’s public dissemination requirement. Moreover, to the extent that U.S. persons might be incited to structure their trading operations through guaranteed foreign subsidiaries to avoid public dissemination that otherwise would apply to trades executed between U.S. person direct counterparties, the Commission seeks to minimize that incentive by re-proposing Rule 908(a)(2)(ii) to require public dissemination of a

then U.S. persons would have an incentive to evade the reporting requirements by conducting transactions with other U.S. persons through guaranteed foreign affiliates or foreign branches. Altering the form of the transaction in this manner would allow U.S. persons to continue to avail themselves of transparency in the U.S. security-based swap market while themselves evading the requirements intended to enhance that transparency, even though the substance of the transaction remains unchanged.

⁸⁹⁸ See Rule 908(a)(2) of Regulation SBSR, as originally proposed. See also Regulation SBSR Proposing Release, 75 FR at 75239-40.

security-based swap transaction if a U.S. person is present on each side, whether directly or indirectly.

Re-proposed Rule 908(a)(2)(iii) would provide that a security-based swap would be subject to public dissemination if at least one direct counterparty is a U.S. person (except in the case of a transaction conducted through a foreign branch⁸⁹⁹). This prong generally reincorporates the original proposal's approach that a security-based swap executed anywhere in the world and having just one U.S. person counterparty would be subject to public dissemination. The Commission generally believes that a security-based swap transaction having even just one U.S. person direct counterparty generally should be viewed as part of the U.S. security-based swap market and, as such, should be subject to Title VII's public dissemination requirement. The Commission preliminarily believes that the benefits of requiring public dissemination of all security-based swaps involving at least one U.S. person direct counterparty would inure to other U.S. persons that transact in the same or similar instruments.

However, re-proposed Rule 908(a)(2)(iii) would provide a limited exception to the general rule that any transaction involving a U.S. person direct counterparty would be subject to public dissemination; re-proposed Rule 908(a)(2)(iii) would not apply if the transaction is conducted through a foreign branch.⁹⁰⁰ The Commission is concerned that, if it did not take this approach, non-U.S. market participants might avoid entering into security-based swaps with the

⁸⁹⁹ The term "transaction conducted through a foreign branch" would be defined in re-proposed Rule 900(hh) of Regulation SBSR to cross-reference the definition of that term in proposed Rule 3a71-3(a)(4) under the Exchange Act, as discussed in Section III.B.7 above.

⁹⁰⁰ However, a security-based swap having a direct counterparty that is a foreign branch could be subject to public dissemination for other reasons—e.g., if the transaction included a U.S. person on the other side. See re-proposed Rule 908(a)(2)(ii) of Regulation SBSR.

foreign branches of U.S. banks so as to avoid their security-based swaps being publicly disseminated. The Commission notes that registration with the local regulatory authority to engage in banking business is inherent in the proposed definition of “foreign branch.” This approach would restrict the proposed exception to public dissemination for transactions conducted through a foreign branch.⁹⁰¹ The Commission further notes that the proposed exclusion for transactions conducted through a foreign branch is equivalent to the proposed approach for transactions conducted by foreign affiliates that are guaranteed by a U.S. person. In the case of a security-based swap transaction executed outside the United States between a non-U.S. person and either the guaranteed foreign affiliate or the foreign branch of the U.S. bank, re-proposed Rule 908(a)(2) would not require public dissemination of the transaction. Re-proposed Rule 908(a)(2)(iii) would not require public dissemination if the transaction were conducted through a foreign branch. Re-proposed Rule 908(a)(2)(ii) would not require public dissemination if the only U.S. person involved in the transaction were the U.S. person providing the guarantee.

Re-proposed Rule 908(a)(2)(iv) would provide that a security-based swap would be subject to public dissemination if one side includes a U.S. person and the other side includes a non-U.S. person that is a security-based swap dealer, as defined in Section 3(a)(71) of the Exchange Act and the rules and regulations thereunder. The Commission notes that re-proposed Rule 908(a)(2)(ii) would require public dissemination of a transaction if both sides include a U.S. person. Under re-proposed Rule 908(a)(2)(iv), however, public dissemination would be required

⁹⁰¹ Thus, for example, a security-based swap involving a U.S. person that sends staff to a foreign country to negotiate and execute the transaction but does not have a recognized foreign branch in that country would be required to be publicly disseminated, and would not qualify for the proposed exclusion in re-proposed Rule 908(a)(2)(iii) for transactions conducted through a foreign branch.

when only one side includes a U.S. person, provided the other side includes a non-U.S. person security-based swap dealer. The Commission preliminarily believes that both types of transaction generally should be considered part of the U.S. security-based swap market and, as such, should be subject to Title VII's public dissemination requirement. As the Commission has previously stated, post-trade transparency of security-based swap transactions would reduce information asymmetries and could have the potential to lower transaction costs, improve confidence in the market, encourage participation by a larger number of market participants, and increase liquidity in the security-based swap market.⁹⁰² Post-trade transparency of security-based swap transactions also has the potential to improve valuation models and thereby contribute to more efficient capital allocation.⁹⁰³ The Commission preliminarily believes that not subjecting transactions between U.S. persons (whether directly or indirectly) or between a U.S. person and a non-U.S. person security-based swap dealer to post-trade transparency would undermine these goals. The fact that both sides of the transaction include a U.S. person, or that one side includes a U.S. person and the other side includes a person that conducts enough U.S. business to warrant requiring it to register with the Commission, suggests that they are engaging in the types of transactions that might be engaged in by other U.S. persons or others who are required to register with the Commission. Furthermore, in the absence of re-proposed Rule 908(a)(2)(iv), a non-U.S. person security-based swap dealer could encourage foreign affiliates that are guaranteed by a U.S. parent to transact business with it outside the United States in order

⁹⁰² See Regulation SBSR Proposing Release, 75 FR at 75267.

⁹⁰³ See id. at 75267-68.

to evade the public dissemination requirement.⁹⁰⁴ If re-proposed Rule 908(a)(2)(iv) applied, all transactions between a security-based swap dealer (regardless of whether it is a U.S. person) and a U.S. person (whether as a direct or indirect counterparty), would be required to be publicly disseminated, regardless of where such transactions are conducted. Finally, the Commission notes that Section 13(m)(1)(D) of the Exchange Act gives the Commission authority to require registered entities—such as security-based swap dealers—regardless of whether or not they are U.S. persons, to publicly disseminate security-based swap transaction and pricing data.

However, the Commission notes that re-proposed Rule 908(a)(2) would not require public dissemination of a security-based swap transacted outside the United States between two non-U.S. persons that are security-based swap dealers (assuming that neither side is guaranteed by a U.S. person). Non-U.S. person security-based swap dealers are likely to have significant operations in foreign security-based swap markets. A transaction between two such non-U.S. person security-based swap dealers conducted outside the United States is less likely than a transaction conducted within the United States or a transaction involving a U.S. person on the other side to affect the U.S. security-based swap market. Therefore, the Commission is not proposing to require public dissemination of transactions conducted outside the United States between two non-U.S. person security-based swap dealers.

Re-proposed Rule 908(a)(2)(v) would preserve the principle from the original proposal

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The Commission notes that re-proposed Rule 908(a)(2)(iii) of Regulation SBSR would require public dissemination if only one direct counterparty is a U.S. person, regardless of the status, nationality, or place of domicile of the other direct counterparty. Thus, re-proposed Rule 908(a)(2)(iii) already would require public dissemination in the case of a security-based swap between a non-U.S. person security-based swap dealer and a U.S. person direct counterparty. Re-proposed Rule 908(a)(2)(iv) of Regulation SBSR would, in addition, require public dissemination in the case of a security-based swap between a non-U.S. person security-based swap dealer and a U.S. person indirect counterparty.

that a security-based swap would be subject to public dissemination if it is cleared through a clearing agency having its principal place of business in the United States.⁹⁰⁵ As noted in the Regulation SBSR Proposing Release, the Commission preliminarily believes that, if non-U.S. persons determined to clear a security-based swap transaction through a clearing agency having its principal place of business in the United States, this suggests that the clearing agency has made the security-based swap eligible for clearing because at least some U.S. counterparties might wish to trade the security-based swap as well.⁹⁰⁶ The Commission preliminarily believes, therefore, that requiring public dissemination of the security-based swap transaction would promote price discovery for market participants in the United States and elsewhere.⁹⁰⁷

A security-based swap transaction would need to meet only one prong of re-proposed Rule 908(a)(2) to trigger the public dissemination requirement. For example, assume a security-based swap is solicited, negotiated, executed, and cleared in London between (A) the London branch of a U.S. financial institution and (B) a London-based firm (i.e., a non-U.S. person) that has registered with the Commission as a security-based swap dealer. Re-proposed Rule 908(a)(2)(i) would not apply, because the transaction is not conducted within the United States. Re-proposed Rule 908(a)(2)(v) would not apply, because the security-based swap is not cleared in the United States. Re-proposed Rule 908(a)(2)(ii) would not apply, because there is not a direct or indirect counterparty that is a U.S. person on both sides of the transaction. Re-proposed Rule 908(a)(2)(iii) would not apply because neither side includes a direct counterparty that is a U.S. person that would trigger public dissemination; here, the U.S. person direct counterparty is

⁹⁰⁵ See Rule 908(a)(3) of Regulation SBSR, as originally proposed.

⁹⁰⁶ See Regulation SBSR Proposing Release, 75 FR at 75240.

⁹⁰⁷ See id.

acting through a foreign branch, which is carved out of re-proposed Rule 908(a)(2)(iii). However, this transaction would be subject to public dissemination under re-proposed Rule 908(a)(2)(iv): one side includes a U.S. person (in this case, the London branch of the U.S. bank) and the other side includes a non-U.S. person security-based swap dealer. The result would be the same if, instead of a London branch of a U.S. financial institution, one of the direct counterparties were the London-based affiliate of a U.S. person that guarantees the performance of the London subsidiary (i.e., the transaction is between, on one side, a security-based swap dealer and, on the other side, an indirect counterparty that is a U.S. person).

Request for Comment

The Commission requests comment on all aspects of the re-proposed Rule 908(a), including the following:

- Do you agree with the approach taken in re-proposed Rule 908(a) that a security-based swap should be subject to regulatory reporting and public dissemination regardless of the nationality or place of domicile of the counterparties if it is a transaction conducted in the United States? Why or why not? Do you agree with the Commission's use of the term "transaction conducted within the United States" in re-proposed Rule 908? Why or why not?
- Do you agree with the approach taken in re-proposed Rule 908(a) that a security-based swap cleared through a clearing agency having its principal place of business in the United States should be subject to the regulatory reporting and public dissemination requirements? Why or why not?
- Do you agree with the Commission's general approach of treating guarantors as counterparties for purposes of security-based swap trade reporting requirements?

Why or why not? Do you believe that a security-based swap should be subject to regulatory reporting solely because one side includes a guarantor that is a U.S. person? Why or why not? Would the Commission's ability to exercise prudential and regulatory oversight of the securities markets be compromised if it did not have the ability to learn about all security-based swap positions held by U.S. persons, including guarantors? Why or why not?

- Do you believe that a security-based swap should be subject to regulatory reporting solely because one side includes a security-based swap dealer or major security-based swap participant, regardless of the nationality or place of domicile of that entity? Why or why not? Would the Commission's ability to exercise prudential and regulatory oversight of entities registered with it be compromised if it did not have the ability to learn about all security-based swap positions held by such entities? Why or why not?
- In general, do you agree with how re-proposed Rule 908(a) would apply to security-based swaps entered into by non-U.S. person security-based swap dealers and major security-based swap participants? Why or why not?
- Do you agree with the requirement, in re-proposed Rule 908(a)(2)(ii), that a security-based swap should be subject to public dissemination if there is a direct or indirect counterparty that is a U.S. person on each side of the transaction? Why or why not? What would be the benefits of requiring public dissemination in this scenario? What would be the costs? Please be specific.
- Do you agree with the requirement, in re-proposed Rule 908(a)(2)(iii), that a security-based swap should be subject to public dissemination if at least one direct

counterparty is a U.S. person, even if the transaction is not conducted within the United States? Why or why not? What would be the benefits of requiring public dissemination in this scenario? What would be the costs? Please be specific. Do you agree with the exception to this general rule for transactions conducted through a foreign branch of a U.S. person? Why or why not? Should the exception be limited to foreign branches? Why or why not? Are there any alternatives that the Commission should consider? If so, what are they?

- Do you agree with the requirement, in re-proposed Rule 908(a)(2)(iv), that would provide that a security-based swap, even if not a transaction conducted within the United States, would be subject to public dissemination if one side includes a U.S. person and the other side includes a non-U.S. person security-based swap dealer? Why or why not? What would be the benefits of requiring public dissemination in this scenario? What would be the costs? Please be specific.
- Should the Commission require public dissemination of security-based swaps cleared by any clearing agency registered with the Commission, even if its principal place of business is outside the United States? Why or why not?
- In general, do you agree the distinctions drawn in the scenarios set forth in re-proposed Rule 908(a) regarding which security-based swaps would be subject to the regulatory reporting and public dissemination? Why or why not?

2. Revisions to Proposed Rule 908(b)

In the initial proposal, the Commission explained when duties would be imposed on non-U.S. person counterparties of security-based swaps when some connection to the United States

might be present. Rule 908(b), as initially proposed, provided that no duties would be imposed on a counterparty unless one of the following conditions were true:

- The counterparty is a U.S. person;
- The security-based swap is executed in the United States or through any means of interstate commerce; or
- The security-based swap is cleared through a clearing agency having its principal place of business in the United States.

Under the initial proposal, if none of these conditions were true, a foreign counterparty “would not become a ‘participant’ of an SDR and would not become subject to proposed Regulation SBSR”⁹⁰⁸—even if the security-based swap itself and its counterparty were subject to Regulation SBSR.

In light of other revisions being made to Regulation SBSR discussed above, the Commission is now proposing several conforming revisions to proposed Rule 908(b). First, consistent with the other revisions described above, Rule 908(b) is being re-proposed to account for the possibility that a non-U.S. person security-based swap dealer or major security-based swap participant could incur a duty to report. Second, consistent with the broader conceptual framework set forth in this release, the “interstate commerce clause,” used in the initial proposal to describe a security-based swap that may generate reporting duties for counterparties under Regulation SBSR,⁹⁰⁹ is being replaced with the new concept of a “transaction conducted within the United States” that is being used throughout the Commission’s proposed cross-border

⁹⁰⁸ Regulation SBSR Proposing Release, 75 FR at 75240.

⁹⁰⁹ See Rule 908(b)(2) of Regulation SBSR, as originally proposed.

rules.⁹¹⁰ Therefore, re-proposed Rule 908(b) would provide that a direct or indirect counterparty to a security-based swap would not incur any obligation under Regulation SBSR unless the counterparty were:

- A U.S. person;
- A security-based swap dealer or major security-based swap participant; or
- A counterparty to a transaction conducted within the United States.⁹¹¹

Request for Comment

The Commission requests comment on all aspects of the re-proposed Rule 908(b), including the following:

- Do you agree with the removal of the “interstate commerce clause” contained in Rules 908(a)(2) and 908(b)(2), as originally proposed, and its replacement with the new concept of “transaction conducted within the United States”? Does this new concept provide additional clarity? If not, what alternative formulations of the concept should the Commission consider, and why? Please be specific.

⁹¹⁰ See Section III.B.6, supra (discussing the proposed definition of “transaction conducted within the United States”).

⁹¹¹ In addition, the Commission is re-proposing the definition of the term “participant” in Rule 900 to make changes conforming to re-proposed Rule 908(b) of Regulation SBSR. The term “participant” was designed to include any counterparty to a security-based swap that might incur duties under Regulation SBSR. Rule 906(a) of Regulation SBSR, as proposed and re-proposed, would impose certain duties on participants other than those required to initially report the transaction. The originally proposed definition of “participant” would track proposed Rule 908(b) and include a U.S. person that is a counterparty to a security-based swap that is required to be reported to a registered SDR, or a non-U.S. person that is a counterparty to a security-based swap that is: (i) required to be reported to a registered SDR; or (ii) executed in the United States or through any means of interstate commerce, or cleared through a clearing agency having its principal place of business in the United States. As re-proposed, “participant” would be defined simply as “a person that is a counterparty to a security-based swap that meets the criteria of [Rule 908(b)].” This would include both direct and indirect counterparties.

D. Modifications to “Reporting Party” Rules and Assigning Duty to Report

The Commission also is re-proposing aspects of Regulation SBSR that would specify who must report the security-based swap. Rule 900, as initially proposed, would define “reporting party” as “the counterparty to a security-based swap with the duty to report information in accordance with [Regulation SBSR] to a registered security-based swap data repository, or if there is no registered security-based swap data repository that would receive the information, to the Commission.” Because the Commission is now proposing to extend the reporting requirement to security-based swaps executed outside the United States if the performance of one or both direct counterparties under the security-based swap is guaranteed by a U.S. person,⁹¹² the Commission also is re-proposing the rules that would assign the duty to report in a number of ways. Overall, these revisions are designed to assign the responsibility to report a security-based swap transaction to persons that the Commission preliminarily believes have greater capacity to fulfill that responsibility, and in a manner consistent with the reporting hierarchy set forth in Section 13A(a)(3) of the Exchange Act.⁹¹³

First, the Commission is revising the proposed term “reporting party” to “reporting side.” A “side” would be defined in new paragraph (ee) of re-proposed Rule 900 to mean “a direct counterparty and any indirect counterparty.” “Reporting side” would be defined as “the side of a security-based swap having the duty to report information in accordance with §§ 242.900-911 to

⁹¹² The Commission notes that, under both the initial and current proposals, security-based swaps would be subject to Regulation SBSR if they are executed within the United States, regardless of who the counterparties are or whether they are guaranteed by U.S. persons.

⁹¹³ 15 U.S.C. 78m-1(a)(3). Section 13A(a)(3) of the Exchange Act assigns to specific kinds of counterparties the duty to report uncleared security-based swaps to an SDR or to the Commission.

a registered security-based swap data repository, or if there is no registered security-based swap data repository that would receive the information, to the Commission.” Under this formulation, if a side has the duty to report a security-based swap transaction, any counterparty on that side—direct or indirect—would have responsibility for carrying out the reporting obligation. The Commission preliminarily believes that it would be impractical and unnecessarily complicated to attempt to assign the reporting duty to either the direct or indirect counterparty specifically, and is instead proposing to assign the duty to the side jointly.⁹¹⁴

Furthermore, the Commission is revising our proposed approach to assigning the reporting duty to minimize consideration of the domicile of the counterparties, and to focus more on their status (*i.e.*, whether or not a counterparty is a security-based swap dealer or major security-based swap participant). The initial proposal laid out three scenarios for assigning the reporting duty: both direct counterparties are U.S. persons, only one direct counterparty is a U.S. person, and neither direct counterparty is a U.S. person.⁹¹⁵ The definition of “U.S. person”—as proposed and re-proposed—does not include a security-based swap dealer or major security-based swap participant that is organized under the laws of a foreign jurisdiction and has its principal place of business outside the United States, even though it is a security-based swap dealer or major security-based swap participant under Title VII. Thus, under the initial proposal, for a security-based swap between (A) an end user or other counterparty that is a U.S. person and

⁹¹⁴ The Commission anticipates that the direct counterparty and any indirect counterparty on the reporting side would decide which of them would carry out the duty to report the transaction. Alternately, the direct and indirect counterparties on the reporting side could elect to have a third party carry out the duty to report on their behalf, although the direct and indirect counterparties on the reporting side—not the agent—would incur legal liability for the agent’s failure to report the transaction in a timely and complete manner.

⁹¹⁵ See Rules 901(a)(1), (2), and (3) of Regulation SBSR, as originally proposed. See also Regulation SBSR Proposing Release, 75 FR at 75211.

is not a security-based swap dealer or major security-based swap participant (a “non-registered U.S. counterparty”) and (B) a security-based swap dealer or major security-based swap participant that is a non-U.S. person, the non-registered U.S. counterparty would have been the reporting party.

Several commenters argued that this requirement would unfairly place the reporting burden on the non-registered U.S. counterparty. These commenters generally argued that, due to their status as security-based swap dealers and major security-based swap participants, even security-based swap dealers and major security-based swap participants that are not U.S. persons have greater technological capability than non-registered U.S. counterparties to carry out the reporting function.⁹¹⁶ These commenters generally maintained that non-registered U.S. counterparties would incur significant costs to build the systems necessary to report security-based swaps.⁹¹⁷ Certain commenters noted the unequal treatment and potential consequences that could result if non-registered U.S. counterparties incurred the reporting obligation for security-based swaps that they entered into with non-U.S. security-based swap dealers and non-

⁹¹⁶ See DTCC I at 8; ICI Letter at 5 (stating that security-based swap dealers are the only market participants that currently have the standardization necessary to report the required security-based swap data); ISDA/SIFMA Letter I at 19; SIFMA Letter I at 3 (arguing that an end user should not incur higher transaction costs or potential legal liabilities depending on the domicile of its counterparty); Vanguard Letter at 6 (stating that non-U.S. security-based swap dealers and major security-based swap participants would be more likely to have appropriate systems in place to facilitate reporting).

⁹¹⁷ See DTCC I at 27; ICI Letter at 5 (stating that investment funds would incur significant costs to build the necessary systems); Vanguard Letter at 6 (stating that end users would be required to commit significant capital and resources to build out their reporting systems). See also MarkitSERV Letter I at 9 (suggesting that, in light of capacity and resource constraints, a non-registered U.S. counterparty would seek to delegate any reporting obligations).

U.S. major security-based swap participants.⁹¹⁸ One commenter specifically recommended that security-based swap dealers and major security-based swap participants that are not U.S. persons be subject to the same regulatory reporting responsibilities as security-based swap dealers and major security-based swap participants that are U.S. persons, when transacting with non-registered U.S. counterparties.⁹¹⁹

The Commission generally agrees with these arguments. The Commission preliminarily believes that non-U.S. person security-based swap dealers and major security-based swap participants, like U.S. person security-based swap dealers and major security-based swap participants, have greater technological capability than non-registered U.S. persons to carry out the reporting function. Furthermore, the Commission preliminarily sees no reason not to assign the duty to report to non-U.S. person security-based swap dealers and major security-based swap participants in appropriate circumstances. Although such entities are not U.S. persons, the fact that they are security-based swap dealers and major security-based swap participants necessarily implies that they have substantial contacts with the U.S. security-based swap market and thus could incur significant regulatory duties arising from their U.S. business. Accordingly, the Commission is re-proposing Rule 901(a) to provide that a security-based swap dealer or major security-based swap participant that is not a U.S. person could incur the duty to report a security-based swap in various cases. Re-proposed Rule 901(a) now provides as follows:

⁹¹⁸ See ISDA/SIFMA Letter I at 19 (requiring end users to report could result in end users declining to trade with non-U.S. security-based swap dealers, which could increase systemic risk by decreasing liquidity and further concentrating the U.S. security-based swap market); Cleary Letter II at 18 (requiring end users to report could result in their declining to trade with non-U.S. security-based swap dealers, thereby potentially reducing price competition).

⁹¹⁹ See SIFMA Letter I at 2.

- If both sides of the security-based swap include a security-based swap dealer, the sides would be required to select the reporting side.
- If only one side of the security-based swap includes a security-based swap dealer, that side would be the reporting side.
- If both sides of the security-based swap include a major security-based swap participant, the sides would be required to select the reporting side.
- If one side of the security-based swap includes a major security-based swap participant and the other side includes neither a security-based swap dealer nor a major security-based swap participant, the side including the major security-based swap participant would be reporting side.
- If neither side of the security-based swap includes a security-based swap dealer or major security-based swap participant: (i) if both sides include a U.S. person or neither side includes a U.S. person, the sides would be required to select the reporting side; and (ii) if only one side includes a U.S. person, that side would be the reporting side.

Re-proposed Rule 901(a)(2) would preserve the reporting hierarchy of proposed Rule 901(a), while additionally taking into account the possibility that a direct counterparty to a security-based swap might have a guarantor that is better suited for carrying out the reporting duty. Thus, the newly proposed approach set forth in re-proposed Rule 901(a) looks to the status of each person on a side (i.e., whether it is a security-based swap dealer or major security-based swap participant), not the status of only the direct counterparties. Under the initial proposal, if a non-U.S. person were a direct counterparty to a security-based swap executed outside the United States, that non-U.S. person would under no circumstances have had a duty to report the

security-based swap, even if it were guaranteed by a U.S. person or if it were a security-based swap dealer or major security-based swap participant. The Commission is now proposing to refocus the reporting duty primarily on the status of the counterparties, rather than on their nationality or place of domicile.

Under re-proposed Rule 901(a), the only time that the domicile of the counterparties could determine who must report is if neither side includes a security-based swap dealer or major security-based swap participant. In such case, if one side includes a U.S. person while the other side does not, the side with the U.S. person would be the reporting side. Similar to the initial proposal, however, if both sides include a U.S. person or neither side includes a U.S. person, the sides would be required to select the reporting side.

These proposed revisions to Regulation SBSR are designed to more efficiently align the duty to report with the entities that the Commission preliminarily believes are best suited to carrying out that duty. The Commission has previously noted that it “understands that many reporting parties already have established linkages to entities that may register as SDRs, which could significantly reduce the out-of-pocket costs associated with establishing the reporting function.”⁹²⁰ These proposed revisions also are designed to minimize the burdens faced by non-registered U.S. counterparties that might enter into security-based swaps with non-U.S. person security-based swap dealers or major security-based swap participants, as well as to clarify and simplify the reporting rules more generally.

The following examples explain the operation of re-proposed Rule 901(a).

- Example 1. A non-registered U.S. counterparty executes a security-based swap with a security-based swap dealer that is a non-U.S. person. Neither side has a

⁹²⁰ Regulation SBSR Proposing Release, 75 FR at 75265.

guarantor. The security-based swap dealer would be the reporting side.

- Example 2. Same facts as Example 1, except that the non-registered U.S. counterparty is guaranteed by a security-based swap dealer. Because both sides include a person that is a security-based swap dealer, the sides would be required to select which is the reporting side.
- Example 3. A security-based swap is executed in London between a foreign subsidiary of a U.S. person and a French hedge fund. The performance of the foreign subsidiary is guaranteed by its U.S. parent, a major security-based swap participant. The side consisting of the major security-based swap participant and its foreign subsidiary would be the reporting side.
- Example 4. The New York branch of a German bank executes, in New York, a security-based swap with the New York branch of a Brazilian bank. Neither foreign bank is a security-based swap dealer or a major security-based swap participant and neither direct counterparty is guaranteed by a U.S. person. The sides must select which would be the reporting side.
- Example 5. A U.S. hedge fund executes a security-based swap in London with a foreign bank that is registered as a dealer in its home jurisdiction, but is not a security-based swap dealer or major security-based swap participant under Title VII. Neither direct counterparty is guaranteed by a U.S. person. The U.S. hedge fund would be the reporting side, because its side includes the only U.S. person.

Request for Comment

The Commission generally requests comment on all aspects of issues regarding cross-border inter-affiliate transactions, including the following:

- Do you agree with the proposed definitions for “counterparty,” “direct counterparty,” and “indirect counterparty”? Why or why not?
- Do you agree with the new proposed definitions of “side” and “reporting side”? Why or why not? If you disagree with these proposed definitions, what alternative formulations should the Commission consider, and why?
- Do you believe that the re-proposed provisions would appropriately reduce the potential reporting burdens of non-registered U.S. counterparties? Why or why not?
- Do you agree with the shifting of reporting burdens as detailed in re-proposed Rule 901(a)? Why or why not? Do you believe it is appropriate to require a security-based swap dealer or major security-based swap participant that is not a U.S. person to incur the duty to report a security-based swap? Why or why not?
- Should re-proposed Rule 901(a) focus only on the status of the direct counterparties (i.e., whether or not they are security-based swap dealers or major security-based swap participants) rather than also taking into account the status of any indirect counterparties? Why or why not?
- Do you agree, as provided in re-proposed Rule 901(a), that the domicile of the counterparties should determine who must report only if neither side includes a security-based swap dealer or major security-based swap participant? Why or why not?
- Do you believe that Rule 901(a), as re-proposed, would more efficiently align the burdens of reporting with the entities having the greatest technological capability to carry out the reporting function? If not, how could the Commission more efficiently align the burdens of reporting with the operational capabilities of security-based swap

counterparties? Please be specific.

- Are the examples provided sufficiently clear to inform entities of their reporting obligations? Would additional examples be helpful? If so, please provide specific examples that should be addressed by the Commission.

E. Other Technical and Conforming Changes

In connection with the new provisions of re-proposed Regulation SBSR discussed above, the Commission is proposing to make various minor technical and conforming changes to other parts of the regulation. These changes are described below.

Rule 902(a), as initially proposed, would require a registered SDRs to publicly disseminate a transaction report of any security-based swap immediately upon receipt of information about the security-based swap, except in the case of a block trade. Re-proposed Rule 908, however, contemplates situations where a security-based swap would be required to be reported to a registered SDR but not publicly disseminated.⁹²¹ Therefore, the Commission is re-proposing Rule 902(a) to provide that a registered SDR would not have an obligation to publicly disseminate a transaction report for any such security-based swap.

Similarly, Rule 910(b)(4), as initially proposed, would provide that, in Phase 4 of the Regulation SBSR compliance schedule, “[a]ll security-based swaps reported to the registered security-based swap data repository shall be subject to real-time public dissemination as specified in § 242.902.” As noted above, under the re-proposal of Rule 908, certain security-based swaps would be subject to regulatory reporting but not public dissemination requirements.

⁹²¹ This could occur in the case of a security-based swap between (i) a foreign branch of a U.S. bank, a non-U.S. person security-based swap dealer, or a non-U.S. person that has a guarantee from a U.S. person, and (ii) a non-U.S. person that is not guaranteed by a U.S. person; and further provided that neither side solicits, negotiates, executes, books, or submits to clear the transaction within the United States. See Section VIII.C, supra.

Therefore, the Commission is re-proposing Rule 910(b)(4) to provide that, “All security-based swaps received by the registered security-based swap data repository shall be treated in a manner consistent with §§ 242.902, 242.905, and 242.908.”⁹²²

In addition, the Commission is proposing certain changes to proposed Rules 901(c) and 901(d), which address the data elements to be reported to a registered SDR, to reflect that, under the re-proposal, certain security-based swaps may be subject to regulatory reporting but not public dissemination. Rule 901(c), as initially proposed, was titled “Information to be reported in real time.” Under Rule 902(a), as originally proposed, the registered SDR to which such information was reported would be required to promptly disseminate to the public such information (except in the case of a block trade). However, the Commission preliminarily believes that, if a security-based swap were subject to regulatory reporting but not public dissemination, there is no need to require that information about the security-based swap be reported in real time. Therefore, the introductory language to Rule 901(c) is being re-proposed as follows: “For any security-based swap that must be publicly disseminated pursuant to §§ 242.902 and 242.908 and for which it is the reporting side, the reporting side shall report the following information in real time. If a security-based swap is required by §§ 242.901 and 242.908 to be reported but not publicly disseminated, the reporting side shall report the following information no later than the time that the reporting side is required to comply with paragraph (d) of this section.” In addition, re-proposed Rule 901(c) would be retitled “Primary trade

⁹²² Re-proposed Rules 902 and 908 of Regulation SBSR, when read together, would provide that certain security-based swaps reported to a registered SDR would not be publicly disseminated. The Commission also is adding the reference to Rule 905 here to provide that, after Phase 4, a registered SDR must publicly disseminate not only initial transaction reports (consistent with re-proposed Rules 902 and 908), but also corrected transaction reports (consistent with re-proposed Rule 905).

information,” thus eliminating the reference to real-time reporting—since the information required to be reported under Rule 901(c) would no longer in all cases be required to be reported in real time. Furthermore, re-proposed Rule 901(d) would be retitled “Secondary trade information.”⁹²³

The Commission also is re-proposing Rule 905(b)(2) to clarify that, if a registered SDR receives corrected information relating to a previously submitted transaction report, it would be required to publicly disseminate a corrected transaction report only if the initial security-based swap were subject to public dissemination.⁹²⁴

Rule 901(c)(10), as initially proposed, provided that the following data element would be required to be reported: “If both counterparties to a security-based swap are security-based swap dealers, an indication to that effect.” As the Commission stated in the Regulation SBSR Proposing Release: “Prices of transactions involving a dealer and a non-dealer are typically ‘all-in’ prices that include a mark-up or mark-down, while interdealer transaction prices typically do not. Thus, the Commission believes that requiring an indication of whether a [security-based swap] was an interdealer transaction or a transaction between a dealer and a non-dealer counterparty would enhance transparency by allowing market participants to more accurately assess the reported price for a [security-based swap].”⁹²⁵ The Commission is now re-proposing Rule 901(c)(10) as follows: “If both sides of the security-based swap include a security-based

⁹²³ In the original proposal, Rule 901(d) of Regulation SBSR was titled “Additional information that must be reported.” This additional information would be for regulatory purposes only and would not be publicly disseminated.

⁹²⁴ Re-proposed Rule 905(b)(2) of Regulation SBSR also substitutes the word “counterparties”—which is a defined term in Regulation SBSR—for the word “parties,” which was used in the initial proposal but was not a defined term.

⁹²⁵ Regulation SBSR Proposing Release, 75 FR at 75214.

swap dealer, an indication to that effect.” The re-proposed rule would clarify that a security-based swap dealer might be a direct or indirect counterparty to a security-based swap. The Commission continues to believe that, in either case, a security-based swap having a security-based swap dealer on each side could, all other things being equal, be priced differently than a security-based swap having a security-based swap dealer on only one side. Therefore, the Commission continues to believe that the existence of a security-based swap dealer on each side should be reported to the registered SDR and made known to the public.

The Commission is re-proposing Rule 901(d)(1)(ii) to require reporting of the broker ID, desk ID, and trader ID, as applicable, only of the direct counterparty on the reporting side. The Commission preliminarily believes that it would be impractical and unnecessary to report such data elements with respect to an indirect counterparty, as such elements might not be applicable to an indirect counterparty.⁹²⁶ Similarly, Rule 901(d)(1)(iii) is being re-proposed to require reporting of a description of the terms and contingencies of the payment streams only of each direct counterparty to the other. The Commission is including the word “direct” to avoid extending Rule 901(d)(1)(iii) to indirect counterparty relationships, where payments generally would not flow to or from an indirect counterparty.

Proposed Rule 901(e) set forth provisions for reporting life cycle events of a security-based swap. The basic approach set forth in proposed Rule 901(e) was that, generally, the original reporting party of the initial transaction would have the responsibility to report any subsequent life cycle event; this approach remains unchanged in the re-proposal. However, if the life cycle event were an assignment or novation that removed the original reporting party, either

⁹²⁶ An indirect counterparty typically would not have a desk or trader involved in the transaction, or engage the services of a broker, in the same manner as a direct counterparty.

the new counterparty or the original counterparty would have to be the reporting party. Further, Rule 901(e), as initially proposed, would provide that the new counterparty would be the reporting party if it were a U.S. person, whereas the other counterparty would be the new reporting party if the new counterparty were not a U.S. person.

However, as discussed above, the Commission is now proposing the concept of a “reporting side,” which would include the direct and any indirect counterparty. Further, as discussed above, the Commission is proposing that non-U.S. person security-based swap dealers or major security-based swap participants would, in certain instances, incur a duty to report. Thus, the Commission is re-proposing Rule 901(e) to provide that the duty to report would switch to the other side only if the new side did not include a U.S. person (as in the originally proposed rule) or a security-based swap dealer or major security-based swap participant (references to which are being added to Rule 901(e)). The Commission preliminarily believes that, if the new side includes a security-based swap dealer or major security-based swap participant, the new side should retain the duty to report. This approach is designed to align reporting duties with the market participants that the Commission preliminarily believes are better suited to carrying them out because non-U.S. person security-based swap dealers and major security-based swap participants likely have already taken significant steps to establish and maintain the systems, processes and procedures, and staff resources necessary to report security-based swaps currently.⁹²⁷

Request for Comment

The Commission generally requests comment on all aspects of all the technical and

⁹²⁷ See Section VIII.D, *supra* (explaining rationale for proposing to align reporting duties with greater capability to carry out such duties).

conforming changes in re-proposed Regulation SBSR, including the following:

- Do you disagree with any of the technical and conforming changes in the re-proposed rules? If so, why?
- Do you agree with the proposed change to Rule 902(a) which provides that a registered SDR would not have an obligation to publicly disseminate a transaction report for any security-based swap that is required to be reported but not publically disseminated? Why or why not?
- Do you agree with the proposed change to Rule 910(b)(4) that would remove the requirement that “[a]ll security-based swaps reported to the registered security-based swap data repository [] be subject to real-time public dissemination as specified in § 242.902” and replace it with the requirement that “[a]ll security-based swaps received by the registered security-based swap data repository [] be treated in a manner consistent with §§ 242.902, 242.905, and 242.908”? Are there any alternative formulations of the re-proposed rule text that the Commission should consider? If so, what are they? Please be specific.
- Do you agree with the proposed changes to the data elements initially contained in proposed Rules 901(c) and 901(d)? Specifically, do you agree with the reformulation of the introductory language contained in re-proposed Rule 901(c) to reflect situations in which a security-based swap could be subject to regulatory reporting but not public dissemination? Why or why not? Do you agree with the retitling of re-proposed Rule 901(c) to “Primary trade information” to eliminate the reference to real-time reporting? Why or why not?
- Do you agree with the proposed change to re-proposed Rule 905(b)(2) to clarify that,

if a registered SDR receives corrected information relating to a previously submitted transaction report, it would be required to publicly disseminate a corrected transaction report only if the initial security-based swap were subject to public dissemination?

Why or why not?

- Do you agree with the proposed change to re-proposed Rule 901(c)(10) to clarify that a security-based swap dealer might be a direct or indirect counterparty to a security-based swap? Why or why not?
- Do you agree with the proposed change to re-proposed Rule 901(d)(1)(ii) to require the reporting of the broker ID, desk ID, and trader ID only of the direct counterparty on the reporting side? Why or why not? Similarly, do you agree with the requirement in re-proposed Rule 901(d)(1)(iii) for reporting of a description of the terms and contingencies of the payment streams only of each direct counterparty to the other in order to avoid extending the rule to indirect counterparty relationships? Why or why not?
- Do you agree with the proposed change to re-proposed Rule 901(e) to provide that the duty to report would switch to the other side only if the new side did not include a U.S. person or a security-based swap dealer or major security-based swap participant? Why or why not?
- Are there any other technical and conforming changes that the Commission should make to re-proposed Regulation SBSR?

F. Cross-Border Inter-Affiliate Transactions

Commenters raised concerns about applying Title VII reporting or dissemination

requirements to cross-border inter-affiliate security-based swaps.⁹²⁸ One commenter argued that, for a foreign entity registered as a bank holding company and subject to the consolidated supervision of the Federal Reserve, the reporting of inter-affiliate transactions would be superfluous because the Federal Reserve has “ample authority to monitor transactions among affiliates.”⁹²⁹ The second commenter expressed concern about duplicative or conflicting regulation of inter-affiliate transactions. It stated that, for example, inter-affiliate security-based swaps “could be required to be publicly reported in multiple jurisdictions, even though they are not suitable for reporting in any jurisdiction.”⁹³⁰ A third commenter argued that inter-affiliate security-based swaps generally—not referencing cross-border inter-affiliate transactions in particular—should not be subject to public dissemination requirements, stating that “public reporting could confuse market participants with irrelevant information and raise the costs to corporate groups of managing risk internally.”⁹³¹

The Commission preliminarily believes that regulatory reporting and public dissemination serve different purposes and, while these two requirements are related, their application to cross-border inter-affiliate transactions should be considered separately. The Commission notes that the statutory provisions that require regulatory reporting and public dissemination of security-based swap transactions state that “each” security-based swap shall be reported; these statutory provisions do not by their terms distinguish such reporting based on particular characteristics (such as being negotiated at arm’s length). Section 13A(a)(1) of the

⁹²⁸ See Japanese Banks Letter at 5; Multiple Associations Letter IV at 11-12.

⁹²⁹ Japanese Banks Letter at 5.

⁹³⁰ Multiple Associations Letter IV at 16.

⁹³¹ Cleary Letter II at 17-18.

Exchange Act⁹³² provides that each security-based swap that is not accepted for clearing shall be subject to regulatory reporting. Section 13(m)(1)(G) of the Exchange Act⁹³³ provides that each security-based swap (whether cleared or uncleared) shall be reported to a registered SDR, and Section 13(m)(1)(C) of the Exchange Act⁹³⁴ generally provides that transaction, volume, and pricing data of security-based swaps shall be publicly disseminated. With respect to regulatory reporting of cross-border inter-affiliate security-based swaps, the Commission preliminarily believes that regulators should have ready access to information about the precise legal entities that hold risk positions in all security-based swaps. While it is true that the Federal Reserve or perhaps other regulators might exercise consolidated supervision over a group, this might not provide regulators with current and specific information about security-based swap positions taken by the group's subsidiaries. As a result, it would likely be more difficult for the Commission to conduct general market analysis or surveillance of market behavior, and could create particular problems during a crisis situation when having accurate and timely information about specific risk exposures could be crucial. Therefore, the Commission continues to believe that each cross-border inter-affiliate security-based swap that otherwise satisfies any of the criteria in re-proposed Rule 908(a)(1) should be subject to regulatory reporting.

With respect to public dissemination of cross-border inter-affiliate transaction data, the Commission preliminarily believes that the analysis of this issue in the cross-border context is in many ways similar to the analysis of dissemination of inter-affiliate transaction data in the domestic context. In particular, many of the issues raised by commenters with respect to the

⁹³² 15 U.S.C. 78m-1(a)(1).

⁹³³ 15 U.S.C. 78m(m)(1)(G).

⁹³⁴ 15 U.S.C. 78m(m)(1)(C).

public dissemination of inter-affiliate transactions generally appear to be relevant whether a transaction is conducted within the United States or conducted on a cross-border basis. These general issues include a concern about information distortion, market confusion, and interference with internal risk management of a corporate group.

First, commenters stated that inter-affiliate transactions—whether cross-border or not—are typically risk transfers with no market impact. They believe that the market-facing transactions already would have been publicly reported, so requiring that inter-affiliate transactions also be publically reported would duplicate information already known to the public. The commenters express the concern that such “double counting” would distort information that is critical for price discovery and measuring liquidity, the depth of trading, and exposure to swaps in the market.⁹³⁵ They also believe that it would distort the establishment of regulatory thresholds and analysis, as well as enforcement activities that require an accurate assessment of the swaps market.⁹³⁶

Second, commenters stated that affiliates often enter into an inter-affiliate transaction on terms linked to an external trade being hedged, which they are concerned could create confusion in the market if publicly reported. If markets move because of the external trade before the inter-affiliate transaction is entered into on a SEF or reported as an off-exchange trade, market participants could misconstrue the market’s true direction and depth simply because of the disconnect in timing between the two offsetting trades.⁹³⁷

Third, commenters stated that public dissemination of inter-affiliate transactions could

⁹³⁵ See Multiple Associations Letter IV at 11-12.

⁹³⁶ See *id.*

⁹³⁷ See *id.* at 12.

interfere with the internal risk management practices of a corporate group. For example, one entity in a group may be better positioned to take on a certain type of risk, even though another entity must, for unrelated reasons, actually enter into the transaction with an external counterparty. Public disclosure of a transaction between affiliates could prompt other market participants to act in a way that would prevent the corporate group from following through with its risk management strategy by, for instance, causing adverse price movements in the market that the risk-carrying affiliate would use to hedge.⁹³⁸

Beyond these concerns regarding the public dissemination of inter-affiliate transactions, commenters addressing the public reporting of cross-border inter-affiliate transactions focused more generally on duplicative and conflicting regulations. Using public dissemination as an example, one commenter stated that inter-affiliate security-based swaps “could be required to be publicly reported in multiple jurisdictions, even though they are not suitable for reporting in any jurisdiction.”⁹³⁹ However, the Commission is not aware of any commenter proposing a treatment of cross-border inter-affiliate transactions under public dissemination requirements that differs substantively from proposals for the treatment of other inter-affiliate transactions.

The Commission has considered the issues raised by these commenters both with respect to inter-affiliate transactions generally and in the cross-border context. The common thread of the issues identified by commenters to date is that public dissemination should not be required for a security-based swap that is undertaken to transfer the risk of an initial security-based swap (between X and Y) to an affiliate (i.e., from X to XA) because it would have no price discovery value or could even give market observers a false understanding of the nature of the

⁹³⁸ Cleary Letter II at 17.

⁹³⁹ See note 930, supra.

transaction.⁹⁴⁰ The Commission acknowledges that the initial security-based swap between X and Y likely would have more price discovery value than the subsequent inter-affiliate transaction between X to XA, all else being equal. In this hypothetical, the initial transaction presumably represents the mutual agreement of parties operating on an arm's-length basis to execute a trade at a particular price, while the latter transaction generally would not involve negotiation of the terms, particularly as regards to price. It may not follow, however, that the subsequent inter-affiliate transaction would have no price discovery value whatsoever, particularly in a cross-border context where multiple public dissemination requirements may be involved. Arguing that an inter-affiliate security-based swap has no price discovery value appears to presuppose that the initial, arm's-length security-based swap had been publicly disseminated. This could be the case if the initial security-based swap were subject to the rules of a jurisdiction having public dissemination requirements.⁹⁴¹ However, if the initial security-based swap had not been publicly disseminated, public dissemination of the cross-border inter-affiliate transaction, assuming it were subject to Rule 908(a)(2) of re-proposed Regulation SBSR,⁹⁴² might be the only way for the market to obtain any pricing information about the series of transactions. These circumstances could be present if the initial security-based swap were not subject to the rules of a jurisdiction having public dissemination requirements. In this case, public dissemination of the cross-border inter-affiliate transaction, assuming it were subject to

⁹⁴⁰ See Cleary Letter II at 17-18; Multiple Associations Letter IV at 16.

⁹⁴¹ See Multiple Associations Letter IV at 12 ("The market-facing swaps already will have been reported and therefore, to require that inter-affiliate swaps also be reported will duplicate information").

⁹⁴² Re-proposed Rule 908(a)(2) of Regulation SBSR would describe when a cross-border security-based swap would be subject to public dissemination.

Rule 908(a)(2) of re-proposed Regulation SBSR,⁹⁴³ might be the only way for the market to obtain any pricing information about the series of transactions.

As described above, commenters also raised a general concern about the potential for duplicative and conflicting regulation of cross-border inter-affiliate transactions. The Commission is sensitive to these concerns both generally and in the context of public dissemination.⁹⁴⁴ The treatment of these issues in connection with public dissemination is not dissimilar to their treatment in other contexts under Title VII, including the context of regulatory reporting. Accordingly, the Commission preliminarily believes that the concern expressed by the commenters should be addressed by the proposed substituted compliance policy and framework discussed in detail below, as well as when the Commission considers the adopting release for public dissemination, which the Commission anticipates will address the issue of dissemination of inter-affiliate transactions.⁹⁴⁵

In light of these considerations, the Commission preliminarily believes that cross-border inter-affiliate security-based swaps should not be excluded from the public dissemination requirements to the extent that inter-affiliate security-based swaps are not excluded as a general matter. The Commission preliminarily believes that the considerations regarding whether or not to exclude inter-affiliate cross-border security-based swaps from public dissemination on the grounds that they could be misleading or have no price discovery value are similar to the considerations regarding whether or not to exclude inter-affiliate security-based swaps generally.

⁹⁴³ See id.

⁹⁴⁴ Duplicative and conflicting regulation is one of the considerations the Commission takes into account in proposing the approach to application of Title VII requirements to security-based swap transactions in the cross-border context. See Section II.C, supra.

⁹⁴⁵ See Section XI, infra.

Similarly, the Commission preliminarily believes that any steps short of exclusion that could be taken to maximize the price discovery value that inter-affiliate cross-border security-based swaps may have (while minimizing any concern that they might mislead the market) are similar to the steps that could be taken with respect to inter-affiliate security-based swaps generally. Although the Commission is not in this release re-proposing any provisions of Regulation SBSR regarding the public dissemination of inter-affiliate security-based swaps generally (whether or not cross-border),⁹⁴⁶ as previously stated, the Commission invites public comment on whether there are specific concerns or reasons to support different treatment or analysis of public dissemination of cross-border inter-affiliate transactions from the treatment or analysis of the same issue in the domestic context, and, in particular, why cross-border inter-affiliate transactions may not be suitable for public dissemination.

For example, the concerns about the potentially limited price discovery value of inter-affiliate security-based swaps may be able to be addressed through the public dissemination of relevant data that may be indicative of such limitations, rather than suppressing these transactions entirely. In the Regulation SBSR Proposing Release, the Commission proposed to require a registered SDR to “publicly disseminate a transaction report of a security-based swap immediately upon receipt of information about the security-based swap from a reporting party.”⁹⁴⁷ As the Commission noted in the Regulation SBSR Proposing Release, “[t]he transaction report that is disseminated would be required to consist of all the information

⁹⁴⁶ See Regulation SBSR Proposing Release, 75 FR at 75215 (proposing that inter-affiliate security-based swaps should not be suppressed from the public data feed, but rather should be disseminated and appropriately tagged).

⁹⁴⁷ See Rule 902(a) of Regulation SBSR, as originally proposed. If the SDR were closed when the reporting party submitted its transaction report, the SDR would be required to publicly disseminate the transaction report immediately upon re-opening. See *id.*

reported by the reporting party pursuant to proposed Rule 901(c).⁹⁴⁸ One of the data elements enumerated in proposed Rule 901(c) would be “[i]f applicable, an indication that the transaction does not accurately reflect the market.”⁹⁴⁹ Such data element should send a message to the market that the transaction was not conducted at arm’s length on the open market.⁹⁵⁰ Market participants could take such information into account when interpreting or analyzing the publicly-disseminated inter-affiliate transaction pricing information.

As noted above, one commenter expressed concern that public dissemination of an inter-affiliate transaction could interfere with the internal risk management of a corporate group by causing adverse price movements in the market that the risk-carrying affiliate might use to hedge. The commenter did not explain why the corporate group might be unable or might choose not to hedge the risk when the initial transaction is executed, or why the impact of the public dissemination of the subsequent inter-affiliate transaction might be different from the impact of the public dissemination of the initial transaction. The Commission preliminarily believes that, assuming that the corporate group does not hedge at the time the initial transaction was executed, a concern about the potential impact of public dissemination of the inter-affiliate transaction on the ability to hedge the position would be similar to the concern that commenters

⁹⁴⁸ Regulation SBSR Proposing Release, 75 FR at 75228.

⁹⁴⁹ Rule 901(c)(11) of Regulation SBSR, as originally proposed.

⁹⁵⁰ The Commission preliminarily disagrees with the commenter that argued that “inclusion of these swaps in swaps market data will distort the establishment of position limits, analysis of open interest, determinations of block trade thresholds and performance of other important regulatory analysis, functions and enforcement activities that require an accurate assessment of the swaps market.” Multiple Associations Letter IV at 11-12. Security-based swaps that have been appropriately marked as inter-affiliate transactions also could be excluded from certain aggregated market data, depending on the purpose for which those data are being used.

have expressed generally about public dissemination of block trades.⁹⁵¹ This concern about a potential impact of the public dissemination—either of the original transaction or the subsequent inter-affiliate transaction—may be addressed by delayed dissemination instead of suppressing dissemination of these transactions entirely. The broader issue of how to treat block trades, including how to define what is a block trade, is one that the Commission continues to evaluate. In addition, public dissemination of relevant data indicating the inter-affiliate nature of the transaction separately may help address concerns about potential impact on markets on which a hedge might occur if such markets are made aware that there may be special considerations that should be taken into account when assessing the extent to which the transaction may reflect the current market.

Regulation SBSR would require registered SDRs, in their policies and procedures, to enumerate the specific data elements of a security-based swap or life cycle event that would be required to be reported, and to specify one or more acceptable data formats, connectivity requirements, and other protocols for submitting information.⁹⁵² The Commission itself did not propose to specify each data element that would have to be reported, but instead identified broad categories of information that must be reported.⁹⁵³ Furthermore, the Commission initially

⁹⁵¹ Specifically, if the corporate group hedges the initial transaction at the time of execution, there would appear to be no need to hedge at the time of the inter-affiliate transaction, and thus no concern about the impact of the dissemination of the inter-affiliate transaction on the market in which the hedge is put on. Furthermore, if the corporate group chooses not to hedge the position until the time of the inter-affiliate transaction, the Commission questions why the concern about the impact of the disclosure of that transaction would be different than a concern about the dissemination of the original transaction.

⁹⁵² See Rules 907(a)(1) and 907(a)(2) of Regulation SBSR, as originally proposed.

⁹⁵³ For example, the Commission proposed to require the reporting of “[i]nformation that identifies the security-based swap instrument”—see Rule 901(c)(2) of Regulation SBSR,

proposed to require, in Rule 907(a)(4), that a registered SDR have policies and procedures “[d]escribing how reporting parties shall report and, consistent with the enhancement of price discovery, how the registered security-based swap data repository shall publicly disseminate . . . security-based swap transactions that do not involve an opportunity to negotiate any material terms, other than the counterparty; and any other security-based swap transactions that, in the estimation of the registered security-based swap data repository, do not accurately reflect the market.”⁹⁵⁴ However, the Commission invites public comment on whether concerns about the inter-affiliate security-based swaps not accurately reflecting the market can be addressed in the policies and procedures of registered SDRs that would be required under re-proposed Rule 907(a)(4).

For example, such policies and procedures could be designed to maximize the price discovery value of cross-border (or other) inter-affiliate security-based swaps and to minimize their ability to mislead. These policies and procedures could require not only that reporting sides mark whether a security-based swap is an inter-affiliate transaction, but also whether the initial security-based swap was executed in a jurisdiction with public dissemination requirements.⁹⁵⁵ Further, these policies and procedures also could require the reporting side to indicate the

as originally proposed—but did not specify the exact manner in which such information must be reported, instead proposing to allow SDRs discretion to set such specifications in their policies and procedures. However, the Commission did propose to require reporting of certain discrete data elements. *See, e.g.*, Rule 901(d)(vi) of Regulation SBSR (requiring reporting of the name of the clearing agency, if the security-based swap will be cleared).

⁹⁵⁴ Rule 907(a)(4) of Regulation SBSR, as originally proposed.

⁹⁵⁵ This could be either the United States or another jurisdiction that imposes post-trade transparency requirements similar to those in re-proposed Regulation SBSR.

approximate time when the initial security-based swap was executed.⁹⁵⁶ This would permit market observers to gauge how much price discovery value to assign to the price provided in the inter-affiliate security-based swap transaction report that would be publicly disseminated under Rule 902 of re-proposed Regulation SBSR. Information about an initial trade done less than 24 hours before (obtained indirectly from the later-appearing trade report of the inter-affiliate cross-border security-based swap) could have significant price discovery value, while information from an initial trade executed over a week before could, all things being equal, have less.⁹⁵⁷ The Commission invites public comment on these approaches to the treatment of inter-affiliate security-based swaps generally, as well as their relative advantages and disadvantages. In particular, the Commission invites public comment on how these approaches would affect the internal risk management practices of a corporate group. In addition, as previously stated, the Commission invites public comment on whether there are specific concerns or reasons to support different treatment or analysis of public dissemination of cross-border inter-affiliate transactions from the treatment or analysis of the same issue in the domestic context.

Request for Comment

The Commission generally requests comment on all aspects of issues regarding cross-border inter-affiliate security-based swaps, including the following:

- Do you believe that cross-border inter-affiliate security-based swaps should be excluded from the regulatory reporting requirements of Regulation SBSR? If so,

⁹⁵⁶ For example, there could be indicators for the initial security-based swap having been executed within the past 24 hours, between one and seven days before, or longer than seven days before.

⁹⁵⁷ However, even information about a trade done over a week ago (or more) could have price discovery value for security-based swap instruments that trade infrequently.

under what circumstances should such security-based swaps be excluded, and why? What would be the harm of having such inter-affiliate security-based swaps reported to a registered SDR? What are the risks of not requiring regulatory reporting of inter-affiliate security-based swaps?

- Do you believe that cross-border inter-affiliate security-based swaps should be analyzed differently from domestic inter-affiliate security-based swaps? Why or why not?
- Do you believe that cross-border inter-affiliate security-based swaps should be excluded from the public dissemination requirements of Regulation SBSR? Why or why not? What are the risks or benefits of not requiring public dissemination of inter-affiliate security-based swaps? How should the Commission balance these risks and benefits?
- Does your view about public dissemination for cross-border inter-affiliate security-based swaps change depending on whether an initial, arm's-length security-based swap was executed and publicly disseminated in a jurisdiction having public dissemination requirements? Why or why not? On what basis could or should the Commission exclude the cross-border inter-affiliate security-based swap from the public dissemination requirements if the initial, arm's-length security-based swap was executed and publicly disseminated in a jurisdiction having no public dissemination requirements, or public dissemination requirements that are not comparable to those in the United States?
- Does your view on the application of regulatory reporting and public dissemination requirements to inter-affiliate security-based swaps change if the affiliates are subject

to consolidated supervision? If so, please explain.

- Can you suggest any additions to the policies and procedures of registered SDRs that could maximize the price discovery value, and minimize any potentially misleading aspects, of public trade reports of cross-border inter-affiliate security-based swaps? If so, what are they? Should the Commission more clearly specify in Rule 907(a)(4) how inter-affiliate security-based swaps should be publicly disseminated so as to maximize their price discovery value and minimize their potential for misleading market observers? If so, how?
- Do you have any other concerns about public dissemination of cross-border inter-affiliate security-based swaps so long as they are appropriately marked?

G. Foreign Privacy Laws versus Duty to Report Counterparty ID

Rule 901(d), as initially proposed, set forth the data elements that would constitute the required regulatory report of a security-based swap (*i.e.*, information for use only by regulators that would not be included in the publicly disseminated report). One such element is the “participant ID” of the counterparty.⁹⁵⁸ The Title VII provisions relating to security-based swap trade reporting and proposed Regulation SBSR that would implement those provisions contemplate only one counterparty to a security-based swap having a duty to report. However, the Commission preliminarily believes that being able to assess the positions and behavior of both counterparties to the security-based swap would facilitate our ability to carry out our regulatory duties for market oversight.⁹⁵⁹ Because only one party would be required to report,

⁹⁵⁸ See Rule 901(d)(1)(i) of Regulation SBSR, as initially proposed. See also Regulation SBSR Proposing Release, 75 FR at 75217.

⁹⁵⁹ U.S. regulators have a strong interest in being able to monitor the risk exposures of U.S. persons, particularly those involved in the security-based swap market, as the failure or

the only way to obtain the identity of the non-reporting party counterparty would be to require the reporting party to disclose its counterparty's identity.⁹⁶⁰

Three comments on proposed Regulation SBSR cautioned that U.S. persons may be restricted from complying with such a requirement in cases where a security-based swap is executed outside the United States.⁹⁶¹ One commenter stated that the London branch of a U.S. person would need its counterparty's consent to identify that party under U.K. law.⁹⁶² The

financial distress of a U.S. person could impact other U.S. persons and the U.S. economy as a whole. U.S. regulators also have an interest in obtaining information about non-U.S. counterparties that enter into security-based swaps with U.S. persons, as the ability of such non-U.S. counterparties to perform their obligations under those security-based swaps could impact the financial soundness of U.S. persons. See, e.g., S. Comm. on Banking, Hous., & Urban Affairs, The Restoring American Financial Stability Act of 2010, S. Rep. No. 111-176, at 32 (“As a key element of reducing systemic risk and protecting taxpayers in the future, protections must include comprehensive regulation and rules for how the OTC derivatives market operates. Increasing the use of central clearinghouses, exchanges, appropriate margining, capital requirements, and reporting will provide safeguards for American taxpayers and the financial system as a whole.”) (emphasis added).

⁹⁶⁰ Once the identity of the opposite counterparty to a security-based swap is known by a registered SDR, the SDR would be required to obtain certain additional information from that counterparty. See proposed Rule 906(a), which is not being revised by this proposal.

⁹⁶¹ In addition, two comments on the Commission's interim final temporary rule on the reporting of security-based swaps entered into before July 21, 2010, Securities Exchange Act Release No. 63094 (Oct. 13, 2010), 75 FR 64643 (Oct. 20, 2010), made similar points. See Deutsche Bank Letter at 5 (“In some cases, dissemination or disclosure of [counterparty] information could lead to severe civil or criminal penalties for those required to submit information to an SDR pursuant to the Interim Final Rules. These concerns are particularly pronounced because of the expectation that Reportable Swap data will be reported, on a counterparty identifying basis, to SDRs, which will be non-governmental entities, and not directly to the Commissions.”); ISDA Letter II at 6 (“In many cases, counterparties to cross-border security-based swap transactions will face significant legal and reputational obstacles to the reporting of such information. Indeed, disclosure of such information may lead to civil penalties in some jurisdictions and even criminal sanctions in other jurisdictions.”).

⁹⁶² See DTCC Letter II at 21.

commenter added that, under French law, consent is required each time a report is made identifying the counterparty, and this restriction cannot be resolved by changes to the firm's terms of business.⁹⁶³ Another commenter urged the Commission to "consider carefully and provide for consistency with, foreign privacy laws, some of which carry criminal penalties for wrongful disclosure of information,"⁹⁶⁴ but did not provide further detail. A third commenter argued that allowing substituted compliance when both parties are not domiciled in the United States could avoid problems with foreign privacy laws conflicting with U.S. reporting requirements.⁹⁶⁵

The Commission seeks to understand more precisely if—and, if so, how—requiring a counterparty to report the transaction pursuant to Regulation SBSR (including disclosure of the counterparty's identity to a registered SDR) might cause it to violate local law in a foreign jurisdiction where it operates. Before determining whether any exception to reporting the counterparty's identity might be necessary or appropriate, the Commission seeks to obtain additional information about any such foreign privacy laws.

Request for Comment

The Commission generally requests comment on all aspects of issues relating to foreign privacy laws with respect to proposed Regulation SBSR, including the following:

- What jurisdictions have laws that might affect a reporting side's ability to report the participant ID of its counterparty? Please cite and describe specifically for each such law: to whom such restrictions would apply and under what circumstances; how the

⁹⁶³ See *id.*

⁹⁶⁴ ISDA/SIFMA Letter I at 20.

⁹⁶⁵ See Cleary Letter II at 17-18.

law might restrict reporting (e.g., what data elements that otherwise would be required to be reported under Regulation SBSR would be restricted); whether any exceptions under the law, particularly but not limited to consent provisions and provisions relating to compliance with applicable law, might be available to a reporting side that otherwise would be required to comply with re-proposed Rule 901(d)(1)(i), or explain why none of the exceptions would be available.

- If no such exceptions are available under the local law and you believe that an exception by rule from re-proposed Rule 901(d)(1)(i) would be appropriate, how should that exception be crafted? Please suggest appropriate rule text.
- How, if at all, would a substituted compliance regime for regulatory reporting avoid problems with foreign privacy laws? Would the Commission and other U.S. financial regulators be able to obtain information about security-based swap counterparties from foreign trade repositories or foreign regulatory authorities to which such transactions had been reported?

H. Foreign Public Sector Financial Institutions

Six commenters expressed concern about applying the requirements of Title VII to the activities of FPSFIs, such as foreign central banks and multilateral development banks.⁹⁶⁶ One commenter, the European Central Bank (“ECB”), noted that security-based swaps entered into by the Federal Reserve Banks are excluded from the CEA’s definition of “swap”⁹⁶⁷ and that the

⁹⁶⁶ See BIS Letter passim; CEB at 2, 4; ECB Letter passim; ECB Letter II passim; EIB Letter passim; Nordic Investment Bank Letter at 1; World Bank Letter II passim.

⁹⁶⁷ Section 1a(47)(B)(ix) of the CEA excludes from the definition of swap any agreement, contract, or transaction a counterparty of which is a Federal Reserve Bank, the Federal Government, or a Federal agency that is expressly backed by the full faith and credit of the United States. A security-based swap includes any swap, as defined in the CEA, that

functions of foreign central banks and the Federal Reserve are broadly comparable. The ECB argued, therefore, that security-based swaps entered into by foreign central banks should likewise be excluded from the definition of “swap.”⁹⁶⁸ A second commenter, the World Bank (representing the International Bank for Reconstruction and Development, the International Finance Corporation, and other multilateral development institutions of which the United States is a member) also argued generally that the term “swap” should be defined to exclude any transaction involving a multilateral development bank.⁹⁶⁹ The World Bank further noted that the EMIR—which is intended to serve as the E.U. counterpart to Title VII of the Dodd-Frank Act—would expressly exclude multilateral development banks from its coverage.⁹⁷⁰

The ECB and BIS stated that foreign central banks enter into security-based swaps solely in connection with their public mandates, which require them to act confidentially in certain circumstances.⁹⁷¹ The ECB argued in particular that public disclosure of its market activities could compromise its ability to take necessary actions and “could cause signaling effects to other market players and finally hinder the policy objectives of such actions.”⁹⁷² Another commenter, the Council of Europe Development Banks (“CEB”), while opposing application of Title VII

is based on, among other things, a narrow-based index or a single security or loan. See Section 3(a)(68) of the Exchange Act, 15 U.S.C. 78c3(a)(68). See also Product Definitions Adopting Release, 77 FR 48208.

⁹⁶⁸ See ECB Letter I at 2; ECB Letter II at 2. See also EIB Letter at 1; Nordic Development Bank at 1.

⁹⁶⁹ See World Bank Letter II at 6-7.

⁹⁷⁰ See id. at 4. See also EIB Letter at 7 (“As a matter of comity, actions by U.S. financial regulators should be consistent with the laws of other jurisdictions that provide exemption from national regulation for government-owned multinational developments such as the [EIB]”).

⁹⁷¹ See BIS Letter at 4-5; ECB Letter I at 3.

⁹⁷² ECB Letter I at 3. See also ECB Letter II at 2.

requirements to multilateral development banks generally, did not object to the CFTC and SEC preserving their authority over certain aspects of swaps activity, including reporting requirements.⁹⁷³ Similarly, the World Bank believed that the definition of “swap” could be qualified by a requirement that counterparties would treat such transactions as swaps solely for reporting purposes.⁹⁷⁴

The Commission preliminarily believes that security-based swaps to which an FPSFI is a counterparty (“FPSFI trades”) should not, for that fact alone, be exempt from regulatory reporting.⁹⁷⁵ Under Regulation SBSR, as initially proposed, an FPSFI trade would be required to be reported to a registered SDR if the counterparty were a U.S. person. The Commission continues to believe that, if an FPSFI executes a security-based swap with a counterparty that is a U.S. person, the security-based swap should be subject to regulatory reporting. Under re-proposed Regulation SBSR, an FPSFI trade also would be required to be reported if the counterparty were a non-U.S. person security-based swap dealer or major security-based swap

⁹⁷³ See CEB Letter at 4. However, the CEB did not state a view as to whether FPSFI trades should be subject to post-trade transparency.

⁹⁷⁴ See World Bank Letter II at 7.

⁹⁷⁵ The Commission notes that all FPSFIs, even FPSFIs that are based in the United States, would be deemed non-U.S. persons under the Commission’s Title VII rules. See proposed Rule 3a71-3(a)(7)(ii) (“The term ‘U.S. person’ does not include the International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, and their agencies, affiliates, and pension plans, and any other similar international organizations, their agencies, affiliates, and pension plans”). See also Section III.B.5, *supra* (discussing proposed definition of “U.S. person”). As with any other security-based swap transaction having a direct counterparty that is a non-U.S. person, a transaction involving an FPSFI as a direct counterparty would be subject to Regulation SBSR’s regulatory reporting requirements only if it met one of the conditions in re-proposed Rule 908(a)(1), and would be subject to Regulation SBSR’s public dissemination requirements only if it met one of the conditions in re-proposed Rule 908(a)(2).

participant. In either case, without a regulatory report of such security-based swaps, the Commission would have an incomplete view of the risk positions held by security-based swap market participants that are U.S. persons or registered with the Commission. Regulatory reporting of such security-based swaps, despite the fact that an FPSFI is a counterparty, would facilitate the Commission's ability to carry out our regulatory oversight responsibilities with respect to registered entities and the security-based swap market. The Commission notes that this approach was endorsed by two commenters.⁹⁷⁶

Furthermore, the Commission believes that, at this time, a sufficient basis does not exist to support an exemption from public dissemination for FPSFI trades. The Commission preliminarily understands that FPSFI participation in the security-based swap market—rather than the swap market generally—may be limited. Comments submitted by FPSFIs generally were addressed to both the Commission and the CFTC and addressed participation in the swap market generally; it is unclear the extent to which these comments should be read to apply to the security-based swap market.⁹⁷⁷ Furthermore, to the extent that FPSFI trades are subject to public dissemination under Regulation SBSR (e.g., because the direct counterparty is a U.S. person other than a foreign branch of a U.S. bank), such trades could provide useful price discovery information to other market participants.

The Commission is seeking more information with respect to the basis for the claim that public dissemination of FPSFI trades, as contemplated by re-proposed Regulation SBSR, would

⁹⁷⁶ See CEB Letter at 4; World Bank Letter II at 7 (stating that, although swaps involving FPSFIs as counterparties generally should be exempt from the definition of “swap,” they should be treated as swaps solely for reporting purposes).

⁹⁷⁷ But see BIS Letter at 3 (stating that the BIS generally does not transact security-based swaps such as credit default swaps or equity derivatives).

“hinder the policy objectives”⁹⁷⁸ of FPSFIs. The Commission notes that proposed Regulation SBSR contains provisions relating to public dissemination that are designed to protect the identity of security-based swap counterparties⁹⁷⁹ and prohibit a registered SDR (with respect to uncleared security-based swaps) from disclosing the business transactions and market positions of any person.⁹⁸⁰ Furthermore, to the extent that an FPSFI trade is small enough not to constitute a block trade, the Commission questions the extent to which market observers would be able to distinguish the trade as having been conducted by an FPSFI. Given these provisions of Regulation SBSR, which are designed to prevent adverse market impacts due to disclosure of a counterparty’s identity or the public dissemination of a block trade, the Commission preliminarily does not see a basis to exempt FPSFI trades from public dissemination. However, the Commission is open to receiving further information that might support an exemption.

Request for Comment

As noted above, certain FPSFI commenters stated that carrying out their policy mandates would require confidentiality in certain circumstances.⁹⁸¹ The Commission seeks additional information to assist our analysis of this issue, and requests answers to the following questions. In responding, please focus on the security-based swap market, not the market for other swaps. In addition, commenters are requested to answer only with respect to security-based swap activity that would be subject to Regulation SBSR, and not with respect to activity that, because of the place where the transaction is conducted or the nationality of the counterparties, would not

⁹⁷⁸ ECB Letter I at 3.

⁹⁷⁹ See Rule 902(c)(1), as initially proposed.

⁹⁸⁰ See Rule 902(c)(2), as initially proposed.

⁹⁸¹ See BIS Letter at 5; ECB Letter at 3.

be subject to Regulation SBSR in any case:

- How many FPSFIs engage in security-based swap activity with U.S. persons? How active are they in the security-based swap market generally?
- What policy goals might an FPSFI be attempting to carry out by participating in the security-based swap market?
- What trading strategies might an FPSFI conduct in the security-based swap market?
- Are there any characteristics of FPSFI activity in the security-based swap market that could make it easier for market observers to detect an FPSFI as a counterparty, or that could make it easier to detect an FPSFI's business transactions or market positions? If so, are there steps the Commission could take to minimize such information leakage short of suppressing all FPSFI trades from public dissemination? If so, what are they?
- Do FPSFIs typically trade standardized or more bespoke security-based swap instruments? If the former, would market observers be less likely to detect the participation of an FPSFI in the security-based swap market?
- What sizes do FPSFIs typically transact in? Does the size impact any concerns with publicly disseminating FPSFI trades? If so, how? Could the concerns of FPSFIs be addressed by crafting appropriate block thresholds and dissemination delays rather than by suppressing all FPSFI trades from public dissemination? Why or why not?
- Do you believe that FPSFI trades should be included in public dissemination? Why or why not? To what extent, and how, would price transparency and market efficiency be affected if FPSFI trades were suppressed from public dissemination?

I. Summary and Additional Request for Comment

The provisions of re-proposed Regulation SBSR discussed above represent the Commission's preliminary views regarding the application of Title VII's provisions relating to regulatory reporting and public dissemination of security-based swap transactions in the cross-border context. This re-proposal reflects a particular balancing of the principles and applicable requirements described above,⁹⁸² informed by, among other things, the particular nature of the security-based swap market, the structure of security-based swap dealing activity, and the Commission's experience in applying the federal securities laws in the cross-border context. The Commission recognizes that other approaches are possible and might more effectively achieve the goals of the Dodd-Frank Act, in whole or in part. Accordingly, the Commission invites comment regarding all aspects of re-proposed Regulation SBSR, and each re-proposed rule contained therein, including potential alternative approaches. Data and comment from market participants and other interested parties regarding the likely effect of each re-proposed rule and potential alternative approaches will be particularly useful to the Commission in evaluating possible modifications to the proposals.

The Commission requests comment on any other cross-border issues relating to regulatory reporting and public dissemination of security-based swaps that may not have been addressed above. In particular, the Commission requests comment on how the Commission's re-proposal addressing cross-border issues related to regulatory reporting and public dissemination might differ from the CFTC's cross-border guidance on these matters.⁹⁸³ For example, the CFTC Cross-Border Proposal provides that a swap between two unregistered non-U.S. persons,

⁹⁸² See Section II, supra.

⁹⁸³ See note 21, supra.

each of which is guaranteed by a U.S. person, would not be subject to regulatory reporting or public dissemination requirements.⁹⁸⁴ The Commission, on the other hand, is proposing that a security-based swap between two such direct counterparties would be subject to both regulatory reporting and public dissemination requirements.⁹⁸⁵ Furthermore, the CFTC Cross-Border Proposal provides that a swap between, on one side, an unregistered non-U.S. person that is guaranteed by a U.S. person and, on the other side, an unregistered non-U.S. person that is not guaranteed by a U.S. person also would not be subject to regulatory reporting or public dissemination requirements.⁹⁸⁶ The Commission is proposing that a security-based swap between two such direct counterparties would be subject to regulatory reporting⁹⁸⁷ (but, in accord with the CFTC's proposal, not subject to public dissemination). Please describe any other differences that you believe might exist and what would be the impact of any such differences.

In addition, the Commission requests comment on the market impact of the approach to re-proposed Regulation SBSR. For example, how would the application of re-proposed Regulation SBSR affect the competitiveness of U.S. entities in the global marketplace (both in the United States as well as in foreign jurisdictions)? Would re-proposed Regulation SBSR place any market participants at a competitive disadvantage or advantage? If so, please explain. Would re-proposed Regulation SBSR be a more general burden on competition? If so, please explain. What other measures should the Commission consider to implement re-proposed Regulation SBSR?

⁹⁸⁴ See CFTC Cross-Border Proposal, 77 FR at 41237-38.

⁹⁸⁵ See re-proposed Rules 908(a)(1)(ii) and 908(a)(2)(ii) of Regulation SBSR.

⁹⁸⁶ See CFTC Cross-Border Proposal, 77 FR at 41237-38.

⁹⁸⁷ See re-proposed Rule 908(a)(1)(ii) of Regulation SBSR.

IX. Mandatory Security-Based Swap Clearing Requirement

A. Introduction

Section 3C(a)(1) of the Exchange Act provides that it “shall be unlawful for any person to engage in a security-based swap unless that person submits such security-based swap for clearing to a clearing agency that is registered under [the Exchange] Act or a clearing agency that is exempt from registration under [the Exchange] Act if the security-based swap is required to be cleared.”⁹⁸⁸ In this section, we are proposing a rule to specify when persons engaging in cross-border security-based swap transactions would be required to comply with a mandatory clearing determination.⁹⁸⁹ Consistent with the approach we have taken elsewhere in this release,⁹⁹⁰ the

⁹⁸⁸ 15 U.S.C. 78c-3(a)(1). Section 3C of the Exchange Act further requires the Commission to review each security-based swap (or any group, category, type, or class of security-based swaps) to make a determination that such security-based swap (or group, category, type, or class of security-based swap) should be required to be cleared. 15 U.S.C. 78c-3(b). The Commission has adopted final rules regarding process for submissions for review of security-based swaps for mandatory clearing and notice filing requirements for clearing agencies. See Clearing Procedures Adopting Release, 77 FR 41602. The proposed application of the mandatory clearing requirement in the cross-border context does not address, in any respect, our obligation to review security-based swaps and make mandatory clearing determinations under Section 3C(b) of the Exchange Act.

⁹⁸⁹ The mandatory clearing requirement in Section 3C(a)(1) of the Exchange Act will not apply unless and until the Commission makes a determination that a security-based swap is required to be cleared, and the Commission has not yet made any such determinations. In addition, the registration requirement for security-based swap clearing agencies in Section 17A(g) of the Exchange Act is not yet effective because further rulemaking is required regarding registration of and standards for security-based swap clearing agencies. See 15 U.S.C. 78q-1(i) and (j). The Commission recently adopted rules to establish minimum requirements for registered clearing agency risk management practices and operations. The rules identify certain minimum standards for all clearing agencies, including clearing agencies that clear security-based swaps. See Clearing Agency Standards Adopting Release, 77 FR 66220. The Commission continues to consider additional standards for adoption, including standards for confidentiality of trading information, conflicts of interest, and members of clearing agency boards of directors or committees, as outlined in the proposing release for clearing agency

proposed rule is designed in general to help ensure that the mandatory clearing requirement applies to persons that engage in security-based swap transactions within the United States and who may pose financial or operational risk to the U.S. financial system that may be mitigated by requiring transactions to be centrally cleared.⁹⁹¹ The proposed rule also is designed to help avoid limiting the access of U.S. persons that conduct security-based swap activity through foreign branches or guaranteed non-U.S. persons to foreign security-based swap markets. To address concerns regarding the clearance and settlement of security-based swaps subject to the mandatory clearing requirement, as well as the potential for conflicting mandatory clearing

standards. See Exchange Act Release No. 64017 (Mar. 3, 2011), 76 FR 14472 (Mar. 16, 2011). Any new rules governing security-based swap clearing agencies could also affect counterparties that are required to clear security-based swaps.

⁹⁹⁰ See, e.g., Section V, supra (discussing the registration requirement in Section 17A(g) of the Exchange Act for security-based swap clearing agencies); see also the general discussion of the Commission's approach to applying Title VII to cross-border activities in Section II.B, supra.

⁹⁹¹ See Testimony Regarding Reducing Risks and Improving Oversight in the OTC Credit Derivatives Market Before the Subcomm. on Secs., Ins., & Inv., of the S. Comm. on Banking, Hous., & Urban Affairs, 110th Cong. (2008) (statement of James A. Overdahl, Chief Economist, Commission), available at: <http://www.sec.gov/news/testimony/2008/ts070908jao.htm> ("The 1975 Amendments [to the Exchange Act] were in direct response to the Paperwork Crisis of the late 1960's that nearly brought the securities industry to a standstill and directly or indirectly resulted in the failure of large numbers of broker-dealers. The causes of the Paperwork Crisis are similar to the issues that we have been trying to resolve in the OTC derivatives market. The crisis resulted from a combination of sharply increased volume and inattention to securities processing. As a result, the industry's clearance and settlement procedures were inefficient and lacked automation, thus implicating the finances of the securities firms. Today, almost forty years later, increasing automation in the processing of OTC derivatives transactions is one of the key goals of the OTC confirmations initiative, in which the Commission is a very active participant . . ."); see also CPSS, New Developments in Clearing and Settlement Arrangements for OTC Derivatives, at 9, 39 (Mar. 2007), available at: <http://www.bis.org/publ/cpss77.pdf> (noting "increasing concern about the size and rapid growth of confirmation backlogs for credit derivatives" and the growing importance of "operational reliability" to "safe and efficient clearing and settlement" as the "market infrastructure moves further in the direction of centralised processing of trades and post-trade events").

requirements in different jurisdictions, we discuss under what circumstances the Commission would permit substituted compliance with the mandatory clearing requirement in Section XI.E below.⁹⁹²

Our proposed approach reflects a particular balancing of the principles discussed above.⁹⁹³ We recognize that other approaches may achieve the goals of the Dodd-Frank Act and Section 17A of the Exchange Act, in whole or in part. Accordingly, we invite comment regarding all aspects of the proposed rule described here, including potential alternative approaches. Data and comment from market participants and other interested parties regarding the likely effect of the proposed rule and of potential alternative approaches will be particularly useful to the Commission in evaluating potential modifications to the proposal.

B. Summary of Comments

The Commission has published several rulemaking proposals under Title VII of the Dodd-Frank Act that relate to clearing security-based swaps.⁹⁹⁴ The Commission solicited public comment on each of these proposals. The Commission also solicited public comment on

⁹⁹² Under the Commission's proposal, substituted compliance may be permitted for cross-border security-based swap transactions subject to the mandatory clearing requirement in Section 3C(a)(1) of the Exchange Act to enable counterparties to clear and settle such transactions at a clearing agency that is neither registered with the Commission nor exempt from registration, under certain conditions. See Section XI.E, infra.

⁹⁹³ See Section II.C, supra.

⁹⁹⁴ See Exchange Act Release Nos. 63556 (Dec. 15, 2010), 75 FR 79992 (Dec. 21, 2010) (proposing a rule governing the end-user exception to the mandatory clearing requirement); 63107 (Oct. 14, 2010), 75 FR 65881 (Oct. 26, 2010) (proposing Regulation MC which would in part set ownership limitations and governance requirements for clearing agencies); see also notes 988 and 989, supra (discussing final rules adopted in the Clearing Procedures Adopting Release and rules proposed and adopted relating to clearing agency standards).

regulatory initiatives under the Dodd-Frank Act related to clearing security-based swaps.⁹⁹⁵

Generally, these commenters requested that the Commission take actions to limit duplicative or conflicting regulations with respect to clearing security-based swaps.⁹⁹⁶

Two commenters highlighted the global nature of the security-based swap market and raised concerns about the possible effect of foreign regulations on U.S. participants in the

⁹⁹⁵ See Exchange Act Release Nos. 63435 (Dec. 6, 2010), 75 FR 76705 (Dec. 9, 2010) (joint roundtable with CFTC regarding capital and margin requirements); 63112 (Oct. 15, 2010), 75 FR 64710 (Oct. 20, 2010) (joint roundtable with CFTC regarding issues related to clearing); 62864 (Sept. 8, 2010), 75 FR 55574 (Sept. 13, 2010) (joint roundtable with CFTC regarding swap execution facilities); 62725 (Aug. 16, 2010), 75 FR 51305 (Aug. 19, 2010) (joint roundtable with CFTC regarding governance and conflicts of interest).

⁹⁹⁶ See, e.g., Davis Polk Letter I at 8 (“First, requiring foreign swap transactions to be cleared through a U.S.-regulated clearinghouse may conflict with any applicable foreign law that requires such transactions to be cleared at a home country (non-U.S.) clearinghouse. Second, such an approach would also legally compel a disproportionate amount of global swaps clearing to be conducted through U.S.-regulated clearinghouses. Third, such a requirement would also concentrate risk that is non-U.S. (because the transactions are with non-U.S. persons) in the U.S.-regulated clearinghouses, which would cause them and the U.S. financial system to bear additional non-U.S. risks.”); Davis Polk Letter II at 21-22 (proposing rule modifications that “would avoid imposing unnecessarily duplicative and inconsistent clearing and trade reporting obligations on swap dealers and their counterparties”); Cleary Letter IV at 27 (noting swaps between non-U.S. persons “are, in many cases, likely to be subject to local clearing requirements (which may (practically or legally) require use of a local clearing organization and so, in some cases, could conflict with Dodd-Frank’s clearing requirement”); Japanese Banks Letter at 4 (“We believe that future Japanese regulation of swap activities of Japanese banks will render regulation of such banks subject to Title VII superfluous at best and potentially subject such banks to inconsistent regulations under U.S. and Japanese law.”); Multiple Associations Letter I at 9-10 (“We believe that [the Commission] and other U.S. regulatory agencies should anticipate where the rulemaking may overlap, and possibly conflict, and make every effort to actively coordinate with each other and with foreign regulators both as to harmonizing the substance of related regulations and the timing of their implementation. Otherwise, the development of the Swap markets will be vulnerable to false starts, significant revisions and inefficiencies, and possible regulatory arbitrage across, or the flight to, other jurisdictions.”); Multiple Associations Letter II at 2 (stating that it is “essential that rules be appropriately tailored, work in tandem, and avoid unduly impairing market liquidity or adversely impacting investors” and that [i]t is not enough to phase-in implementation if the final rules themselves are unworkable or in conflict”).

security-based swap market.⁹⁹⁷ These commenters requested that U.S. and foreign regulators identify possible areas where rulemaking may overlap or conflict and actively coordinate to harmonize both the substance of related regulations and the timing of their implementation.⁹⁹⁸ The commenters argued that, without such coordination, “the development of the swap markets will be vulnerable to false starts, significant revisions and inefficiencies, and possible regulatory arbitrage across, or the flight to, other jurisdictions.”⁹⁹⁹

Commenters representing several foreign banks requested that the Commission adopt implementing regulations under the Dodd-Frank Act “that enable and encourage foreign banks engaged in swap dealing activities to book their swaps businesses in a single well-capitalized, highly rated foreign-based banking institution.”¹⁰⁰⁰ These commenters did not comment specifically on the proposed rules, but rather argued in favor of a regulatory framework that relies on home country supervision where regulations operate at the entity level, and that relies on Title VII of the Dodd-Frank Act with respect to “U.S. swap transactions,” where regulations operate at the transaction level.¹⁰⁰¹ In particular, these entities believe that the mandatory clearing requirement should not apply to “foreign swap transactions” (i.e., transactions they

⁹⁹⁷ See Multiple Associations Letter I at 9 (“[I]t is unclear to what extent foreign regulation, in addition to regulation by the Commissions, may affect U.S. Swap market participants.”); Multiple Associations Letter II at 1 (noting that “an iterative approach to rulemaking has been taken when rules have an unusually large impact on market structure and participants”).

⁹⁹⁸ Multiple Associations Letter I at 9.

⁹⁹⁹ Id. at 9-10.

¹⁰⁰⁰ See Davis Polk Letter I at 2.

¹⁰⁰¹ Id.

defined as not involving a U.S. counterparty) or, more broadly, to transactions that a counterparty thereto is required to submit for clearing pursuant to foreign law.¹⁰⁰²

Commenters representing foreign financial institutions submitted a second, supplemental comment letter to elaborate on the above comments.¹⁰⁰³ In this letter, these commenters requested that the Commission modify the proposed definition of “security-based swap dealer” to make clear that “a security-based swap which is required to be cleared under foreign law (including by virtue of the fact that any counterparty thereto is required under foreign law to submit the same for clearing) is not required to be cleared under the [Dodd-Frank] Act.”¹⁰⁰⁴

Moreover, commenters representing Japan’s three largest bank groups requested that the Commission “adopt implementing regulations under the Dodd-Frank Act with the effect that Japanese banks, including their U.S. branches, are not made subject to the application of Title VII requirements.”¹⁰⁰⁵ Should the Commission not take such action, these commenters requested that the regulations issued pursuant to Title VII: (i) not apply to transactions between affiliates of a bank group regulated as a bank holding company¹⁰⁰⁶ and (ii) not apply to “a foreign dealer”—particularly one that is “subject to comprehensive home country regulation”—with respect to transactions entered into by the foreign dealer with a U.S.-based dealer regulated as a swap dealer or security-based swap dealer pursuant to Title VII.¹⁰⁰⁷

¹⁰⁰² Id.; Cleary Letter IV at 27.

¹⁰⁰³ See Davis Polk Letter II.

¹⁰⁰⁴ Id. at 4-5.

¹⁰⁰⁵ See Japanese Banks Letter at 4.

¹⁰⁰⁶ Id.

¹⁰⁰⁷ Id. at 5.

In addition, multiple commenters endorsed the use of mandatory clearing generally to further the goals of the Dodd-Frank Act. One commenter described mandatory clearing as “the centerpiece of reform embodied in Title VII of the Dodd-Frank Act” that, accordingly, should be subject to “only a very few, narrow, and limited exceptions.”¹⁰⁰⁸ Another commenter similarly urged the Commission to “prioritize the finalization and implementation of clearing-related rules.”¹⁰⁰⁹ Another stated that the Commission’s “top priority should be to implement requirements that reduce systemic risk, such as the use of centralized Swap clearinghouses.”¹⁰¹⁰

C. Application of Title VII Mandatory Clearing Requirements to Cross-Border Transactions

1. Statutory Framework

By its terms, the mandatory clearing requirement in Section 3C(a)(1) of the Exchange Act applies to any person that “engage[s] in a security-based swap . . . if the security-based swap is required to be cleared.”¹⁰¹¹ We are proposing to apply the statutory language “engage in a security-based swap” to mean any transaction in which a U.S. person is a counterparty¹⁰¹² to a

¹⁰⁰⁸ Better Markets Letter at 10.

¹⁰⁰⁹ Citadel Letter at 2 (further noting that “anything less needlessly inhibits transparency and competition in the SB swaps markets and will leave US financial markets vulnerable, damage American competitiveness, and weaken our long-term prospects for sound economic growth”); see also MFA Letter IV at 4 (urging the Commission to prioritize clearing rules to “lay the regulatory groundwork for more informed implementation” of other final rules planned under the Dodd-Frank Act).

¹⁰¹⁰ Multiple Associations Letter I at 2.

¹⁰¹¹ Section 3C(a)(1) of the Exchange Act, 15 U.S.C. 78c-3(a)(1).

¹⁰¹² The use of the term “counterparty” in the proposed rule is intended to refer to the direct counterparty to the security-based swap transaction, not a party that provides a guarantee on the performance of the direct counterparty under the security-based swap. As discussed in Section VIII.C, *supra*, re-proposed Rules 900(j) and (o) under the Exchange Act would define the term “direct counterparty” as “a person that enters directly with another person into a contract that constitutes a security-based swap,” and an “indirect counterparty” as “a person that guarantees the performance of a direct counterparty to a

security-based swap or guarantees the performance of a non-U.S. person under a security-based swap because of the involvement of a U.S. person in the transaction.¹⁰¹³ We also are proposing to apply the statutory language “engage in a security-based swap” to include any transaction in which a person performs any of the activities that are key stages in a security-based swap transaction (*i.e.*, solicitation, negotiation, execution, or booking of the transaction)¹⁰¹⁴ within the United States. As we noted above, a “transaction conducted within the United States,” as defined in proposed Rule 3a71-3(a)(5), includes soliciting, negotiating, executing, or booking a security-based swap transaction.¹⁰¹⁵ Accordingly, subject to certain statutory exceptions¹⁰¹⁶ and certain other exceptions described below,¹⁰¹⁷ we are proposing to apply the mandatory clearing requirement to any person that engages in a security-based swap transaction in which at least one

security-based swap or that otherwise provides recourse to the other side for the failure of the direct counterparty to perform any obligation under the security-based swap.”

¹⁰¹³ See Section II.B.2(d), *supra* (discussing the Commission’s treatment of guarantees).

¹⁰¹⁴ As noted above, solicitation, negotiation, execution, and booking are activities that represent key stages in a potential or completed security-based swap transaction. See note 310 and accompanying text, *supra*. Persons that conduct any of these activities would be considered to be “engaged in a security-based swap” under the Commission’s proposed interpretation.

¹⁰¹⁵ See Section III.B.6, *supra*.

¹⁰¹⁶ The Exchange Act provides an exception from the mandatory clearing requirement in connection with security-based swaps that involve persons that are not financial entities and that use the security-based swaps to hedge or mitigate commercial risk. See Section 3C(g) of the Exchange Act, 15 U.S.C. 78c-3(g). The Exchange Act also provides exemptions from the clearing requirement for security-based swaps entered into prior to the enactment of the Dodd-Frank Act, and for security-based swaps entered into prior to the application of the clearing requirement, so long as those instruments are reported to a registered SDR. See Sections 3C(e)(1) and (f)(1) of the Exchange Act, 15 U.S.C. 78c-3(e)(1) and (f)(1) (pre-enactment security-based swaps); Sections 3C(e)(2) and (f)(2) of the Exchange Act, 15 U.S.C. 78c-3(e)(2) and (f)(2) (post-enactment security-based swaps entered into prior to the application of the clearing requirement).

¹⁰¹⁷ See Sections IX.C.3(a)ii and IX.C.3(b)ii, *infra*.

of the counterparties to the transaction is a U.S. person or a non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person, or if the transaction is a “transaction conducted within the United States,” as defined in proposed Rule 3a71-3(a)(5) under the Exchange Act.¹⁰¹⁸

We preliminarily believe our proposed approach to the mandatory clearing requirement, including the interpretation of the statutory language discussed above and further discussed below, is consistent with the purposes of the mandatory clearing requirement in Section 3C(a)(1) of the Exchange Act. The Dodd-Frank Act is intended to promote the financial stability of the United States by, among other things, reducing risks to the U.S. financial system by ensuring that, whenever possible and appropriate, derivatives contracts are centrally cleared rather than traded exclusively in the OTC market.¹⁰¹⁹ In making our mandatory clearing determination, the Commission is required to take into account certain factors, including, among other things, “the availability of rule framework, capacity, operational expertise and resources, and credit support infrastructure” in clearing agencies to support clearing of the product in question, and “the effect on the mitigation of systemic risk.”¹⁰²⁰ The Commission preliminarily believes that the proposed

¹⁰¹⁸ Proposed Rule 3Ca-3(a) under the Exchange Act.

¹⁰¹⁹ See, e.g., S. Comm. on Banking, Hous., & Urban Affairs, The Restoring American Financial Stability Act of 2010, S. Rep. No. 111-176, at 32 (“As a key element of reducing systemic risk and protecting taxpayers in the future, protections must include comprehensive regulation and rules for how the OTC derivatives market operates. Increasing the use of central clearinghouses, exchanges, appropriate margining, capital requirements, and reporting will provide safeguards for American taxpayers and the financial system as a whole.”); id. at 34 (“Some parts of the OTC market may not be suitable for clearing and exchange trading due to individual business needs of certain users. Those users should retain the ability to engage in customized, uncleared contracts while bringing in as much of the OTC market under the centrally cleared and exchange-traded framework as possible.”).

¹⁰²⁰ Section 3C(b)(4)(B) of the Exchange Act, 15 U.S.C. 78c-3(b)(4)(B).

approach generally would help to ensure that the goals of the Dodd-Frank Act to increase the use of available centralized market infrastructures to reduce operational risks and mitigate systemic risk are achieved,¹⁰²¹ while not unnecessarily limiting the access of U.S. persons that conduct security-based swap activity through foreign branches or guaranteed non-U.S. persons to foreign security-based swap markets.

2. Proposed Rule

In light of the interpretation of the statutory language “engage in a security-based swap” and the policy concerns discussed above, we are proposing a rule that would apply the mandatory clearing requirement to a person that engages in a security-based swap transaction if a counterparty to the transaction is (i) a U.S. person or (ii) a non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person.¹⁰²² We also are proposing a rule that would apply the mandatory clearing requirement to a person that engages in a security-based swap transaction if such transaction is a “transaction conducted within the United States,” as

¹⁰²¹ The purpose of central clearing is to mitigate counterparty credit risk by shifting that risk from individual counterparties to CCPs, thereby helping protect counterparties from each other’s potential failures. Central clearing also requires that mark-to-market pricing and margin requirements be applied in a consistent manner. CCPs generally use liquid margin collateral to manage the risk of a CCP member’s failure, and rely on their margin calculations and their access to that liquid collateral to protect against sudden movements in market prices, including movements in market value after a counterparty’s default. A CCP that stands between counterparties for OTC derivatives is generally perceived to decrease systemic risk. Further, the use of CCPs may lead to standardization of contracts and processes, which improve market efficiency and reduce the operational risks attributable to human and processing errors. See, e.g., Wellink, *supra* note 110, at 132–33; Culp, *supra* note 111, at 15–16; Manmohan Singh, “Collateral, Netting and Systemic Risk in the OTC Derivatives Market,” IMF Working Paper (2010), at 9–13, available at: <http://www.imf.org/external/pubs/ft/wp/2010/wp1099.pdf>.

¹⁰²² Proposed Rule 3Ca-3(a)(1) under the Exchange Act. Under proposed Rule 3Ca-3(c) under the Exchange Act, the term “U.S. person” would have the same meaning as set forth in proposed Rule 3a71-3(a)(7) under the Exchange Act, as discussed in Section III.B.5, *supra*.

defined in proposed Rule 3a71-3(a)(5) under the Exchange Act.¹⁰²³ To limit the scope of the proposal, we are proposing exceptions to the mandatory clearing requirement in the following two scenarios:

- If the security-based swap transaction is not a “transaction conducted within the United States,” the proposed rule would not apply the mandatory clearing requirement if one counterparty to the transaction is (i) a foreign branch of a U.S. bank¹⁰²⁴ or (ii) a non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person,¹⁰²⁵ and if the other counterparty to the transaction is a non-U.S. person (i) whose performance under the security-based swap is not guaranteed by a U.S. person and (ii) who is not a foreign security-based swap dealer.¹⁰²⁶

¹⁰²³ Proposed Rule 3Ca-3(a)(2) under the Exchange Act. Under proposed Rule 3Ca-3(c) under the Exchange Act, the term “transaction conducted within the United States” would have the same meaning as set forth in proposed Rule 3a71-3(a)(5) under the Exchange Act, as discussed in Section III.B.5, *supra*.

¹⁰²⁴ Under proposed Rule 3Ca-3(c) under the Exchange Act, the term “foreign branch” would have the same meaning as set forth in proposed Rule 3a71-3(a)(1) under the Exchange Act. *See* discussion in Section III.B.7, *supra*. A security-based swap transaction conducted through a foreign branch, as defined in proposed Rule 3a71-3(a)(4) under the Exchange Act, would be specifically excluded from the proposed definition of “transaction conducted within the United States.” *See* proposed Rule 3a71-3(a)(5)(ii) under the Exchange Act.

¹⁰²⁵ A security-based swap transaction involving a non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person would not be a “transaction conducted within the United States” by virtue of the guarantee alone under proposed Rule 3a71-3(a)(5) under the Exchange Act, unless the transaction is solicited, negotiated, executed, or booked within the United States. We would consider such transaction to be engaged in within the United States, however, by virtue of the guarantee from the U.S. person, who acts as an “indirect counterparty” to the transaction. *See* note 1012, *supra*.

¹⁰²⁶ Proposed Rule 3Ca-3(b)(1) under the Exchange Act. Proposed Rule 3Ca-3(c) defines the term “foreign security-based swap dealer” by cross-reference to the definition of that term in proposed Rule 3a71-3(a)(3) of the Exchange Act (defining “foreign security-

- If the security-based swap transaction is a “transaction conducted within the United States,” the proposed rule would not apply the mandatory clearing requirement if (i) neither counterparty to the transaction is a U.S. person; (ii) neither counterparty’s performance under the security-based swap is guaranteed by a U.S. person; and (iii) neither counterparty to the transaction is a foreign security-based swap dealer.¹⁰²⁷

We discuss below the proposed rule regarding the application of the mandatory clearing requirement in more detail.

3. Discussion

(a) Security-Based Swap Transactions Involving U.S. Persons or Non-U.S. Persons Receiving Guarantees from U.S. Persons

i. Proposed Rule

The proposed rule would apply the mandatory clearing requirement in Section 3C(a)(1) of the Exchange Act, and the rules and regulations thereunder, to a person that engages in a security-based swap transaction if a counterparty to the transaction is (i) a U.S. person or (ii) a non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person,¹⁰²⁸ subject to certain exceptions.¹⁰²⁹

As discussed above,¹⁰³⁰ a U.S. person that is a counterparty to a security-based swap transaction bears the ongoing risk of the transaction. It is the financial resources of that U.S.

based swap dealer” to mean “a security-based swap dealer, as defined in section 3(a)(71) of the [Exchange] Act (15 U.S.C. 78c(a)(71)), and the rules and regulations thereunder, that is not a U.S. person”).

¹⁰²⁷ Proposed Rule 3Ca-3(b)(2) under the Exchange Act.

¹⁰²⁸ Proposed Rules 3Ca-3(a)(1)(i) and (ii) under the Exchange Act.

¹⁰²⁹ Proposed Rule 3Ca-3(b) under the Exchange Act.

¹⁰³⁰ See Section II.A.6, *supra*.

person that will be called upon in performing any obligations pursuant to that transaction, and this activity is capable of posing risks to the stability of the U.S. financial system. Because these obligations and risks reside in the United States, the Commission preliminarily believes that when a U.S. person is a counterparty to a security-based swap transaction, such person necessarily engages in a security-based swap within the United States and, therefore, would be subject to the mandatory clearing requirement in Section 3C(a)(1) of the Exchange Act and the rules and regulations thereunder.

In the case of a non-U.S. person guaranteed by a U.S. person (“U.S. guarantor”), the guarantee provides the counterparty of the guaranteed entity direct recourse to the U.S. guarantor with respect to any obligations owed by the guaranteed entity under the security-based swap, and the U.S. guarantor exposes itself to the security-based swap risk as if it were a direct counterparty¹⁰³¹ to the security-based swap through the security-based swap activity engaged in by the guaranteed entity. In many cases, the counterparty would not enter into the transaction (or would not do so on the same terms) with the guaranteed entity, and the guaranteed entity would not be able to engage in any security-based swaps, without the guarantee. Given the reliance by both the guaranteed entity and its counterparty on the creditworthiness of the guarantor in the course of engaging in security-based swap transactions and for the duration of the transaction, we preliminarily believe that a security-based swap transaction in which one of the counterparties is a non-U.S. person whose performance under a security-based swap is guaranteed by a U.S. person is a transaction that is engaged in within the United States by virtue of the involvement of the U.S. guarantor in the security-based swap.¹⁰³² Our proposed rule,

¹⁰³¹ See note 1012, *supra*.

¹⁰³² See note 1025, *supra*.

therefore, would subject transactions involving at least one counterparty whose performance under the security-based swap is guaranteed by a U.S. person to the mandatory clearing requirement,¹⁰³³ subject to certain exceptions discussed below.¹⁰³⁴

We recognize that this proposed approach would subject certain security-based swap transactions with non-U.S. persons to the mandatory clearing requirement if a U.S. person is a counterparty to the transaction (e.g., U.S. dealer to foreign dealer transactions). We preliminarily believe that such an approach is appropriate, as a significant proportion of the risk borne by U.S. persons, and, therefore, the risk to the U.S. financial system as a result of the U.S. persons' security-based swap activity, arises from transactions entered into with non-U.S. persons.¹⁰³⁵ Even where a U.S. person's security-based swap activity occurs in part outside the United States (e.g., the transaction is negotiated or executed outside the United States), this activity may pose risk to the U.S. financial system because security-based swap transactions give rise to ongoing obligations on the part of the U.S. person and credit risk exposures to its non-U.S. counterparties. Therefore, subjecting a transaction in which a U.S. person is a counterparty to the transaction to the mandatory clearing requirement would further the purposes of Title VII by ensuring that security-based swaps involving persons whose security-based swap activities create risk that Title VII is intended to address would be centrally cleared through a CCP.¹⁰³⁶

¹⁰³³ Proposed Rule 3Ca-3(a)(1)(ii) under the Exchange Act.

¹⁰³⁴ Proposed Rule 3Ca-3(b) under the Exchange Act.

¹⁰³⁵ See Section II.A.6, supra.

¹⁰³⁶ We preliminarily believe that the proposed approach to the mandatory clearing requirement is not being applied to persons who are "transact[ing] a business in security-based swaps without the jurisdiction of the United States," within the meaning of Section 30(c). See Section II.B.2(b), supra. However, the Commission also preliminarily believes that the proposed approach to the mandatory clearing requirement is necessary or appropriate to help prevent the evasion of the particular provisions of the Exchange

ii. Proposed Exception for Certain Transactions Involving Foreign Branches of U.S. Banks and Guaranteed Non-U.S. Persons

The Commission is proposing an exception from the mandatory clearing requirement described above for certain transactions that involve foreign branches of a U.S. bank or guaranteed non-U.S. persons, provided the transactions are not conducted within the United States. Specifically, under the proposed rule, the mandatory clearing requirement would not apply to a security-based swap transaction if one counterparty to the transaction is a foreign branch of a U.S. bank¹⁰³⁷ or a non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person and if the other counterparty to the transaction is a non-U.S. person (i) whose performance under the security-based swap is not guaranteed by a U.S. person and (ii) who is not a foreign security-based swap dealer.¹⁰³⁸ Such exception would not apply if the security-based swap transaction were a transaction conducted within the United States, as defined in proposed Rule 3a71-3(a)(5) under the Exchange Act.¹⁰³⁹

Act that were added by the Dodd-Frank Act that are being implemented by the approach and prophylactically will help ensure that the purposes of those provisions of the Dodd-Frank Act are not undermined. See Section II.B.2(e), supra; see also Section II.B.2(d), supra.

For example, if the mandatory clearing requirement does not apply to transactions among non-U.S. persons that receive guarantees from U.S. persons and foreign branches of U.S. banks, then U.S. persons would have an incentive to conduct transactions with other U.S. persons through guaranteed foreign affiliates or foreign branches to avoid the mandatory clearing requirement, even though altering the form of the transactions would not alter the substance of the risk to U.S. markets that the Dodd-Frank Act was enacted to address and thus could undermine the purposes of the Dodd-Frank Act. See Section II.A.6, supra.

¹⁰³⁷ See note 1024, supra.

¹⁰³⁸ Proposed Rule 3Ca-3(b)(1) under the Exchange Act. See note 1026, supra.

¹⁰³⁹ Proposed Rule 3Ca-3(b)(1) under the Exchange Act.

Without such an exception, U.S. persons conducting security-based swap activity out of foreign branches or guaranteed non-U.S. persons may have less access to foreign security-based swap markets because non-U.S. person counterparties may be less willing to enter into security-based swap transactions with them if such transactions are subject to a mandatory clearing requirement. We recognize that imposing the mandatory clearing requirement on a foreign branch of a U.S. bank or on a non-U.S. person whose performance under a security-based swap is guaranteed by a U.S. person would be consistent with the view that a foreign branch of a U.S. bank is part of a U.S. person¹⁰⁴⁰ and that a U.S. guarantor is an indirect counterparty¹⁰⁴¹ to the transaction entered into by the guaranteed non-U.S. person. We also recognize that such transactions pose risk to the U.S. financial system. At the same time, however, imposing the mandatory clearing requirement on U.S. persons that conduct their foreign security-based swap dealing activity through foreign branches or guaranteed non-U.S. persons, without any exceptions, could put such U.S. persons at a significant competitive disadvantage to non-U.S. persons who conduct security-based swap business in the same foreign local market and thereby limit the access of such U.S. persons to foreign security-based swap markets.¹⁰⁴² After balancing the various policy considerations, including the Dodd-Frank Act's goal of mitigating risk to the

¹⁰⁴⁰ See Section III.B.5, *supra*.

¹⁰⁴¹ See note 1012, *supra*.

¹⁰⁴² See, e.g., Sullivan & Cromwell Letter at 14 (“The jurisdictional scope of the swaps entity definitions is critical to the ability of U.S. banking organizations to maintain their competitive position in foreign marketplaces. Imposing the regulatory regime of Title VII on their Non-U.S. Operations would place them at a disadvantage to their foreign bank competitors because the Non-U.S. Operations would be subject to an additional regulatory regime which their foreign competitors would not.”); Cleary Letter IV at 7 (“Subjecting such non-U.S. branches and affiliates to U.S. requirements could effectively preclude them from, or significantly increase the cost of, managing their risk in the local financial markets, since local financial institutions may be required to comply with Dodd-Frank to provide those services.”).

U.S. financial system, we have preliminarily concluded that the proposed exception from the mandatory clearing requirement for transactions by U.S. persons conducting security-based swap activity out of foreign branches or guaranteed non-U.S. persons with non-U.S. persons whose performance under the security-based swap is not guaranteed by a U.S. person is appropriate, provided that it is not a transaction conducted within the United States.¹⁰⁴³

This exception from the mandatory clearing requirement would not apply under the proposed rule, however, when the non-U.S. person counterparty of the foreign branch of the U.S. bank or the guaranteed non-U.S. person is a foreign security-based swap dealer.¹⁰⁴⁴ As discussed above, a non-U.S. person would be required to register as a foreign security-based swap dealer if its transactions with U.S. persons or otherwise conducted within the United States, connected with its dealing capacity, exceed the de minimis threshold in the security-based swap dealer definition.¹⁰⁴⁵ Thus, a foreign security-based swap dealer would necessarily have a significant connection with the U.S. security-based swap market. As a result, the Commission preliminarily believes that it is not appropriate to provide an exception for U.S. persons conducting security-

¹⁰⁴³ In this regard, we note that such transaction may be subject to a mandatory clearing requirement in a foreign jurisdiction. See Section XI.E, infra (discussing substituted compliance).

¹⁰⁴⁴ Proposed Rule 3Ca-3(b)(1)(ii)(B) under the Exchange Act. Like U.S. persons conducting security-based swap activity out of foreign branches or guaranteed non-U.S. persons, a foreign security-based swap dealer would not be subject to the mandatory clearing requirement when it engages in a security-based swap transaction with a non-U.S. person, provided neither party's performance under the security-based swap is guaranteed by a U.S. person and the transaction is not conducted within the United States. Such a transaction would not be captured by proposed Rule 3Ca-3(a) under the Exchange Act (and, therefore, it is not necessary for such transaction to be included as an exception in paragraph (b) of Rule 3Ca-3).

¹⁰⁴⁵ See Section III.B.4, supra.

based swap activity out of foreign branches or guaranteed non-U.S. persons when they enter into security-based swaps with foreign security-based swap dealers.

We are not proposing to provide an exception from mandatory clearing for U.S. persons generally, however, although we recognize that such exception could increase access to foreign security-based swap markets for all U.S. persons. The Commission preliminarily believes that such a broad exception to the mandatory clearing requirement, in a market as global as the security-based swap market,¹⁰⁴⁶ would undermine the goal of the mandatory clearing requirement to reduce financial risk to the U.S. financial system. In light of the statutory goal, we preliminarily do not believe that the benefit of providing U.S. persons greater access to foreign security-based swap markets warrants expanding the exception beyond the scope we are proposing here. In this regard, we also note that a uniform mandatory clearing requirement for all U.S. persons other than foreign branches and guaranteed non-U.S. persons should facilitate the development of central clearing infrastructures and encourage the standardization of contract terms.¹⁰⁴⁷

(b) Transactions Conducted Within the United States

i. Proposed Rule

Under the proposed rule, a security-based swap transaction that is a “transaction conducted within the United States,” as defined in proposed Rule 3a71-3(a)(5) under the

¹⁰⁴⁶ See Section II.A.1, supra (discussing the global nature of the security-based swap market).

¹⁰⁴⁷ See, e.g., note 991, supra. A robust infrastructure for clearing of security-based swaps should reduce operational risks resulting from backlogs and processing errors. See FMI Principles at 20, 94 (describing operational risk as the “risk that deficiencies in information systems or internal processes, human errors, management failures, or disruptions from external events will result in the reduction, deterioration, or breakdown of services” and noting that operational risks “can be a source of systemic risk.”).

Exchange Act, would be subject to the mandatory clearing requirement.¹⁰⁴⁸ The Commission preliminarily believes that engaging in a security-based swap includes the performance by a person of any of the activities that represent key stages in a security-based swap transaction, including solicitation, negotiation, execution, or booking of a security-based swap transaction. As we have noted above, a “transaction conducted within the United States,” as defined in proposed Rule 3a71-3(a)(5), includes soliciting, negotiating, executing, or booking a security-based swap transaction.¹⁰⁴⁹ Accordingly, we preliminarily would interpret engaging in a security-based swap within the United States to encompass the same types of activities that characterize a transaction conducted within the United States, as that term is defined in proposed Rule 3a71-3(a)(5).¹⁰⁵⁰

ii. Proposed Exception for Transactions Conducted Within the United States by Certain Non-U.S. Persons

The Commission recognizes that transactions between two non-U.S. persons whose performances under a security-based swap are not guaranteed by a U.S. person do not pose the same risk to the U.S. financial system that is posed by transactions with U.S. person counterparties or transactions in which a U.S. person provides a guarantee. In particular, while the operational risks associated with the transaction may reside in the United States and would potentially be reduced by required use of the central market infrastructure available to clear the products in question, we preliminarily believe that because the financial risks of the transaction would reside with non-U.S. persons outside the United States, it is not necessary to apply the mandatory clearing requirement to a transaction between two non-U.S. persons solely because

¹⁰⁴⁸ Proposed Rule 3Ca-3(a)(2) under the Exchange Act.

¹⁰⁴⁹ See Section III.B.6, *supra*.

¹⁰⁵⁰ Proposed Rule 3Ca-3(a)(2) under the Exchange Act.

the transaction is a “transaction conducted within the United States” as defined in proposed Rule 3a71-3(a)(5) under the Exchange Act. Accordingly, the Commission is proposing an exception from the mandatory clearing requirement for security-based swap transactions that are “transactions conducted within the United States” when no counterparty to the transaction is (i) a U.S. person; (ii) a non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person; or (iii) a foreign security-based swap dealer.¹⁰⁵¹

The Commission preliminarily believes it is appropriate to limit the exception from the mandatory clearing requirement when one or both of the non-U.S. person counterparties is a foreign security-based swap dealer. Non-U.S. persons whose transactions arising from dealing activity with U.S. persons or otherwise conducted within the United States exceed the de minimis threshold in the security-based swap dealer definition have a sufficient connection to the U.S. security-based swap market to lead the Commission to preliminarily conclude that it would not be appropriate to except transactions involving them from the mandatory clearing requirement when they conduct security-based swap transactions within the United States. Permitting non-U.S. persons to engage in security-based swap transactions within the United States with foreign security-based swap dealers without being subject to the mandatory clearing requirement would potentially limit the access of U.S. persons to foreign security-based swap markets because non-U.S. persons seeking to engage in security-based swaps within the United States may prefer to engage in security-based swaps with foreign security-based swap dealers rather than U.S. persons to avoid the mandatory clearing requirement.

¹⁰⁵¹ Id.

Request for Comment

The Commission seeks comment on the proposed rule in all aspects. In addition, the Commission seeks comment on the following specific questions:

- Should the mandatory clearing requirement apply to all transactions conducted by a U.S. person, including transactions conducted out of a foreign branch, or by a guaranteed non-U.S. person? Why or why not? Should the mandatory clearing requirement apply to such transactions unless, for example, they are conducted in a foreign regime that has a mandatory clearing regime that is comparable to the mandatory clearing regime under the Dodd-Frank Act? In assessing comparability under this approach, to what extent should results of mandatory clearing determinations under the foreign regime be taken into account? Should the determinations with respect to “local” products be viewed differently than products that are subject to mandatory clearing determinations in one or more other jurisdictions, *i.e.*, “global” products? Would some other standard for assessing a foreign regime in these circumstances be appropriate?
- Is the proposed approach over-broad or over-narrow? If so, why? Should a security-based swap that is required to be cleared under foreign law not be required to be cleared pursuant to Section 3C, as some commenters stated? If so, why?
- When the conduct occurring in the United States is limited only to negotiating or soliciting a transaction, does the transaction carry risk into the U.S. financial system? If not, is application of the mandatory clearing requirement to such transactions appropriate?

- How should the Commission weigh the operational risks that arise from requiring mandatory clearing? To what extent do the exceptions to the mandatory clearing requirement undermine the development of a central clearing infrastructure that will facilitate the prompt and accurate clearance and settlement of security-based swaps? Are persons excepted from the mandatory clearing requirement likely to develop the same operational capacity and safeguards to facilitate clearing as persons not excepted? If not, to what extent does this increase operational risk to the national system for clearance and settlement? To what extent, if any, should the exceptions to the mandatory clearing requirement be limited to minimize operational risks and market risks that may be experienced in the United States?
- Are there other rationales besides risk mitigation that justify imposing the mandatory clearing requirement? If so, what are they and why? Do these alternative rationales support a different application of the requirement to U.S. persons and non-U.S. persons? As regards foreign branches of U.S. banks? As regards non-U.S. persons who receive guarantees from U.S. persons and non-U.S. persons who do not receive guarantees from U.S. persons? As regards security-based swap dealers?
- How should the mandatory clearing requirement treat members of clearing agencies registered with the Commission? For instance, to what extent should the mandatory clearing requirement apply to members of clearing agencies registered with the Commission if the member is not a U.S. person, does not have its performance guaranteed by a U.S. person, is not a security-based swap dealer, or is not conducting the transaction within the United States? Please be specific.

- How should the mandatory clearing requirement treat counterparties who are swap dealers? For instance, should non-U.S. persons who are swap dealers and whose performance under the swap is not guaranteed by a U.S. person be excepted from the mandatory clearing requirement in any circumstances? If so, under what circumstances? How should other financial entities be treated? How should major swap participants and major security-based swap participants be treated under the proposed rule? Should they be excepted from the mandatory clearing requirement, in certain circumstances, as we have proposed?
- Are the proposed exceptions from the mandatory clearing requirement appropriate? Should other transactions also be excepted? If so, which? Should other categories of persons also be excepted? If so, whom?
- Should any transactions conducted within the United States be subject to any exception from the mandatory clearing requirement? If so, why? For instance, should a transaction between two non-U.S. persons neither of whom is guaranteed by a U.S. person and neither of whom are security-based swap dealers, as excepted from the mandatory clearing requirement under proposed Rule 3Ca-3(b)(2), be subject to mandatory clearing? If so, why?
- Should any transactions where one counterparty is a U.S. person be subject to an exception from the mandatory clearing requirement? If so, which transactions and why? For instance, should transactions not conducted in the United States in which one counterparty is a foreign branch of a U.S. bank be subject to any exceptions, such as the exception in proposed Rule 3Ca-3(b)(1)?

- To what extent might the exceptions described in proposed Rule 3Ca-3(b) create competitive disparity between similarly situated persons competing in the same market? For instance, for transactions conducted within the United States, to what extent, if any, might proposed Rule 3Ca-3(b)(2) create competitive disparity between U.S. persons and non-U.S. persons? For transactions not conducted within the United States, to what extent, if any, might proposed Rule 3Ca-3(b)(1) create competitive disparity between counterparties who are security-based swap dealers and foreign branches of U.S. banks?
- Should the Commission impose any conditions to the exceptions from the mandatory clearing requirement? What conditions would be appropriate?
- If the proposed rule overlaps with a foreign mandatory clearing requirement, in what ways are the requirements likely to conflict? What would be the effects on efficiency, competition and capital formation in the event that there are overlapping or duplicative mandatory clearing requirements or varying exceptions to such requirements across multiple jurisdictions?
- What provisions of Section 3C, or the Exchange Act and rules thereunder generally, would a counterparty be unable to comply with if the security-based swap transaction was subject to more than one mandatory clearing requirement? What categories of transactions are likely to be subject to such multiple mandatory clearing requirements? To what extent, if any, would a counterparty's membership in a clearing agency that clears security-based swaps affect the likelihood that multiple mandatory clearing requirements would apply to a security-based swap transaction? To what extent, if any, would a guaranteed non-U.S. person be subject to multiple

mandatory clearing requirements? To what extent, if any, does the home country of the reference entity under a security-based swap affect the likelihood that multiple mandatory clearing requirements would apply to the transaction? Does proposed Rule 3Ca-3 provide sufficient regulatory guidance regarding such transactions? Why or why not?

- What would be the market impact of proposed Rule 3Ca-3? How would the proposed application of the mandatory clearing requirement affect the competitiveness of U.S. entities in the global marketplace (both in the United States as well as in foreign jurisdictions)? Would the proposed rule place any market participants at a competitive disadvantage or advantage? If so, please explain. Would the proposed rule be a more general burden on competition? If so, please explain. What other measures should the Commission consider to implement the mandatory clearing requirement? What would be the market impacts and competitiveness effects of alternatives to the proposed approach discussed in this release?

X. Mandatory Security-Based Swap Trade Execution Requirement

A. Introduction

Section 3C(h)(1) of the Exchange Act requires, with respect to transactions involving security-based swaps subject to the clearing requirement in Section 3C(a)(1) of the Exchange Act, that counterparties execute such transactions on an exchange or a security-based swap execution facility that is registered under Section 3D of the Exchange Act or exempt from registration under Section 3D(e) of the Exchange Act (the “mandatory trade execution requirement”).¹⁰⁵² Section 3C(h) thus provides that security-based swap transactions subject to the mandatory trade execution requirement cannot be executed on an OTC basis, but must instead be executed on an exchange or security-based swap execution facility that is registered or exempt from registration under the Exchange Act, unless an exception applies.¹⁰⁵³ As such, the mandatory trade execution requirement is important in helping to bring the trading of security-based swaps onto transparent, regulated markets, from more opaque OTC markets.¹⁰⁵⁴

¹⁰⁵² 15 U.S.C. 78c-3(h)(1).

¹⁰⁵³ 15 U.S.C. 78c-3(h). Section 3C(h)(2) of the Exchange Act provides two exceptions to compliance with the mandatory trade execution requirement: (i) if no exchange or security-based swap execution facility makes the security-based swap available to trade; or (ii) if the security-based swap transaction is subject to the clearing exception under Section 3C(g) of the Exchange Act. 15 U.S.C. 78c-3(h)(2). In this release, we are not addressing either of these exceptions, as they pertain to whether a particular security-based swap is subject to the mandatory trade execution requirement. Our focus here is on the obligations of the counterparties to a transaction involving a security-based swap that is subject to the mandatory execution requirement where neither of these exceptions applies.

¹⁰⁵⁴ See SB SEF Proposing Release, 76 FR at 10949 (“The current market for [security-based] swaps is opaque, with little, if any, pre-trade transparency (the ability of market participants to see trading interest prior to a trade being executed) or post-trade transparency (the ability of market participants to see transaction information after a trade is executed). A key goal of the Dodd-Frank Act is to bring trading of [security-based] swaps onto regulated markets . . .”).

Because transactions in security-based swaps are often conducted globally with counterparties and intermediaries from multiple jurisdictions,¹⁰⁵⁵ we recognize uncertainty may exist regarding how to apply the mandatory trade execution requirement to cross-border security-based swap transactions.¹⁰⁵⁶ The Commission is proposing Rule 3Ch-1 under the Exchange Act to specify the applicability of the mandatory trade execution requirement with respect to cross-border security-based swap transactions. Our proposed approach follows the territorial approach described above¹⁰⁵⁷ and imposes the mandatory trade execution requirement on transactions that would be subject to the mandatory clearing requirement¹⁰⁵⁸ unless they qualify for an exception.¹⁰⁵⁹ We discuss substituted compliance with the mandatory trade execution requirement in Section XI.F below.¹⁰⁶⁰

We recognize that other approaches are possible to achieve the goals of the Dodd-Frank Act, in whole or in part. Accordingly, we invite comment regarding all aspects of the proposal

¹⁰⁵⁵ See Section II.A.1, *supra*.

¹⁰⁵⁶ One commenter, writing on behalf of a group of various market participants, asked for clear guidance regarding the application of the mandatory trade execution requirement for cross-border transactions in security-based swaps. See Cleary Letter III and Cleary Letter IV. The commenter recommended that the mandatory trade execution requirement should only apply to transactions where at least one counterparty is a U.S. person. See Cleary Letter IV at 27. This commenter also argued that the mandatory trade execution requirement should not apply to transactions involving two non-U.S. persons that utilize U.S. persons to carry out the transaction. We discuss this comment below.

¹⁰⁵⁷ See, e.g., Section VII, *supra* (discussing the registration of foreign security-based swap markets); see also the general discussion of the Commission's territorial approach in Section II.B, *supra*.

¹⁰⁵⁸ See Section IX, *supra* (discussing the scope of the mandatory clearing requirement).

¹⁰⁵⁹ See note 1053, *supra*.

¹⁰⁶⁰ Under the Commission's proposal, substituted compliance would be permitted for certain cross-border security-based swap transactions that would be subject to the mandatory trade execution requirement in Section 3C(h) of the Exchange Act and the rules and regulations thereunder. See discussion in Section XI.F, *infra*.

described below, including potential alternative approaches. Data and comment from market participants and other interested parties regarding the likely effect of the proposed rule and potential alternative approaches will be particularly useful to the Commission in evaluating possible modifications to the proposal.

B. Application of the Mandatory Trade Execution Requirement to Cross-Border Transactions

1. Statutory Framework

Section 3C(h) of the Exchange Act provides that if a transaction is subject to the mandatory clearing requirement, counterparties shall execute the transaction on an exchange or on a registered or exempt SB SEF, unless an exception applies.¹⁰⁶¹ Section 3C(a)(1) of the Exchange Act provides that it shall be unlawful for any person “to engage in a security-based swap unless that person submits such security-based swap for clearing . . . if the security-based swap is required to be cleared.”¹⁰⁶² As discussed above, we are proposing to apply the statutory mandatory clearing requirement to any person who engages in a security-based swap transaction within the United States.¹⁰⁶³ We preliminarily believe that, to the extent that a cross-border transaction is subject to the mandatory clearing requirement under the proposed approach described above, it also would be subject to the mandatory trade execution requirement unless it

¹⁰⁶¹ See 15 U.S.C. 78c-3(h).

¹⁰⁶² See 15 U.S.C. 78c-3(a)(1).

¹⁰⁶³ In Section IX above, the Commission proposes Rule 3Ca-3 under the Exchange Act. Subject to certain exceptions, proposed Rule 3Ca-3 would apply the mandatory clearing requirement to any person that engages in a security-based swap transaction in which at least one of the counterparties to the transaction is a U.S. person or a non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person, or if the transaction is a “transaction conducted within the United States,” as defined in proposed Rule 3a71-3(a)(5) under the Exchange Act. See Section IX.C, supra, and Section III.B.6, supra (discussing proposed Rule 3a71-3(a)(5)).

qualifies for an exception.¹⁰⁶⁴ This approach is consistent with the statutory framework of Title VII of the Dodd-Frank Act, because a security-based swap transaction first must be subject to the mandatory clearing requirement before the counterparties to the transaction must comply with the mandatory trade execution requirement, unless an exception to the mandatory trade execution requirement applies. Thus, to the extent that we are proposing not to apply the mandatory clearing requirement to a particular transaction, the mandatory trade execution requirement would not apply to such transaction.

2. Proposed Rule

Consistent with our proposed rule applying the mandatory clearing requirement¹⁰⁶⁵ and our general approach in applying Title VII in the cross-border context,¹⁰⁶⁶ the Commission is proposing Rule 3Ch-1 under the Exchange Act. Under the proposed rule, the mandatory trade execution requirement would apply to any person that engages in a security-based swap transaction in which at least one of the counterparties to the transaction is (i) a U.S. person¹⁰⁶⁷ or (ii) a non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person.¹⁰⁶⁸ We also are proposing to apply the mandatory trade execution requirement to any person that engages in a security-based swap if such transaction is a “transaction conducted within the United States,” as defined in proposed Rule 3a71-3(a)(5) under the Exchange Act.¹⁰⁶⁹

¹⁰⁶⁴ See note 1053, *supra*.

¹⁰⁶⁵ See proposed Rule 3Ca-3 under the Exchange Act.

¹⁰⁶⁶ See Section II.B, *supra*.

¹⁰⁶⁷ Under proposed Rule 3Ch-1(c) under the Exchange Act, the term “U.S. person” would have the same meaning as set forth in proposed Rule 3a71-3(a)(7) under the Exchange Act, as discussed in Section III.B.5 below.

¹⁰⁶⁸ Proposed Rule 3Ch-1(a)(1) under the Exchange Act.

¹⁰⁶⁹ Proposed Rule 3Ch-1(a)(2) under the Exchange Act.

To limit the scope of the proposal, we are proposing exceptions to the mandatory trade execution requirement in the following two scenarios:¹⁰⁷⁰

- If the security-based swap transaction is not a “transaction conducted within the United States,” the proposed rule would not apply the mandatory trade execution requirement if one counterparty to the transaction is (i) a foreign branch of a U.S. bank¹⁰⁷¹ or (ii) a non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person,¹⁰⁷² and if the other counterparty to the transaction is a non-U.S. person (i) whose performance under the security-based swap is not guaranteed by a U.S. person and (ii) who is not a foreign security-based swap dealer.¹⁰⁷³

¹⁰⁷⁰ Consistent with our intent to apply the mandatory trade execution requirement in the same way as the mandatory clearing requirement, these exceptions are identical to the exceptions from the mandatory clearing requirement. See proposed Rule 3Ca-3(b) under the Exchange Act, as discussed in Section IX, supra.

¹⁰⁷¹ Under proposed Rule 3Ch-1(c) under the Exchange Act, the term “foreign branch” would have the same meaning as set forth in proposed Rule 3a71-3(a)(1) under the Exchange Act. See discussion in Section III.B.7, supra. A security-based swap transaction conducted through a foreign branch, as defined in proposed Rule 3a71-3(a)(4) under the Exchange Act, would be specifically excluded from the proposed definition of “transaction conducted within the United States.” See proposed Rule 3a71-3(5)(ii) under the Exchange Act, as discussed in Section III.B.6, supra.

¹⁰⁷² A security-based swap transaction involving a non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person would not be a “transaction conducted within the United States” by virtue of the guarantee alone because providing a guarantee on a transaction is not one of the factors that would cause a transaction to be a transaction conducted within the United States under proposed Rule 3a71-3(a)(5) under the Exchange Act. We would consider such transaction to be engaged in within the United States, however, by virtue of the guarantee from the U.S. person, who acts as an “indirect counterparty” to the transaction.

¹⁰⁷³ Proposed Rule 3Ch-1(b)(1) under the Exchange Act. Proposed Rule 3Ch-1(c) under the Exchange Act defines the term “foreign security-based swap dealer” by cross-reference to the definition of that term in proposed Rule 3a71-3(a)(3) of the Exchange Act (defining “foreign security-based swap dealer” to mean “a security-based swap dealer, as

- If the security-based swap transaction is a “transaction conducted within the United States,” the proposed rule would not apply the mandatory trade execution requirement if (i) neither counterparty to the transaction is a U.S. person; (ii) neither counterparty’s performance under the security-based swap is guaranteed by a U.S. person; and (iii) neither counterparty to the transaction is a foreign security-based swap dealer.¹⁰⁷⁴

We discuss below the proposed rule regarding the application of the mandatory trade execution requirement in more detail.

3. Discussion

In considering how to apply the mandatory trade execution requirement, we have relied primarily on the express statutory relationship between the mandatory clearing requirement and the mandatory trade execution requirement. The statutory text, in our view, indicates that Congress viewed the clearing and trade execution requirements as complementary, since a security-based swap transaction that is subject to the mandatory clearing requirement is subject to the mandatory trade execution requirement, absent circumstances that trigger one of the exceptions to the mandatory trade execution requirement. In the following, we discuss the proposed rule regarding the application of the mandatory trade execution requirement in more detail.

(a) Security-Based Swap Transactions Involving U.S. Persons or Non-U.S. Persons Receiving Guarantees from U.S. Persons

defined in section 3(a)(71) of the [Exchange] Act (15 U.S.C. 78c(a)(71)), and the rules and regulations thereunder, that is not a U.S. person”).

¹⁰⁷⁴ Proposed Rule 3Ch-1(b)(2) under the Exchange Act.

i. Proposed Rule

The proposed rule would apply the mandatory trade execution requirement to transactions in which one of the counterparties is (i) a U.S. person or (ii) a non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person,¹⁰⁷⁵ subject to certain exceptions.¹⁰⁷⁶ We preliminarily believe that applying the mandatory trade execution requirement to transactions in which U.S. persons are counterparties or provide guarantees of the performance of non-U.S. persons under a security-based swap would be consistent with the purposes of the Dodd-Frank Act to improve transparency in the U.S. financial system.¹⁰⁷⁷ As noted above, the mandatory trade execution requirement in Title VII is critical to this goal because this requirement is designed promote the trading of security-based swap transactions on transparent, regulated markets.¹⁰⁷⁸ Therefore, by applying the mandatory trade execution requirement to transactions in which U.S. persons are counterparties or provide guarantees of the performance of non-U.S. persons under a security-based swap, the proposed rule would further the goals of the Dodd-Frank Act to improve the transparency of the U.S. financial system.¹⁰⁷⁹

¹⁰⁷⁵ Proposed Rules 3Ch-1(a)(1)(i) and (ii) under the Exchange Act.

¹⁰⁷⁶ Proposed Rule 3Ch-1(b) under the Exchange Act. See also note 1053, supra.

¹⁰⁷⁷ See Section II.B.2(d), supra (discussing guarantees in the cross-border context).

¹⁰⁷⁸ See note 1054, supra.

¹⁰⁷⁹ We preliminarily believe that the proposed approach with respect to the mandatory trade execution requirements is not being applied to persons who are “transact[ing] a business in security-based swaps without the jurisdiction of the United States,” within the meaning of Section 30(c). See Section II.B.2(b), supra. However, the Commission also preliminarily believes that the proposed approach with respect to the mandatory trade execution requirements is necessary or appropriate to help prevent the evasion of the particular provisions of the Exchange Act that were added by the Dodd-Frank Act that are being implemented by the approach and prophylactically will help ensure that the purposes of those provisions of the Dodd-Frank Act are not undermined. See Section II.B.2(e), supra; see also Section II.B.2(d), supra.

ii. Proposed Exception for Certain Transactions Involving Foreign Branches of U.S. Banks and Guaranteed Non-U.S. Persons

Consistent with the Commission's proposed approach to the mandatory clearing requirement discussed above,¹⁰⁸⁰ the Commission is proposing an exception from the mandatory trade execution requirement described above for certain transactions that involve foreign branches of U.S. banks or guaranteed non-U.S. persons, provided the transactions are not conducted within the United States. Specifically, under proposed Rule 3Ch-1(b)(1), the mandatory trade execution requirement would not apply to a security-based swap transaction if one counterparty to the transaction is (i) a foreign branch of a U.S. bank¹⁰⁸¹ or (ii) a non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person and if the other counterparty to the transaction is a non-U.S. person (i) whose performance under the security-based swap is not guaranteed by a U.S. person and (ii) who is not a foreign security-based swap dealer.¹⁰⁸² Such exception would not apply if the security-based swap transaction were a transaction conducted within the United States, as defined in proposed Rule 3a71-3(a)(5) under the Exchange Act.¹⁰⁸³

For example, if the mandatory trade execution requirement does not apply to a transaction among non-U.S. persons that receive guarantees from U.S. persons and foreign branches of U.S. banks, then U.S. persons would have an incentive to evade the mandatory trade execution requirement by conducting transactions with other U.S. persons through guaranteed foreign affiliates or foreign branches. Altering the form of the transaction in this manner would allow U.S. persons to continue to avail themselves of transparency in the U.S. security-based swap market while evading the requirements intended to enhance that transparency, even though the substance of the transaction remains unchanged. See note 1054 and accompanying text, supra.

¹⁰⁸⁰ See Section IX, supra.

¹⁰⁸¹ See note 1071, supra.

¹⁰⁸² Proposed Rule 3Ch-1(b)(1) under the Exchange Act. See also note 1073, supra.

¹⁰⁸³ Proposed Rule 3Ch-1(b)(1) under the Exchange Act.

The Commission preliminarily believes that imposing the mandatory trade execution requirement on all security-based swap transactions in which a U.S. person is a counterparty or in which a U.S. person provides a guarantee to a non-U.S. person counterparty may adversely affect the ability of U.S. persons to access foreign security-based swap markets because non-U.S. persons may be less willing to enter into transactions with them if such transactions are subject to the mandatory trade execution requirement. Accordingly, we are proposing an exception from the mandatory trade execution requirement for transactions in which a counterparty to the transaction is a foreign branch of a U.S. bank or a non-U.S. person who receives a guarantee from a U.S. person on its performance under the security-based swap and the other counterparty is a non-U.S. person whose performance under the security-based swap is not guaranteed by a U.S. person and who is not a foreign security-based swap dealer.¹⁰⁸⁴

We recognize that imposing the mandatory trade execution requirement on a foreign branch of a U.S. bank or on a non-U.S. person whose performance under a security-based swap is guaranteed by a U.S. person would be consistent with the view that a foreign branch of a U.S. bank is part of a U.S. person¹⁰⁸⁵ and that a U.S. guarantor is an indirect counterparty¹⁰⁸⁶ to the transaction entered into by the guaranteed non-U.S. person. We also recognize that subjecting such transactions to the mandatory trade execution requirement could help to bring the trading of security-based swaps onto transparent, regulated markets, from more opaque OTC market. At the same time, however, imposing the mandatory trade execution requirement on U.S. persons that conduct their foreign security-based swap dealing activity through foreign branches or

¹⁰⁸⁴ Id.

¹⁰⁸⁵ See Section III.B.5, supra.

¹⁰⁸⁶ See note 1012, supra.

guaranteed non-U.S. persons, without any exceptions, could put such U.S. persons at a significant competitive disadvantage to non-U.S. persons who conduct security-based swap business in the same foreign local market and thereby limit the access of such U.S. persons to foreign security-based swap markets. After balancing the various policy considerations, including the Dodd-Frank Act's goal of promoting trading on transparent, regulated markets, we have preliminarily concluded that the proposed exception from the mandatory trade execution requirement for transactions by U.S. persons conducting security-based swap activity out of foreign branches, or transactions by guaranteed non-U.S. persons, with non-U.S. persons whose performance under the security-based swap is not guaranteed by a U.S. person (and who is not a foreign security-based swap dealer) is appropriate, provided that it is not a transaction conducted within the United States.

This exception from the mandatory trade execution requirement would not apply under the proposed rule, however, when the non-U.S. person counterparty of the foreign branch of the U.S. bank or the guaranteed non-U.S. person is a foreign security-based swap dealer.¹⁰⁸⁷ The reason for this proposed carve-out from the exception from the mandatory trade execution requirement is similar to the reason discussed above in the context of the mandatory clearing requirement. Because a foreign security-based swap dealer would necessarily have a significant connection with the U.S. security-based swap market because its dealing activity with U.S. persons or within the United States would trigger registration requirements, we preliminarily believe it is not appropriate to provide an exception for U.S. persons conducting security-based swap activity out of foreign branches or for guaranteed non-U.S. persons when they enter into security-based swaps with foreign security-based swap dealers

¹⁰⁸⁷ Proposed Rule 3Ch-1(b)(1)(ii)(B) under the Exchange Act.

(b) Transactions Conducted Within the United States

i. Proposed Rule

Under the proposed rule, a security-based swap transaction that is a transaction conducted within the United States, as defined in proposed Rule 3a71-3(a)(5) under the Exchange Act, would be subject to the mandatory trade execution requirement.¹⁰⁸⁸ As we have noted above, a “transaction conducted within the United States,” as defined in proposed Rule 3a71-3(a)(5), includes soliciting, negotiating, executing, or booking a security-based swap transaction.¹⁰⁸⁹ The Commission believes that applying the mandatory trade execution requirement to a security-based swap transaction when the activities that are key stages in that transaction are conducted within the United States furthers a goal of the mandatory trade execution requirement, namely, to bring the trading of security-based swaps within the United States onto regulated markets, unless an exception applies. Furthermore, such an approach is consistent with our proposed approach to the mandatory clearing requirement discussed above.¹⁰⁹⁰

ii. Proposed Exception for Transactions Conducted Within the United States by Certain Non-U.S. Persons

We recognize that one commenter has recommended that transactions between two non-U.S. persons that utilize U.S. agents should not be subject to the mandatory trade execution

¹⁰⁸⁸ Proposed Rule 3Ch-1(a)(2) under the Exchange Act.

¹⁰⁸⁹ See Section III.B.6, supra.

¹⁰⁹⁰ As discussed above, the statutory language for the mandatory clearing requirements apply to any person that “engages in a security-based swap,” which the Commission proposes to interpret to include any transaction in which a person performs any of the activities that are key stages in a security-based swap transaction (i.e., solicitation, negotiation, execution, or booking of the transaction). See Section IX.C, supra; see also Section 3C(a)(1) of the Exchange Act.

requirement.¹⁰⁹¹ The commenter noted that it is common for non-U.S. persons to utilize U.S. agents because of their expertise in the relevant market (such as in the case of a swap with an underlying U.S. security) or because of logistical matters (such as the time zones in which the parties conduct business).¹⁰⁹² The commenter argued that applying the mandatory trade execution requirement to these transactions could curtail the use of U.S. agents to negotiate trades and encourage personnel in the United States to relocate elsewhere.¹⁰⁹³

Consistent with our proposed approach to applying the mandatory clearing requirement to transactions conducted within the United States by non-U.S. persons, the Commission is proposing an exception from the mandatory trade execution requirement for security-based swap transactions that are transactions conducted within the United States when no counterparty to the transaction is (i) a U.S. person; (ii) a non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person; or (iii) a foreign security-based swap dealer.¹⁰⁹⁴

The Commission preliminarily believes that it is appropriate to limit the exception from the mandatory trade execution requirement when one or both of the non-U.S. person counterparties is a foreign security-based swap dealer. Non-U.S. persons whose transactions arising from dealing activity with U.S. persons or otherwise conducted within the United States exceed the de minimis threshold in the security-based swap dealer definition have a sufficient connection to the U.S. security-based swap market to lead the Commission to preliminarily conclude that it would not be appropriate to except transactions involving them from the

¹⁰⁹¹ See Cleary Letter IV at 27-28.

¹⁰⁹² See id.

¹⁰⁹³ See id.

¹⁰⁹⁴ Proposed Rule 3Ch-1(b)(2).

mandatory trade execution requirement when they conduct security-based swap transactions within the United States. Permitting non-U.S. persons to engage in security-based swap transactions within the United States with foreign security-based swap dealers without being subject to the mandatory trade execution requirement would potentially limit the access of U.S. persons to foreign security-based swap markets because non-U.S. persons seeking to engage in security-based swaps within the United States may prefer to engage in security-based swaps with foreign security-based swap dealers rather than U.S. persons to avoid the mandatory trade execution requirement.

Request for Comment

The Commission seeks comment on all aspects of proposed Rule 3Ch-1, including the following:

- Should the mandatory trade execution requirement apply to all transactions conducted by a U.S. person, including transactions conducted out of a foreign branch of a U.S. bank or a non-U.S. person whose performance under a security-based swap is guaranteed by a U.S. person? Why or why not?
- Is it appropriate for the application of the mandatory trade execution requirement in the cross-border context to follow our approach to the mandatory clearing requirement? If not, why not? What alternative approach would better suit the relationship between these two requirements under the statute? Please explain.
- Is the proposed rule appropriate and sufficiently clear? Should additional details be included as to any aspect of the proposed rule? If so, what additional details should be provided and why?

- As discussed above, under proposed Rule 3Ch-1(a), the mandatory trade execution requirement would apply to a person that engages in a security-based swap transaction if such person is a U.S. person, such person is a non-U.S. person whose performance under such security-based swap transaction is guaranteed by a U.S. person, or such security-based swap transaction is a transaction conducted within the United States. Are the circumstances in which the Commission proposes to apply the mandatory trade execution requirement sufficiently clear? If not, why not? Are these the appropriate circumstances in which to apply the mandatory trade execution requirement? If not, why not? Are there additional types of counterparties or security-based swap transactions to which the mandatory trade execution requirement should be applied? If so, who or what are they, and why? Are there types of counterparties or security-based swap transactions that should not be covered by the proposed rule? If so, why not?
- Would the proposed rule apply the mandatory trade execution requirement in ways that appropriately promote the goals of Title VII? Would any objectives of Title VII be hindered by applying the mandatory trade execution requirement as proposed? Would there be any regulatory gaps created by the proposed rule? Please provide detail.
- By requiring transactions conducted within the United States to be subject to the mandatory trade execution requirement, would the proposed rule appropriately create competitive parity between U.S. and non-U.S. persons that act as intermediaries within the United States to conduct transactions in security-based swaps? Why or why not? Please explain. Please provide specific recommendations and explain how

any recommended approach would better promote competition than the proposed rule. More generally, should security-based swap transactions be subject to the mandatory trade execution requirement solely because a transaction was solicited or negotiated within the United States?

- Under proposed Rule 3Ch-1(b), certain security-based swap transactions by foreign branches and guaranteed non-U.S. persons that are not conducted within the United States would be excluded from the mandatory trade execution requirement. The Commission generally solicits comments on the appropriateness of excluding the security-based swap transactions described in proposed Rule 3Ch-1(b) from the application of the mandatory trade execution requirement. Should additional types of transactions be excluded from the application of the mandatory trade execution requirement? Should some or all of the transactions covered by proposed Rule 3Ch-1(b) not be excluded? If so, in either case, please explain why. Does proposed Rule 3Ch-1(b) appropriately balance the competitiveness of U.S. persons in the global security-based swaps market and the goals of Title VII? If not, how could this balance be better achieved? Should proposed Rule 3Ch-1(b) also apply to non-U.S. persons that are security-based swap dealers? Why or why not?
- What would be the market impact of proposed Rule 3Ch-1? How would the proposed application of the mandatory trade execution requirement affect the competitiveness of U.S. entities in the global marketplace (both in the United States as well as in foreign jurisdictions)? Would the proposed rule place any market participants at a competitive disadvantage or advantage? If so, please explain. Would the proposed rule be a more general burden on competition? If so, please explain. Would any

burdens on competition be effectively mitigated by the proposed exception to mandatory trade execution in proposed Rule 3Ch-1(b)? Please explain. What other measures should the Commission consider to implement the mandatory trade execution requirement? What would be the market impacts and competitiveness effects of alternatives to the proposed approach discussed in this release?

XI. Substituted Compliance

A. Introduction

As noted above, we are proposing to establish a policy and procedural framework pursuant to rules under the Exchange Act in which the Commission would consider permitting compliance with comparable regulatory requirements in a foreign jurisdiction to substitute for compliance with requirements in the Exchange Act, and rules and regulations thereunder, relating to security-based swaps (i.e., substituted compliance). As proposed, under a Commission substituted compliance determination, a person would be able to satisfy relevant requirements in the Exchange Act, and the rules and regulations thereunder, by substituting compliance with corresponding requirements under a foreign regulatory system. A person relying on a substituted compliance determination still would be subject to the particular Exchange Act requirement that is the subject of the substituted compliance determination, but would be permitted to comply with such requirement in an alternative fashion. Failure of a person to comply with the applicable foreign regulatory requirements would mean that such person would be in violation of the requirements in the Exchange Act.

The Commission is proposing to consider making substituted compliance determinations with respect to four distinct categories of requirements, each of which raises separate issues and will be discussed separately below. These categories are as follows: (i) requirements applicable to registered security-based swap dealers in Section 15F of the Exchange Act and the rules and regulations thereunder; (ii) requirements relating to regulatory reporting and public dissemination of information on security-based swaps; (iii) requirements relating to clearing for security-based swaps; and (iv) requirements relating to trade execution for security-based swaps.

With respect to each of these categories of requirements, the Commission is proposing a “comparability” standard as the basis for making a substituted compliance determination. Generally, the Commission would endeavor to take a holistic approach in making substituted compliance determinations—that is, we would ultimately focus on regulatory outcomes as a whole with respect to the requirements within the same category rather than a rule-by-rule comparison. As noted above,¹⁰⁹⁵ efforts to regulate the derivatives market are underway, not only in the United States, but also in other jurisdictions. Since their 2009 statement, the G20 leaders have reiterated their commitment to OTC derivatives regulatory reform. And, as described above,¹⁰⁹⁶ the Commission has participated in numerous bilateral and multilateral discussions with foreign regulatory authorities addressing the regulation of OTC derivatives and foreign regulatory reform efforts. We recognize that foreign regulatory systems differ in their approaches to achieving particular regulatory outcomes, and that foreign regulatory requirements may differ from those ultimately adopted by the Commission, but may nonetheless achieve regulatory outcomes comparable with the regulatory outcomes of the relevant provisions of the Exchange Act added by Title VII of the Dodd-Frank Act. In addition, we recognize that different regulatory systems may be able to achieve some or all of those regulatory outcomes by using more – or fewer – specific requirements than the Commission. For example, under certain circumstances, a foreign regulatory system may be able to achieve one of those regulatory outcomes in the absence of one or more specific requirements that the Commission has implemented under a particular set of provisions of the Dodd-Frank Act.

¹⁰⁹⁵ See Section I.C., supra.

¹⁰⁹⁶ Id.

Accordingly, we do not envision that the Commission, in making a comparability determination, would look to whether a foreign jurisdiction has implemented specific rules and regulations that are comparable to rules and regulations adopted by the Commission. Rather, the Commission would determine whether the foreign regulatory system in a particular area, taking into consideration any relevant principles, regulations, or rules in other areas of the foreign regulatory system to the extent they are relevant to the analysis, achieves regulatory outcomes that are comparable to the regulatory outcomes of the relevant provisions of the Exchange Act. If it does, the Commission preliminarily believes that a comparability determination would be appropriate, notwithstanding differences in or the absence of specific requirements of particular regulatory provisions.

In addition, the Commission recognizes that other regulatory systems are informed by the business and market practices present in the foreign jurisdictions where those systems apply, and that such practices may differ in certain respects from practices described in this release. More broadly, other regulatory systems are informed by the characteristics of the markets for which they were designed, including the number and nature of their market participants to which they apply. In making a comparability determination, the Commission recognizes that it may need to take into account such practices and characteristics in understanding the design and application of another regulatory system and whether and how it may achieve regulatory outcomes comparable to the regulatory outcomes of the relevant provisions of the Exchange Act.

As explained below, how the Commission would find a foreign regulatory system “comparable” would vary depending on the category of requirements. Because the Commission is proposing to make substituted compliance determinations with respect to each of the aforementioned categories of requirements, it is possible that a foreign regulatory system would

be comparable with respect to some, but not all, categories of requirements. For instance, a foreign regulatory system may impose requirements on non-U.S. dealers that achieve regulatory outcomes comparable to the requirements applicable to registered security-based swap dealers in Section 15F of the Exchange Act, but the same foreign regulatory system may not achieve comparable regulatory outcomes regarding public reporting of trade information for security-based swaps. Similarly, a foreign regulatory system may impose requirements on clearing agencies that achieve regulatory outcomes comparable to the requirements applicable to registered security-based swap clearing agencies under Section 17A of the Exchange Act, but may not provide for comparable regulation of SB SEFs. By assessing each of these categories separately, the Commission would have the flexibility to make a substituted compliance determination with respect to one category of requirements but not another. However, the Commission would also retain the flexibility to consider the extent to which principles, regulations, or rules in one category may bear on a determination with respect to another category. Such an approach also would allow substituted compliance in certain categories to address competition and market efficiency concerns when a foreign regime is not comparable across the full range of Title VII policy objectives.

In addition, as described below, in making substituted compliance determinations, the Commission would consider a variety of factors that the Commission deems appropriate, including the nature of the global security-based swap market and the scope and objectives of the relevant foreign regulatory requirements. As part of this holistic review, the Commission would consider the various ways in which a foreign regulatory system achieves its overall goals and purposes, including those undertaken in response to the G20 commitments. As noted above, the Commission would also consider the extent to which applicable principles, regulations, or rules

in one category may bear on a determination with respect to another category. In addition, the Commission recognizes that our proposed application of Title VII to cross-border activities may affect the policy decisions of these other regulators as they seek to address potential conflicts or duplication in the regulatory requirements that apply to market participants under their authority.

More specifically, the proposed policy and procedural framework for substituted compliance recognizes the potential, in a market as global as the security-based swap market, for market participants who engage in cross-border security-based swap activity to be subject to conflicting or duplicative compliance obligations. As a result of the efforts to implement the G20 commitments in various jurisdictions described above, in some cases of cross-border activity, market participants may be subject to compliance obligations in a foreign jurisdiction that are similar to those imposed by the Exchange Act. The proposed framework would allow the Commission to provide for substituted compliance to address the effect of conflicting or duplicative regulations on competition and market efficiency and to facilitate a well-functioning global security-based swap market. In other cases, however, market participants may not be subject to conflicting or duplicative regulation because the foreign jurisdiction has not enacted comprehensive regulation of the security-based swap markets or is still in the process of implementing regulatory reforms that have been enacted. It also may be that the foreign jurisdiction's regulation does not apply to the market participant or entity or the foreign jurisdiction has established regulations that differ, in material respects, from requirements in the Exchange Act (e.g., requirements relating to real-time public reporting) and do not achieve comparable regulatory outcomes. In such cases, there would be less justification for allowing substituted compliance.

One alternative to making substituted compliance determinations by looking at separate categories of requirements would be to provide substituted compliance across the entire set of security-based swap requirements with respect to regimes that have implemented regulations consistent with the overall objectives of the G20 commitments. Preliminarily, however, we believe that making substituted compliance determinations on a regime-wide basis would be unworkable in light of the Commission's responsibility to implement the specific statutory provisions of the Exchange Act added by Title VII of the Dodd-Frank Act. While these provisions of the Exchange Act are consistent with the G20 commitments, they also contain provisions designed to achieve particular regulatory outcomes that may not be part of another jurisdiction's regulatory system. Thus, while the Commission would certainly consider the broader regulatory landscape in a foreign jurisdiction—including its approach to the G20 commitments—before making a substituted compliance determination, the Commission would also need to consider the particular regulatory outcomes achieved under the Exchange Act provisions added by Title VII of the Dodd-Frank Act.

In the following, we propose rules and interpretive guidance addressing the policy and procedural framework under which we would consider permitting compliance with comparable regulatory requirements in a foreign jurisdiction to substitute for compliance with requirements of the Exchange Act, and the rules and regulations thereunder, relating to security-based swaps, with respect to each of the aforementioned categories of requirements.

Request for Comment

The Commission requests comment on all aspects of our general approach to substituted compliance, including the following questions:

- Should the Commission make substituted compliance determinations on a regime-wide basis for a jurisdiction rather than with respect to categories of requirements? If so, should the finding that the regulatory outcomes of a foreign regulatory system are not comparable with respect to the regulatory outcomes of one category of the Exchange Act requirements cause the Commission to find the entire foreign regulatory regime to be not comparable as a whole? More specifically, under a regime-wide approach, how should the Commission make substituted compliance determinations with respect to foreign regulatory systems that do not achieve regulatory outcomes comparable to the regulatory outcomes with respect to certain categories of the Exchange Act requirements, taking into account the Commission's responsibility and statutory authority to implement the requirements of the Exchange Act added by Title VII of the Dodd-Frank Act?
- Should the Commission take into consideration the various ways in which a foreign regulatory system achieves its overall goals and purposes that are consistent with the G20 commitments in making a substituted compliance determination with respect a category of the Exchange Act requirements added by Title VII of the Dodd-Frank Act? Why or why not?
- Should the Commission take a more granular approach to substituted compliance determinations, for example, conducting a rule-by-rule or requirement-by-requirement comparison? Why or why not?
- Should the Commission identify more or less categories in our framework for substituted compliance? If so, how should those categories be demarcated?

B. Process for Making Substituted Compliance Requests

The Commission is proposing to amend our Rules of General Application to establish procedures pursuant to which it would consider applications for substituted compliance determinations with respect to each of the aforementioned categories of requirements.¹⁰⁹⁷ These procedures are similar to those now used by the Commission in considering exemptive order applications under Section 36 of the Exchange Act.¹⁰⁹⁸ All supporting documentation submitted pursuant to the proposed amendment would be made public.

Specifically, the proposed amendment would add new Rule 0-13 under the Exchange Act setting forth the general procedures for submission of requests for substituted compliance determinations. These procedures include the requirement that all applications for substituted compliance determinations must be in writing in the form of a letter, must include any supporting documents necessary to make the application complete, and otherwise must comply with 17 CFR § 240.0-3 (Filing of Material with the Commission).¹⁰⁹⁹ All applications must be submitted to the Office of the Secretary of the Commission, and may be submitted either electronically¹¹⁰⁰ or in paper format.¹¹⁰¹ In addition, all filings and supporting documentation filed pursuant to this proposed rule must be in the English language.¹¹⁰² If an application is incomplete, the

¹⁰⁹⁷ Proposed Rule 0-13 under the Exchange Act.

¹⁰⁹⁸ See 17 CFR § 240.0-12. Cf. 17 CFR § 30.10 (Petitions for Exemptions), including Appendices A and C (CFTC's procedures for application by foreign persons with respect to foreign futures and foreign options transactions).

¹⁰⁹⁹ Proposed Rule 0-13(a) under the Exchange Act. In 17 CFR § 240.0-3, the Commission sets forth general procedures for filing materials with the Commission.

¹¹⁰⁰ Proposed Rule 0-13(b) under the Exchange Act.

¹¹⁰¹ Proposed Rule 0-13(d) under the Exchange Act.

¹¹⁰² Proposed Rule 0-13(c) under the Exchange Act. If a filing or submission filed pursuant to this rule requires the inclusion of a document that is in a foreign language, a party must

Commission may request that the application be withdrawn unless the applicant can justify, based on all the facts and circumstances, why supporting materials have not been submitted and undertakes to submit promptly the omitted materials.¹¹⁰³

The Commission would not consider hypothetical or anonymous requests for a substituted compliance order.¹¹⁰⁴ Consistent with this position, every application (electronic or paper) must contain the name, address, telephone number, and email address of each applicant and the name, address, telephone number, and email address of a person to whom any questions regarding the application should be directed.¹¹⁰⁵ In addition, each applicant must provide the Commission with any supporting documentation it believes necessary for the Commission to make the requested substituted compliance determination, including information regarding applicable requirements established by the foreign financial regulatory authority or authorities, as well as the methods used by the foreign financial regulatory authority or authorities to monitor compliance with, and enforce, such requirements.¹¹⁰⁶ Applicants also should cite to and discuss applicable precedent related to a substituted compliance determination.¹¹⁰⁷ Any amendments to

submit instead a fair and accurate English translation of the entire foreign language document. A party may submit a copy of the unabridged foreign language document when including an English translation of a foreign language document in a filing or submission filed pursuant to this rule. A party must provide a copy of any foreign language document upon the request of Commission staff. Id.

¹¹⁰³ Proposed Rule 0-13(a) under the Exchange Act.

¹¹⁰⁴ Proposed Rule 0-13(e) under the Exchange Act.

¹¹⁰⁵ Id.

¹¹⁰⁶ Id.

¹¹⁰⁷ Id.

an application would be required to be prepared and submitted as set forth in the proposed procedures and marked to show what changes were made.¹¹⁰⁸

Under the proposed rule, after the filing of an application for a substituted compliance determination is complete, Division of Trading and Markets staff would review the application and make a recommendation to the Commission.¹¹⁰⁹ After consideration of the recommendation by the Commission, the Commission's Office of the Secretary would issue an appropriate response and would notify the applicant.¹¹¹⁰ As part of our review, the Commission may, in our sole discretion, schedule a hearing on the matter addressed by the application.¹¹¹¹ The Commission also may, in our sole discretion, choose to publish in the Federal Register a notice that the application has been submitted which invites public comment on the application.¹¹¹² Requestors may, however, seek confidential treatment of their applications for substituted compliance determinations.¹¹¹³

¹¹⁰⁸ Proposed Rule 0-13(f) under the Exchange Act.

¹¹⁰⁹ As with other matters, the Division of Trading and Markets would work with the Office of General Counsel, the Division of Risk, Strategy, and Financial Innovation, the Office of International Affairs, the Office of Compliance Inspections and Examinations, and the Division of Enforcement, as well as other divisions and offices within the Commission, in reviewing and making a recommendation regarding substituted compliance determinations.

¹¹¹⁰ Proposed Rule 0-13(g) under the Exchange Act.

¹¹¹¹ Proposed Rule 0-13(i) under the Exchange Act.

¹¹¹² Proposed Rule 0-13(h) under the Exchange Act. The notice would provide that any person may, within the period specified therein, submit to the Commission any information that relates to the Commission action requested in the application. The notice also would indicate the earliest date on which the Commission would take final action on the application, but in no event would such action be taken earlier than 25 days following publication of the notice in the Federal Register. Id.

¹¹¹³ Proposed Rule 0-13(a) under the Exchange Act. Requests for confidential treatment would be permitted to the extent provided under 17 CFR § 200.81. Id.

The Commission preliminarily believes that these proposed procedures would provide sufficient guidance regarding the process whereby persons may seek to make a request for a substituted compliance determination with respect to each of the categories of requirements, as described more fully below.

Request for Comment

The Commission seeks comment on all aspects of the proposed rule, including the following:

- Do the proposed procedures give sufficient guidance to persons regarding the procedures for making a substituted compliance determination? If not, why not? What other procedures should the Commission adopt?
- Should the substituted compliance framework contemplate foreign regulatory authorities, rather than or in addition to market participants, submitting substituted compliance determination requests? Why or why not?

C. Security-Based Swap Dealer Requirements

1. Proposed Rule—Commission Substituted Compliance Determinations

The Commission is proposing a rule that would establish a framework in which the Commission may make a substituted compliance determination permitting a foreign security-based swap dealer that is registered with the Commission to satisfy requirements in Section 15F of the Exchange Act, and the rules and regulations thereunder, by complying with the corresponding rules and regulations established in a foreign jurisdiction.¹¹¹⁴ Specifically, the proposed rule would provide that the Commission may, conditionally or unconditionally, by order, make a substituted compliance determination with respect to a foreign financial regulatory

¹¹¹⁴ Proposed Rule 3a71-5 under the Exchange Act.

system that compliance with specified requirements under such foreign financial regulatory system by a registered foreign security-based swap dealer (or class thereof)¹¹¹⁵ may satisfy the corresponding requirements in Section 15F of the Exchange Act, and the rules and regulations thereunder, that would otherwise apply to such foreign security-based swap dealer (or class thereof).¹¹¹⁶ The proposed framework would permit the Commission to make a substituted compliance determination only if we find that the requirements of such foreign financial regulatory system are comparable to otherwise applicable requirements, taking into account factors that the Commission determines appropriate, such as, for example, the scope and objectives of the relevant foreign regulatory requirements, as well as the effectiveness of the supervisory compliance program administered, and the enforcement authority exercised, by a foreign financial regulatory authority or authorities in such system to support its oversight of such foreign security-based swap dealer (or any class thereof).¹¹¹⁷

In making a substituted compliance determination, as noted above, the Commission's determination would focus on the similarities in regulatory objectives, rather than requiring that

¹¹¹⁵ The Commission is proposing a framework under which it may consider making substituted compliance determinations applicable to bona fide foreign security-based swap dealers. This proposed approach would not extend to entities organized outside of the United States for the purpose of evading U.S. regulation. The Commission would consider a variety of factors to confirm the bona fide nature of a foreign security-based swap dealer for these purposes, including the location of management and risk controls related to such entity's security-based swap dealing activities and the nature of the counterparties.

¹¹¹⁶ Proposed Rule 3a71-5(a)(1) under the Exchange Act.

¹¹¹⁷ Proposed Rule 3a71-5(a)(2)(i) under the Exchange Act. In assessing oversight, the Commission would consider not only overall oversight activities, but also oversight specifically directed at conduct and activity that would be relevant to the substituted compliance determination. For example, it would be difficult for the Commission to make a comparability determination if oversight is directed solely at the local activities of foreign security-based swap dealers, as opposed to the cross-border activities of such dealers.

the foreign jurisdiction's rules be identical. Depending on our assessment of the comparability of the foreign regulatory regime, the Commission could condition the substituted compliance determination by limiting it to a particular class or classes of registrants in the foreign jurisdiction.¹¹¹⁸ For instance, if the foreign jurisdiction imposes different levels of supervisory oversight with respect to classes of entities conducting security-based swap dealing activity, the Commission could limit a substituted compliance determination to permit only certain classes of supervised foreign security-based swap dealers to rely on a substituted compliance determination. The Commission would determine what conditions are appropriate on a case-by-case basis.

The proposed rule would require that, before making a substituted compliance determination, the Commission must have entered into a supervisory and enforcement MOU or other arrangement with the appropriate financial regulatory authority or authorities in that jurisdiction addressing oversight and supervision of applicable security-based swap dealers subject to the substituted compliance determination.¹¹¹⁹ Through such MOU or other arrangement, the Commission and the foreign financial regulatory authority or authorities would express their commitment to cooperate with each other to fulfill their respective regulatory mandates.

Although we intend generally to take a category-by-category approach to substituted compliance, under the proposed rule, the Commission could make a substituted compliance

¹¹¹⁸ Proposed Rule 3a71-5(a)(1) under the Exchange Act (permitting the Commission to make the substituted compliance determination "conditionally or unconditionally").

¹¹¹⁹ Proposed Rule 3a71-5(a)(2)(ii) under the Exchange Act. The Commission expects that any existing supervisory or enforcement MOU or other arrangement would need to be re-negotiated during the substituted compliance determination process to reflect the particulars of a determination.

determination with respect to one Title VII requirement applicable to registered security-based swap dealers but not another.¹¹²⁰ However, consistent with our category-by-category approach, we believe that certain requirements are interrelated such that the Commission would expect to make a substituted compliance determination for the entire group of related requirements. For example, the core entity-level requirements relate to the regulation of an entity's capital and margin. But certain other entity-level requirements (such as risk management, general recordkeeping and reporting, and diligent supervision) are so interconnected with capital and margin oversight that we would expect to make substituted compliance determinations, where warranted with regard to capital and margin rules, on the entire package of entity-level regulations.

The proposed rule also would permit the Commission, on our own initiative, to modify the terms of, or withdraw, a substituted compliance determination for a particular foreign jurisdiction, after appropriate notice and opportunity for comment.¹¹²¹ For instance, due to changes in the foreign regulatory regime, or a failure of a foreign regulator to exercise its supervisory or enforcement authority in an effective manner, the Commission may determine to modify the terms of, or withdraw, a previous substituted compliance determination. The Commission also would have the ability to periodically review the substituted compliance determinations it has granted and decide whether the substituted compliance determination should continue to apply.

In addition, the proposed rule would permit a foreign security-based swap dealer to rely on an applicable substituted compliance determination by the Commission with regard to a

¹¹²⁰ Proposed Rule 3a71-5(a) under the Exchange Act.

¹¹²¹ Proposed Rule 3a71-5(a)(4) under the Exchange Act.

particular jurisdiction to satisfy the specified requirements in Section 15F of the Exchange Act, and the rules and regulations thereunder, as applicable, by complying with the corresponding requirements established in the foreign jurisdiction.¹¹²² The proposed rule would require a foreign security-based swap dealer relying on a substituted compliance determination to satisfy the conditions of the Commission's substituted compliance determination.¹¹²³

Finally, the proposed rule would address the situation in which a foreign security-based swap dealer seeks to rely on the rules and regulations of a foreign jurisdiction to satisfy Commission requirements but the Commission has not previously made a substituted compliance determination with respect to that jurisdiction. In such a case, the proposed rule would permit the foreign security-based swap dealer, or a group of foreign security-based swap dealers, to request pursuant to the procedures set forth in proposed Rule 0-13 under the Exchange Act, that the Commission make a substituted compliance determination for the foreign jurisdiction with respect to specified requirements in Section 15F of the Exchange Act.¹¹²⁴ The proposed rule would require that the foreign security-based swap dealer (or foreign security-based swap dealers) be directly supervised by one or more financial regulatory authorities in that jurisdiction with respect to requirements similar to those in Section 15F of the Exchange Act, and the rules and regulations thereunder,¹¹²⁵ and provide the certification and opinion of counsel as described in proposed Rule 15Fb2-4(c) under the Exchange Act.¹¹²⁶

¹¹²² Proposed Rule 3a71-5(b) under the Exchange Act.

¹¹²³ Proposed Rule 3a71-5(b)(2) under the Exchange Act.

¹¹²⁴ Proposed Rule 3a71-5(c)(1) under the Exchange Act.

¹¹²⁵ Proposed Rule 3a71-5(c)(2)(i) under the Exchange Act.

¹¹²⁶ Proposed Rule 3a71-5(c)(2)(ii) under the Exchange Act. Proposed Rule 15Fb2-4 under the Exchange Act, as discussed in the Registration Proposing Release, 76 FR at 65799-

Although the request for a substituted compliance determination could come from a particular foreign security-based swap dealer or group of dealers, the Commission would make such a determination, under the proposed rule, on a class or jurisdiction basis, depending on the regulator(s) and the foreign regulatory regime (rather than on a firm-by-firm basis).¹¹²⁷ As a result, once the Commission has made a substituted compliance determination with respect to a particular foreign jurisdiction, it would apply to every foreign security-based swap dealer in the specified class or classes registered and regulated in that jurisdiction, subject to the conditions specified in the Commission's substituted compliance order.

The proposed rule would not provide for substituted compliance with respect to registration requirements described in Sections 15F(a) – (d) of the Exchange Act and the rules and regulations thereunder.¹¹²⁸ As an initial matter, the registration process serves two important notice functions for the Commission. First, it is through the submission of a registration application that security-based swap dealers notify the Commission that they are engaged in dealing activity in excess of the de minimis threshold. Second, the registration application

801, would require that a nonresident security-based swap dealer provide the Commission with an opinion of counsel concurring that the firm can, as a matter of law, provide the Commission with prompt access to its books and records and can, as a matter of law, submit to onsite inspection and examination by the Commission. See Section III.C.3(b)ix, supra. The Commission preliminarily believes that, before a foreign security-based swap dealer should be permitted to make a substituted compliance request, it should assure the Commission that it can provide the Commission with prompt access to books and records and submit to onsite inspection and examination because we expect that access to books and records and the ability to inspect and examine a foreign security-based swap dealer will be essential conditions of any substituted compliance determination.

¹¹²⁷ Proposed Rule 3a71-5(a) under the Exchange Act. Because, under the proposed approach, all requests for substituted compliance determinations must come directly from a foreign security-based swap dealer, foreign financial regulatory authorities may not themselves request such a determination.

¹¹²⁸ Proposed Rule 3a71-5(a)(3) under the Exchange Act.

process is how foreign security-based swap dealers notify the Commission that they intend to seek or to rely on an existing substituted compliance determination.¹¹²⁹ In addition to these key notice functions, the registration process provides the Commission with information that is essential to the Commission's ability to provide effective oversight of foreign security-based swap dealers, particularly for those relying on substituted compliance determinations to satisfy their obligations under Section 15F requirements.¹¹³⁰ As a result, we are not proposing to allow substituted compliance for the registration requirements in Section 15F of the Exchange Act.

2. Discussion

The goal of the proposed rule is to increase the efficiency of the security-based swap market and promote competition by helping to avoid subjecting foreign security-based swap dealers to potentially conflicting or duplicative compliance obligations, while still achieving the policy objectives of Title VII of the Dodd-Frank Act. The Commission preliminarily believes that the proposed rule, by requiring that a substituted compliance determination be made on a class or jurisdictional basis and that a foreign jurisdiction's requirements be comparable to otherwise applicable U.S. requirements, is consistent with this goal.

¹¹²⁹ See Section III.E, *supra* (discussing the process by which foreign security-based swap dealers would be required to notify the Commission of their reliance on substituted compliance determinations).

¹¹³⁰ As part of the registration process, nonresident security-based swap dealers must (i) appoint an agent for service of process in the United States, (ii) furnish the Commission with the identity and address of its agent for services of process, (iii) certify that the firm can, as a matter of law, provide the Commission with prompt access to its books and records and can, as a matter of law, submit to onsite inspection and examination by the Commission, and (iv) provide the Commission with an opinion of counsel concurring that the firm can, as a matter of law, provide the Commission with prompt access to its books and records and can, as a matter of law, submit to onsite inspection and examination by the Commission. See proposed Rule 15Fb2-4 under the Exchange Act, as discussed in the Registration Proposing Release, 77 FR at 65799-801

In addition, the Commission preliminarily believes that such an approach is consistent with the global nature of the security-based swap market and may be less disruptive of entity business arrangements than not permitting substituted compliance. At the same time, the Commission recognizes that U.S. security-based swap dealers may be put at a competitive disadvantage with their foreign counterparts if they are subject to, for example, more stringent capital or margin requirements than foreign security-based swap dealers. For instance, all other things being equal, a foreign security-based swap dealer that is subject to lower capital requirements would be able to enter into a security-based swap with a customer at a more competitive price than a U.S. security-based swap dealer that is subject to a higher capital requirement. Of course, more stringent capital or margin requirements could equally be viewed as a source of competitive advantage, with counterparties having greater confidence in the financial stability of U.S. counterparties.

One alternative to the proposed approach would be to impose uniform compliance on all registered security-based swap dealers rather than permitting substituted compliance for registered foreign security-based swap dealers. If the Commission were to adopt a uniform approach to the application of Section 15F requirements to registered U.S. and foreign security-based swap dealers without allowing for substituted compliance, foreign security-based swap dealers may find that complying with the Commission's capital, margin, and other entity-level rules would subject them to duplicative or conflicting requirements and may put them at a competitive disadvantage as a result.

As discussed above, the Dodd-Frank Act divides the entity-level regulatory oversight of security-based swap dealers between the Commission and prudential regulators.¹¹³¹ This statutory division of authority means that the Commission is not responsible for the capital and margin regulation of bank security-based swap dealers and, therefore, does not have the authority to make substituted compliance determinations in those areas for dealers that are banks. As a result, the Commission's provision of substituted compliance for capital and margin requirements only would extend to nonbank security-based swap dealers, whereas the Commission's substituted compliance determinations for all other entity-level requirements would apply to both bank and nonbank security-based swap dealers.

In addition to this statutory limitation on the Commission's ability to provide for substituted compliance in certain areas, the Commission also may consider the rationale for different capital treatment of banks and nonbanks in the United States. As discussed above, the Commission's proposed capital rules for nonbank security-based swap dealers differ from those that would be applicable to bank dealers as proposed by the prudential regulators in that the Commission's proposed capital standards are principally focused on the retention of highly liquid assets that can be distributed to customers.¹¹³² Assuming that the Commission adopts capital standards for nonbank security-based swap dealers as proposed, the Commission's comparability determinations regarding entity-level requirements would likely analyze separately the capital treatment of nonbank entities in jurisdictions that do not impose a comparable net liquid assets test. In performing such an analysis, the Commission would take into account the other principles, rules, and regulations of the foreign jurisdiction that may be relevant to the

¹¹³¹ See Section III.C.3(b), *supra*.

¹¹³² See Section III.C.3(b)(1), *supra*.

analysis. It also would consider whether nonbank dealers in that jurisdiction are permitted to hold more illiquid assets as regulatory capital compared to the assets permitted to be held under the capital rules adopted by the Commission and, if so, whether nonbank dealers in that jurisdiction have access to sufficient liquidity at the entity level to support the liabilities they incur out of their business activity.¹¹³³ Similarly, the Commission would need to consider the impact of any reduced liquidity associated with the application of foreign capital standards on the ability of nonbank dealers in such jurisdiction to wind down operations quickly and distribute assets to customers.¹¹³⁴ As this example illustrates, however, even when separately analyzing capital requirements, the Commission's focus would remain on ensuring not that the foreign jurisdiction has identical rules but on ensuring that a foreign jurisdiction that applies capital rules that do not impose a comparable net liquid assets test to nonbank security-based swap dealers can achieve the regulatory outcomes comparable to those intended under the Dodd-Frank Act.

Similarly, consistent with our category-based approach, the Commission's comparability determination with respect to the requirements set forth in Section 15F of the Exchange Act generally would not depend on the comparability of the goals achieved by foreign jurisdiction's capital and margin requirements taken alone but also would, in light of the interconnectedness of capital and margin with related entity-level requirements, take into account regulatory outcomes of other aspects of the jurisdiction's requirements. Although we believe that capital and margin requirements are at the core of a robust internal risk controls system at a firm, equally foundational to the financial integrity of a firm are effective internal risk management procedures and the effectiveness of other relevant foreign regulatory requirements that are connected to an

¹¹³³ See Capital, Margin, and Segregation Proposing Release, 77 FR at 70304.

¹¹³⁴ See *id.*

entity's financial integrity. As noted above, the Commission is proposing to permit substituted compliance, not only with capital and margin requirements, but also with such other related entity-level requirements as the Commission finds appropriate.¹¹³⁵ The Commission preliminarily believes that this approach to substituted compliance in the context of entity-level requirements will benefit foreign security-based swap dealers by allowing them to comply, where possible, with a single set of entity-level requirements where a substituted compliance determination is deemed appropriate, while ensuring that all registered security-based swap dealers are subject to robust entity-level oversight.

Request for Comment

The Commission requests comment on all aspects of the proposed rule establishing a policy and procedural framework for making substituted compliance determinations for registered foreign security-based swap dealers, including the following:

- What, if any, are the likely competitive effects, within the U.S. security-based swap market and among U.S. security-based swap dealers, of the proposed approach for application of substituted compliance for foreign security-based swap dealers? Please describe the specific nature of any such effects.
- The Commission generally solicits comments on the appropriateness and clarity of the proposed rule. Should additional details be included regarding any aspects of the proposed rule?
- As discussed above, in making a substituted compliance determination, the Commission would ultimately focus on the comparability of regulatory outcomes

¹¹³⁵ See Section XII.B.1, *supra*.

rather than a rule-by-rule comparison. Is this holistic approach to making a substituted compliance determination appropriate? If not, why not?

- Is the comparability standard appropriate and sufficiently clear? Should additional detail be provided as to what would and would not satisfy this standard? If so, what additional detail should be provided? Should a different standard be used? If so, what should be the standard and why?
- As discussed above, in making a substituted compliance determination, the Commission would consider factors such as the scope and objectives of the relevant foreign regulatory requirements, as well as the effectiveness of the supervisory compliance program administered, and the enforcement authority exercised. Are these factors appropriate? Are the enumerated factors too broad or too narrow? What other factors should the Commission consider?
- When assessing the effectiveness of a foreign jurisdiction's supervisory compliance program should the Commission consider factors such as the existence of a dedicated examination program, the expertise of examiners, the existence of a risk monitoring framework and an examination plan, and the existence of a disciplinary program to enforce compliance with laws? Similarly, when assessing the effectiveness of a foreign jurisdiction's enforcement program, should the Commission consider factors such as whether the program is actively administered, resourced, and transparent?
- As discussed above, the Commission could condition a substituted compliance determination by limiting it to a particular class or classes of registrants in the foreign jurisdiction, in which case the Commission would determine what conditions are appropriate on a case-by-case basis. What, if any, are the competitive effects of the

proposed approach with respect to conditional substituted compliance determinations?

- As discussed above, the proposed rule permits the Commission, on our own initiative, to modify or withdraw a substituted compliance determination for a particular foreign jurisdiction, after appropriate notice and opportunity for comment. In the event that the Commission determines that a previous substituted compliance determination needs to be further conditioned or even withdrawn, how much advance notice would be sufficient to permit market participants to adjust their activities to reflect the modification or withdrawal? For example, would 60 days be appropriate? Should the opportunity for comment be made public? Why or why not?
- Should a review period or “sunset provision” to revisit a previous substituted compliance determination be required? If so, what should the appropriate time period be for such review period or sunset provision?
- Should the ability of a foreign security-based swap dealer to take advantage of substituted compliance be conditioned on it not transacting with certain classes of U.S. counterparties, such as persons that do not meet the definition of qualified institutional buyer, as defined in Securities Act Rule 144A (17 CFR § 230.144A(a)(1)) (“QIB”), or some other threshold, such as qualified investor, as defined in Section 3(a)(54) of the Exchange Act? Would such counterparties be less able to appreciate the differences between engaging in security-based swap transactions with a security-based dealer subject to relevant provisions of Title VII versus a security-based swap dealer complying with comparable foreign regulations than a QIB or qualified investor? Would such an approach result in meaningful

safeguards that would justify adopting such an approach? Is the use of such a substituted compliance regime likely to have a disparate impact on any particular class of counterparties? What are the potential advantages or disadvantages (including in terms of risk, competition, and counterparty protection) to counterparties, foreign security-based swap dealers, and U.S. security-based swap dealers in restricting the use of substituted compliance to transactions involving certain classes of U.S. counterparties?

- As discussed above, the proposed rule permits a foreign security-based swap dealer or group of foreign security-based swap dealers to submit a request that the Commission make a substituted compliance determination for the foreign jurisdiction with respect to specified requirements in Section 15F of the Exchange Act. Is the proposed procedure for submitting such requests sufficiently clear? Should additional details be included regarding any aspects of the proposed procedure?
- Do the proposed substituted compliance rules appropriately reflect the goal to increase the efficiency of the security-based swap market and promote competition by avoiding (as appropriate) subjecting foreign security-based swap dealers to potentially conflicting or duplicative compliance obligations? Would it be more appropriate to make substituted compliance determinations on a firm-by-firm basis rather than a class or jurisdictional basis? If so, why?
- Should entity-level requirements be treated separately for purposes of substituted compliance determinations, or should they be considered as a package of regulations?
- Should the Commission permit substituted compliance with respect to external business conduct standards in Section 15F(h) of the Exchange Act and the rules and

regulations thereunder? Would allowing substituted compliance impair the Commission's ability to enforce the business conduct standards that the Dodd-Frank Act added to the Exchange Act?

- Should the Commission permit substituted compliance in transactions between registered non-U.S. dealers and U.S. persons?
- Should the Commission permit substituted compliance in transactions by registered non-U.S. dealers within the United States?
- Would allowing substituted compliance impair the Commission's ability to enforce the business conduct standards that the Dodd-Frank Act added to the Exchange Act relating to counterparty protection, particularly with respect to "special entities"?
- Should the Commission not permit substituted compliance with respect to the conflicts of interest duties described in Section 15F(j)(5) of the Exchange Act and the rules and regulations thereunder? Why or why not? In particular, would allowing substituted compliance with respect to these requirements impair the Commission's ability to enforce these counterparty protections that the Dodd-Frank added to the Exchange Act? Why or why not? Should the foreign dealing subsidiaries of U.S. parents be allowed to take advantage of substituted compliance for entity-level requirements if they engage in U.S. Business?
- Should there be a threshold requirement that foreign security-based swap dealers engage in a predominately foreign business in order to rely on substituted compliance? If so, how should the "predominantly foreign business" threshold be measured? Should it be based on the relative notional amount of the security-based swap business of foreign security-based swap dealers with U.S. persons compared to

the notional amount of their security-based swap business with non-U.S. persons? If so, what should the threshold be (e.g., 80% Foreign Business by notional amount? More than 50%)?

- Should the Commission consider providing substituted compliance determinations related to capital regulation in jurisdictions that apply Basel-based capital standards to nonbank security-based swap dealers? Why or why not?
- In what ways are Basel-based capital standards as applied to nonbank security-based swap dealers consistent with the Commission's own capital standards for nonbank security-based swap dealers? In what ways are they inconsistent?
- While the Commission is determining whether to make an initial set of substituted compliance determinations, should the Commission delay compliance with the requirements of the Exchange Act, and the rules and regulations thereunder, relating to security-based swap dealers for foreign security-based swap dealers? Are there some requirements that would be appropriate for delayed compliance? If so, please specify which ones and explain why. Are there other regulatory or market interests that the Commission should consider in determining the scope of the delayed compliance provision? If so, please describe those interests and how the proposed rule should address them.
- What would be the market impact of the proposed policy and procedural framework for making substituted compliance determinations for registered foreign security-based swap dealers? How would the application of the proposed policy and procedural framework affect the competitiveness of U.S. entities in the global marketplace (both in the United States as well as in foreign jurisdictions)? Would the

proposed approach place any market participants at a competitive disadvantage or advantage? If so, please explain. Would the proposed approach be a more general burden on competition? If so, please explain. What other measures should the Commission consider to implement the proposed policy and procedural framework? What would be the market impacts and competitiveness effects of alternatives to the proposed approach discussed in this release?

- Should the Commission permit substituted compliance in transactions between registered non-U.S. dealers and U.S. persons?
- Should the Commission permit substituted compliance in transactions by registered non-U.S. dealers within the United States?

D. Regulatory Reporting and Public Dissemination

As initially proposed, Regulation SBSR did not contemplate that the reporting and public dissemination requirements associated with cross-border security-based swaps could be satisfied by complying with the rules of a foreign jurisdiction instead of U.S. rules. Thus, counterparties to a security-based swap would be required to comply with proposed Regulation SBSR even if the security-based swap also was, for example, reported to a foreign data repository or a foreign regulatory authority.

In response to this proposed approach, several commenters stated that requiring counterparties to report cross-border security-based swaps in more than one jurisdiction could result in duplicative or inconsistent reporting, unnecessary expense and administrative burden, and potential conflicts with another jurisdiction's confidentiality requirements.¹¹³⁶ Commenters

¹¹³⁶ See, e.g., AIMA Letter at 6; DTCC Letter II at 21; ISDA/SIFMA Letter I at 18. While not specifically addressing reporting requirements, another commenter believed generally

suggested various ways to address these issues. Some recommended generally that the Commission coordinate our trade reporting regime with those of other jurisdictions.¹¹³⁷ Two commenters urged regulators to encourage the development of a single, global trade repository for each asset class.¹¹³⁸ One of these commenters also stated that, in the absence of a global trade repository, regulators should implement internationally compatible reporting systems so that cross-border security-based swaps would not have to be reported twice.¹¹³⁹ Another commenter suggested that the Commission define the term “security-based swap” to exclude a transaction that is reported to a non-U.S. trade repository, which would have the effect of eliminating any U.S. reporting requirement because the transaction would not be a security-based swap.¹¹⁴⁰ Several commenters recommended that the Commission refrain from imposing any reporting requirements on security-based swaps that are reported pursuant to comparable rules of another jurisdiction.¹¹⁴¹

that the U.S. branches of Japanese banks should not be subject to Title VII requirements, because such banks will be subject to comprehensive regulation under Japanese law. See Japanese Banks Letter at 4 (arguing that application of Title VII would be “superfluous at best” and could subject foreign banks to potentially inconsistent requirements).

¹¹³⁷ See AIMA Letter at 6; ISDA/SIFMA Letter I at 18 (urging the Commission to “consult with foreign regulators before establishing the extra-territorial scope of the rules promulgated under Title VII”); Markit Letter III at 2 (arguing that the SEC and CFTC should “harmonize their regulations with those of international regulators to the extent possible”).

¹¹³⁸ See AIMA Letter at 6; ISDA Letter at 14.

¹¹³⁹ See ISDA Letter at 13.

¹¹⁴⁰ See Davis Polk Letter II at 21.

¹¹⁴¹ See, e.g., Cleary Letter II at 17; Davis Polk Letter I at 2 (urging the Commission to implement Title VII in a way that relies on home country supervision), 7 (arguing that a transaction required to be reported to a foreign trade repository should not also be required to be reported to an SDR); Davis Polk Letter II at 21-22; ISDA Letter at 14 (stating that, in the absence of a single international trade repository, regulators should recognize trade repositories in other jurisdictions); Société Générale Letter I at 11

The Commission is sympathetic to the desire to avoid redundant or conflicting reporting requirements, to the extent consistent with applicable statutory requirements. The Commission participates in a number of international organizations and initiatives that seek to coordinate regulation of the global OTC derivatives market, and the Commission staff has engaged in ongoing bilateral discussions with a number of foreign regulators on the subject of cross-border security-based swap activity. The Commission preliminarily believes that regulatory reporting of security-based swap transaction data is crucial to allow it and other regulators more effectively to carry out their statutorily assigned functions, which include the assessment of systemic risks.¹¹⁴² In addition, the Commission preliminarily believes that public dissemination generally would increase efficiency and price competition in the security-based swap market.¹¹⁴³ The Commission preliminarily believes, therefore, that our own efforts to promote these goals should be implemented as quickly as practicable.

It is possible that other jurisdictions will implement reporting and dissemination regimes for security-based swap transactions that are comparable to the one set forth in Title VII and Regulation SBSR. In anticipation of that possibility, the Commission is now proposing rules regarding substituted compliance relating to regulatory reporting and public dissemination of security-based swaps, which are described below.

(recommending deference to foreign regulators that have a comparable regulatory scheme).

¹¹⁴² See Regulation SBSR Proposing Release, 75 FR at 75262-64.

¹¹⁴³ See Regulation SBSR Proposing Release, 75 FR at 75280-82 (discussing anticipated impact of proposed Regulation SBSR on efficiency, competition, and capital formation).

1. General

Proposed Rule 908(c)(2)(i) would provide that the Commission could, conditionally or unconditionally, by order, make a substituted compliance determination with respect to regulatory reporting and public dissemination in a foreign jurisdiction if such foreign jurisdiction imposes a comparable system for the regulatory reporting and public dissemination of all security-based swaps.

Section 13A(a)(1) of the Exchange Act¹¹⁴⁴ provides that all security-based swaps that are not accepted for clearing shall be subject to regulatory reporting. Section 13(m)(1)(G) of the Exchange Act¹¹⁴⁵ provides that each security-based swap (whether cleared or uncleared) shall be reported to a registered SDR, and Section 13(m)(1)(C) of the Exchange Act¹¹⁴⁶ generally provides that transaction, volume, and pricing data of all security-based swaps shall be publicly disseminated. However, these statutory provisions do not address whether, or the extent to which, these requirements should apply to cross-border security-based swaps. Reporting security-based swap transactions pursuant to the regimes of both the United States and a foreign jurisdiction could be duplicative and potentially burdensome. Re-proposed Rule 908(c)(2)(i) would provide generally that compliance with a comparable system of a foreign jurisdiction for the regulatory reporting and public dissemination of all security-based swaps could, if certain conditions are met, be substituted for compliance with U.S. rules to satisfy the goals and objectives of these Title VII requirements.

¹¹⁴⁴ 15 U.S.C. 78m-1(a)(1).

¹¹⁴⁵ 15 U.S.C. 78m(m)(1)(G).

¹¹⁴⁶ 15 U.S.C. 78m(m)(1)(C).

2. Security-Based Swaps Eligible and Not Eligible for Substituted Compliance

The Commission preliminarily believes that, if a foreign jurisdiction applies a comparable system for the regulatory reporting and public dissemination of an entity's security-based swaps, it would be appropriate not to apply the U.S. requirements in addition to the requirements of that foreign jurisdiction. Where the Commission has found that a foreign jurisdiction's reporting and public dissemination requirements are comparable to those implemented by the Commission, we expect to make a substituted compliance determination with respect to such jurisdiction for these requirements. The Commission is re-proposing Rule 908(c)(1) to provide that compliance with the regulatory reporting and public dissemination requirements in Sections 13(m) and 13A of the Exchange Act, and the rules and regulations thereunder, may be satisfied by compliance with the rules of a foreign jurisdiction that is the subject of a substituted compliance order issued by the Commission, provided that, with respect to at least one of the direct counterparties to the security-based swap:

- (i) Such counterparty is either a non-U.S. person or a foreign branch; and
- (ii) No person within the United States is directly involved in executing, soliciting, or negotiating the terms of the security-based swap on behalf of such counterparty.

The Commission preliminarily believes that, if at least one direct counterparty to a security-based swap is a non-U.S. person (even if the non-U.S. person is a security-based swap dealer or major security-based swap participant, or is guaranteed by a U.S. person) and no person within the United States is directly involved in executing, soliciting, or negotiating the terms of the security-based swap on behalf of that counterparty, the security-based swap should be eligible for substituted compliance with respect to regulatory reporting and public dissemination. Thus, substituted compliance with respect to regulatory reporting and public dissemination could

apply even in the instance of a security-based swap with a direct counterparty that is operating from within the United States; so long as the other direct counterparty is a non-U.S. person and no person within the United States is directly involved in executing, soliciting, or negotiating the terms of the security-based swap on behalf of that non-U.S. person. This approach is designed to limit disincentives for non-U.S. persons to transact security-based swaps with U.S. persons by allowing compliance with the rules of a foreign jurisdiction to be substituted for compliance with U.S. rules when the non-U.S. person transacts with a U.S. person.

The Commission also preliminarily believes that the approach proposed above with respect to non-U.S. persons should be extended to the foreign branches of U.S. banks. As a result, we are proposing to allow the possibility of substituted compliance with respect to regulatory reporting and public dissemination if at least one counterparty of a security-based swap is the foreign branch of a U.S. bank, as long as no person within the United States is directly involved in executing, soliciting, or negotiating the terms of the security-based swap on behalf of such foreign branch.¹¹⁴⁷ This approach is designed to promote access of foreign branches of U.S. banks to the local markets in which those branches are located. Assume, for example, that a substituted compliance determination with respect to regulatory reporting and public dissemination applied to a foreign jurisdiction and a transaction involved, on one side, a local, non-U.S. person market participant, and the security-based swap is required to be reported and publicly disseminated under the rules of that foreign jurisdiction regardless of whether the counterparty on the other side is a local dealer or a foreign branch of a U.S. bank. If substituted compliance with respect to regulatory reporting and public dissemination were in effect, the fact

¹¹⁴⁷ See Section III.B.6, *supra* (discussing the definition of “foreign branch” in proposed Rule 3a71-3(a)(1) under the Exchange Act).

that the foreign branch is a counterparty would not cause the transaction to have to be reported pursuant to U.S. rules in addition to the foreign jurisdiction's rules.

Consistent with the factors described above, the Commission preliminarily believes that certain kinds of security-based swaps should not be eligible for substituted compliance with respect to regulatory reporting and public dissemination, even if they might be subject to reporting and public dissemination requirements in a foreign jurisdiction.¹¹⁴⁸ As noted above, re-proposed Rule 908(c)(1) would provide that a security-based swap would be eligible for substituted compliance with respect to regulatory reporting and public dissemination where both of the following conditions apply to at least one direct counterparty to the transaction: (i) such counterparty is either a non-U.S. person or a foreign branch; and (ii) the security-based swap transaction is not solicited, negotiated, or executed by a person within the United States on behalf of such counterparty. Thus, a security-based swap between two U.S. persons would not be eligible for substituted compliance with respect to regulatory reporting and public dissemination, even if the security-based swap were solicited, negotiated, and executed outside the United States.¹¹⁴⁹

Furthermore, re-proposed Rule 908(c)(1) would not allow for the possibility of substituted compliance with respect to regulatory reporting and public dissemination if both direct counterparties (or their agents)—regardless of place of domicile—solicit, negotiate, or execute a security-based swap from within the United States. The Commission preliminarily

¹¹⁴⁸ If the rules of a foreign jurisdiction would not apply to the security-based swap, there would be no need to consider the possibility of substituted compliance, because there would be no foreign rules that could substitute for the applicable U.S. rules.

¹¹⁴⁹ This assumes that neither U.S. person is acting through a foreign branch. If either U.S. person were acting through a foreign branch, the security-based swap between those U.S. persons would be eligible for substituted compliance.

believes that U.S. rules for regulatory reporting and public dissemination should apply to transactions where all or the major part of actions associated with the security-based swap, on both sides of the transaction, are performed within the United States.

The following examples explain the operation of re-proposed Rule 908(c)(1). In all examples, assume that the Commission has issued a substituted compliance order with respect to regulatory reporting and public dissemination that applies to the foreign jurisdiction:

- Example 1. A bank in country X—solely through personnel located in country X—executes a security-based swap over the phone with a U.S. person located in New York, and no person within the United States is directly involved in soliciting, negotiating, or executing the terms of the security-based swap on behalf of the foreign bank. The security-based swap is not cleared. The security-based swap would be eligible for substituted compliance, regardless of whether the foreign bank is registered in any capacity with the Commission.
- Example 2. A foreign branch of a U.S. bank located in country X executes a security-based swap over the phone with a U.S. person located in New York. The foreign branch uses staff located solely in country X to solicit, negotiate, and execute the security-based swap. The security-based swap is not cleared. The security-based swap would be eligible for substituted compliance.
- Example 3. Two foreign branches of U.S. banks, both located in country X, execute a security-based swap in country X. The security-based swap transaction is not solicited, negotiated, or executed by a person within the United States on behalf of either counterparty. The security-based swap would be eligible for substituted compliance.

- Example 4. Two New York branches of foreign banks execute a security-based swap. Persons acting on behalf of each bank are located within the United States and are involved in soliciting, negotiating, and executing the terms of the security-based swap. The security-based swap would not be eligible for substituted compliance.
- Example 5. Same facts as Example 4, except that one foreign bank, instead of soliciting, negotiating, or executing the security-based swap using persons associated with its New York branch, uses only persons located in its home office to perform such functions. The security-based swap would be eligible for substituted compliance.
- Example 6. A foreign subsidiary (C1) of a U.S. person executes a security-based swap with a U.S. person (C2). No person within the United States solicits, negotiates, or executes the security-based swap on behalf of the foreign subsidiary C1. The security-based swap would be eligible for substituted compliance, regardless of the location of persons who executed, solicited, or negotiated the security-based swap on behalf of the U.S. person C2, and regardless of whether the foreign subsidiary C1 is guaranteed by a U.S. person.

3. Requests for Substituted Compliance

Proposed Rule 908(c)(2)(ii) would provide that any person that executes a security-based swap that would, in the absence of a substituted compliance order, be required to be reported pursuant to Regulation SBSR may file an application, pursuant to the procedures set forth in proposed Rule 0-13,¹¹⁵⁰ requesting that the Commission make a substituted compliance

¹¹⁵⁰ See Section XI.B, *supra*.

determination regarding regulatory reporting and public dissemination with respect to a foreign jurisdiction the rules of which also would require reporting and public dissemination of the security-based swap. Proposed Rule 908(c)(2)(ii) would further provide that such application shall include the reasons therefor and such other information as the Commission may request. The Commission would consider those reasons as well as information derived from other sources in considering whether to grant a substituted compliance order with respect to regulatory reporting and public dissemination.

4. Findings Necessary for Substituted Compliance

Re-proposed Rule 908(c)(2)(iii) would provide that, in making a substituted compliance determination with respect to a foreign jurisdiction, the Commission shall take into account such factors as the Commission determines are appropriate, such as the scope and objectives of the relevant foreign regulatory requirements, as well as the effectiveness of the supervisory compliance program administered, and the enforcement authority exercised, by the foreign financial regulatory authority to support oversight of its regulatory reporting and public dissemination system for security-based swaps. Furthermore, the Commission would not make a substituted compliance determination with respect to regulatory reporting and public dissemination unless the Commission found that:

- (A) The data elements that are required to be reported pursuant to the rules of the foreign jurisdiction are comparable to those required to be reported pursuant to § 242.901;
- (B) The rules of the foreign jurisdiction require the security-based swap to be reported and publicly disseminated in a manner and a timeframe comparable to those required by §§ 242.900-911;

(C) The Commission has direct electronic access¹¹⁵¹ to the security-based swap data held by a trade repository or foreign regulatory authority to which security-based swaps are reported pursuant to the rules of that foreign jurisdiction; and

(D) Any trade repository or foreign regulatory authority in the foreign jurisdiction that receives and maintains required transaction reports of security-based swaps pursuant to the laws of that foreign jurisdiction is subject to requirements regarding data collection and maintenance; systems capacity, resiliency, and security; and recordkeeping that are comparable to the requirements imposed on SDRs by §§ 240.13n-5 to 240.13n-7 of the Exchange Act.

As noted above, the Commission preliminarily believes that compliance with a foreign jurisdiction's rules for reporting and public dissemination of security-based swaps should be a substitute for compliance with the U.S. rules only when the foreign jurisdiction has a reporting and public dissemination regime comparable to that of the United States. Thus, re-proposed Rule 908(c)(2)(iii)(A) would provide that the data elements required to be reported pursuant to the rules of the foreign jurisdiction must be comparable to those required to be reported pursuant to Rule 901 of Regulation SBSR. If the data elements required by the foreign jurisdiction were not comparable, certain important data elements about a security-based swap might not be captured by the foreign trade repository or foreign regulatory authority.

Furthermore, re-proposed Rule 908(c)(2)(iii)(B) would provide that the rules of the foreign jurisdiction must require security-based swaps to be reported and publicly disseminated in a manner and a timeframe comparable to those required by Regulation SBSR. The

¹¹⁵¹ New paragraph (k) of re-proposed Rule 900 would define the term "direct electronic access" to have the same meaning as in proposed Rule 13n-4(a)(5) under the Exchange Act, as proposed in the SDR Proposing Release, 75 FR 77318.

Commission preliminarily believes that, given the Title VII requirements that all security-based swaps be reported to an SDR and that all security-based swaps be publicly disseminated in real time (except for block trades), allowing substituted compliance with the rules of a foreign jurisdiction that has standards significantly different from those in the United States would run counter to the objectives and requirements of Title VII. Thus, for example, the Commission would not, under re-proposed Rule 908(c), permit substituted compliance with respect to regulatory reporting and public dissemination if the foreign jurisdiction did not (among other things) impose public dissemination requirements on a trade-by-trade basis; dissemination of trade information on an aggregate basis would not be sufficient. Furthermore, the Commission would not permit substituted compliance under re-proposed Rule 908(c) with respect to regulatory reporting and public dissemination if security-based swaps of non-block size were publicly disseminated in other than real time, as required under Section 763 of the Dodd-Frank Act.

Re-proposed Rule 908(c)(2)(iii)(C) would also provide that, to grant a substituted compliance order with respect to regulatory reporting and public dissemination, the Commission must have direct electronic access to the security-based swap data held by a trade repository or foreign regulatory authority to which security-based swaps are reported pursuant to the rules of that foreign jurisdiction. This requirement stems from the fact that the regulatory reporting provisions of Title VII are premised on the idea that the Commission will have direct electronic access to all the reported data. Not having direct electronic access could reduce the Commission's ability to effectively and efficiently monitor the U.S. security-based swap market and provide timely and complete data to other U.S. financial regulatory agencies. Thus, the Commission preliminarily believes that direct electronic access to the foreign trade repository or

foreign regulatory authority to which security-based swap transactions are reported in the foreign jurisdiction should be a prerequisite to issuing a substituted compliance order with respect to regulatory reporting and public dissemination applying to that jurisdiction.

An alternative to this proposed requirement would be to permit substituted compliance with respect to regulatory reporting and public dissemination if, instead, there existed an information-sharing agreement between the Commission and an appropriate body in the foreign jurisdiction that would permit the Commission to request and obtain transaction information from the foreign trade repository or foreign regulatory authority that otherwise would be reported to a registered SDR pursuant to Regulation SBSR. The Commission preliminarily believes, however, that it would be more appropriate to require direct electronic access to such data before allowing substituted compliance with respect to regulatory reporting and public dissemination.

Without direct electronic access, the Commission could face substantial delays before a foreign entity, even acting expeditiously, could compile a substantial volume of data relating to a substantial volume of transactions. Delays in obtaining such data could compromise the ability of the Commission to supervise security-based swap market participants, and to share information with other U.S. financial regulators, in a timely fashion.

Re-proposed Rule 908(c)(2)(iii)(D) would provide that, to grant a substituted compliance order regarding regulatory reporting and public dissemination, the Commission must be able to find that any trade repository or foreign regulatory authority in the foreign jurisdiction that receives and maintains transaction reports of security-based swaps pursuant to the laws of that foreign jurisdiction is subject to requirements regarding data collection and maintenance; systems capacity, resiliency, and security; and recordkeeping that are comparable to the requirements that the Commission would impose on SDRs. The Commission has proposed

certain requirements for SDRs relating to data collection and maintenance;¹¹⁵² systems capacity, resiliency, and security;¹¹⁵³ and recordkeeping.¹¹⁵⁴ These requirements are designed, among other things, to enhance the ability of SDRs to effectively receive and maintain security-based swap transaction data that are reported to them. Without appropriate system security, for example, the data held by an SDR could be destroyed or rendered unusable by a hacker attack or computer virus. Therefore, the Commission preliminarily believes that, to allow substituted compliance for regulatory reporting and public dissemination with respect to a foreign jurisdiction, any entity in that foreign jurisdiction that is required to receive and maintain security-based swap transaction data should be required to have comparable protections.

Re-proposed Rule 908(c)(2)(iv) would specify that, before issuing a substituted compliance order pursuant to this section, the Commission shall have entered into a supervisory and enforcement MOU or other arrangement with the relevant foreign financial regulatory authority or authorities under such foreign financial regulatory system addressing oversight and supervision of the applicable security-based swap market under the substitute compliance determination.

5. Modification or Withdrawal of Substituted Compliance Order

Re-proposed Rule 908(c)(2)(v) would provide that the Commission may, on our own initiative, modify or withdraw a substituted compliance order with respect to regulatory reporting and public dissemination in a foreign jurisdiction, at any time, after appropriate notice and opportunity for comment. Such a modification or withdrawal could result from a situation

¹¹⁵² See proposed Rule 13n-5 under the Exchange Act.

¹¹⁵³ See proposed Rule 13n-6 under the Exchange Act.

¹¹⁵⁴ See proposed Rule 13n-7 under the Exchange Act.

where, after the Commission issues an order recognizing the reporting and public dissemination regime of a foreign jurisdiction as eligible for substituted compliance, the basis for that order ceases to be true. For example, if the foreign jurisdiction did not sufficiently enforce its reporting and public dissemination rules, compliance with the foreign rules might no longer be deemed an effective substitute for compliance with the U.S. rules. Therefore, the Commission preliminarily believes that it would be appropriate to establish a mechanism whereby it could, at any time and on our own initiative, modify or withdraw a previously issued substituted compliance order with respect to regulatory reporting and public dissemination, after appropriate notice and opportunity for comment.

6. Regulatory Reporting and Public Dissemination Considered Together in the Commission's Analysis of Substituted Compliance

The Commission has considered, but has determined not to propose, treating regulatory reporting and public dissemination separately for purposes of allowing substituted compliance. Under such an approach, for example, the Commission could allow substituted compliance for regulatory reporting with respect to a particular foreign jurisdiction without permitting substituted compliance for public dissemination. The Commission preliminarily believes that this approach would not implement Title VII's regulatory reporting and public dissemination requirements as effectively as considering these requirements together for purposes of analyzing requests for substituted compliance determinations.

One example of a potential problem with viewing these two requirements separately relates to the public dissemination of security-based swap transaction information. If the Commission were to permit substituted compliance for regulatory reporting but not for public dissemination, certain transactions could be reported to a foreign trade repository in lieu of an SDR that is registered with the Commission. However, the Commission has proposed that

registered SDRs would be the entities charged with publicly disseminating information about security-based swap transactions. A registered SDR could carry out that function only if data about individual transactions are reported to it. If data about certain transactions were reported instead to a foreign trade repository, it would be impractical if not impossible for the SDR to publicly disseminate data about those transactions. The Commission also preliminarily believes that it would be impractical and unduly complicated to devise an alternate method for public dissemination of such transactions that did not involve registered SDRs.¹¹⁵⁵ The Commission preliminarily concludes, therefore, that transactions should be required to be reported to a registered SDR even if there are comparable foreign rules that would provide for reporting of such transactions to a foreign trade repository, unless the foreign rules also provide for public dissemination of such transactions in a manner comparable to Regulation SBSR. In such case, the Commission could, under re-proposed Rule 908(c), issue a substituted compliance order for both regulatory reporting and public dissemination with respect to that foreign jurisdiction.

The Commission notes that, under re-proposed Rules 908(a) and 908(b), certain security-based swap transactions would be subject to regulatory reporting but not public dissemination. The Commission also has considered, but has determined not to propose, treating regulatory reporting and public dissemination separately for purposes of allowing substituted compliance with respect to such transactions, even though Regulation SBSR would not require public dissemination of such transactions in any case. The Commission preliminarily believes that this

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A reporting side could be required to report to a registered SDR the data elements required by re-proposed Rule 901(c), which are those that would be publicly disseminated, but not be required to report the elements required by re-proposed Rule 901(d), which are the additional elements required for regulatory reporting. However, reporting the transaction to both a registered SDR and to a foreign trade repository (which it would be required to do by the rules of the foreign jurisdiction) would negate the effect of the substituted compliance order.

approach could introduce unnecessary operational complexity for cross-border market participants and might yield few if any efficiency gains. Assume that a foreign branch of a U.S. bank is operating in a jurisdiction where a substituted compliance order were in effect for transactions that otherwise would be required to be reported but not publicly disseminated. With each transaction, the foreign branch would be required to determine whether the transaction was such that regulatory reporting but not public dissemination would be required under Regulation SBSR, in which case substituted compliance could apply and the transaction could instead be reported to the foreign trade repository, or whether both regulatory reporting and public dissemination would be required under Regulation SBSR, in which case substituted compliance would not apply and the transaction would be required to be reported to a registered SDR. The determination of the appropriate place to send the trade report would depend on the nature of the counterparty.¹¹⁵⁶ While market participants could be expected to develop the appropriate compliance systems to report through the appropriate channel depending on the circumstances, the Commission preliminarily sees only limited benefit to requiring market participants to do so. The Commission preliminarily believes instead that it would be simpler to permit substituted compliance for a foreign jurisdiction only when that foreign jurisdiction has rules for regulatory reporting and public dissemination that are comparable to Regulation SBSR. This approach is designed to minimize the necessity of determining, on a transaction-by-transaction basis, which

¹¹⁵⁶ For example, if the foreign branch transacted with another foreign branch of a U.S. bank or with a non-U.S. person that was guaranteed by a U.S. person, the transaction would be subject to public dissemination (see re-proposed Rule 908(b)(2)(ii)) and substituted compliance would not apply. Thus, the transaction would have to be reported to an SDR registered with the Commission. However, if the foreign branch transacted outside the United States with a non-U.S. person that was not guaranteed by a U.S. person, public dissemination would not be required under Regulation SBSR. See re-proposed Rule 908(b)(2). Therefore, the transaction could be reported instead to the foreign trade repository.

jurisdiction's rules would apply.

Request for Comment

The Commission is re-proposing Regulation SBSR in a manner that would set forth when a security-based swap generally would be required to be reported and publicly disseminated, and when reporting and dissemination requirements could be satisfied by substituting compliance with the rules of a foreign jurisdiction for compliance with U.S. rules. The public is invited to comment on all aspects of these proposed rules. In particular, the Commission invites responses to the following questions about our proposed rules relating to substituted compliance:

- Should the Commission make determinations of substituted compliance for regulatory reporting separately from public dissemination? Why or why not? If so, how could a security-based swap transaction be publicly disseminated if substituted compliance were in effect for regulatory reporting but not for public dissemination?
- Do you believe the Commission, as proposed in Rule 908(c)(2)(i), should have the ability to conditionally or unconditionally, by order, make a substituted compliance determination with respect to regulatory reporting and public dissemination in a foreign jurisdiction if such foreign jurisdiction imposes a comparable system for the regulatory reporting and public dissemination of all security-based swaps? Why or why not? Should the Commission allow for substituted compliance determinations under more limited circumstances? Why or why not? Under what other circumstances should the Commission consider substituted compliance? Please be specific.
- How should the Commission evaluate whether a foreign system is “comparable” for purposes of regulatory reporting and public dissemination? Please be specific.

- The Commission stated that our approach is designed to put the foreign branches of U.S. banks on a level playing field with non-U.S. persons in foreign jurisdictions where those branches are located. Do you believe that the proposed formulation would accomplish this goal? Why or why not? How should the Commission restructure re-proposed Rule 908(c)(1) to accomplish this goal? Please be specific.
- Do you believe that the examples provided adequately describe the situations under which security-based swap transactions should and should not be eligible for substituted compliance? Why or why not? What additional situations should the Commission consider? Please be specific.
- Do you agree with the Commission proposal, in re-proposed Rule 908(c)(2)(ii), that any person that executes security-based swaps that would be required to be reported to Regulation SBSR be eligible to file an application requesting substituted compliance? Why or why not? Should any other entities (i.e., foreign regulators or industry associations) be eligible to file such an application? Why or why not?
- Do you agree with the factors the Commission would take into account when making a substituted compliance determination? Why or why not? What additional factors should the Commission take into account? Should a trade repository be subject to requirements that are comparable to all of Section 13(n) of the Exchange Act and the rules and regulations thereunder as a condition to a substituted compliance determination?
- Do you agree with the proposed findings that the Commission would be required to make pursuant to re-proposed Rule 908(c)(2)(iii)? Why or why not? Are there any other findings the Commission should be required to make? Please be specific.

- Do you agree, as detailed in re-proposed Rule 908(c)(2)(iv), that the Commission should have the ability, on our own initiative, to modify or withdraw a substituted compliance order at any time, after appropriate notice and opportunity for comment? Why or why not?
- The Commission is not at this time proposing that a duty to report and publicly disseminate a security-based swap would depend on the domicile of the issuer of the loan or security underlying the security-based swap. Should the Commission's rules for reporting and public dissemination take this factor into consideration? Why or why not?
- If a foreign jurisdiction has some form of public dissemination but the Commission does not believe that the foreign jurisdiction's rules are comparable to those of the United States to allow substituted compliance with respect to regulatory reporting and public dissemination, what would be the effect of having transaction reports of security-based swaps publicly disseminated in multiple jurisdictions? Do you believe that situation would impact price discovery or the market for such security-based swaps generally? If so, how, to what extent, and why? If not, why not? How practical would it be, and what would be the cost, for private actors to consolidate transaction reports of those security-based swaps emanating from potentially multiple feeds across multiple jurisdictions?
- Should the Commission permit substituted compliance with respect to regulatory reporting and public dissemination even if it does not have direct electronic access to the security-based swaps transactions reported to the foreign trade repository or foreign regulatory authority? If yes, how could the Commission ensure that it has

timely access to the security-based swap transaction data held by the foreign entity that otherwise would have been reported pursuant to Regulation SBSR? If there were delays associated with obtaining data from the foreign entity, how long could those delays be for substituted compliance to still be appropriate? In addition to delays, do you foresee any other potential obstacles to the Commission obtaining this information from foreign entities?

- The Commission's re-proposed rules relating to substituted compliance for regulatory reporting and public dissemination requirements differ in certain respects from the CFTC's cross-border guidance. For example, the CFTC guidance provides that a swap between a U.S. person swap dealer and a non-U.S. person guaranteed by a U.S. person would be subject to public dissemination requirements, and that these requirements could not be satisfied through substituted compliance.¹¹⁵⁷ The Commission, on the other hand, is proposing that public dissemination of a security-based swap between two such direct counterparties could be satisfied by substituted compliance (assuming that no person is soliciting, negotiating, or executing the security-based swap within the United States on behalf of the non-U.S. person that is guaranteed by a U.S. person).¹¹⁵⁸ Please describe any other differences that you believe might exist and what would be the impact of any such differences.
- When making a comparability determination, the Commission would look not just at the rules of a foreign jurisdiction, but also at the comprehensiveness of the supervision and regulation by the appropriate governmental authorities of that

¹¹⁵⁷ See 77 FR at 41237.

¹¹⁵⁸ See re-proposed Rule 908(c)(1) of Regulation SBSR.

jurisdiction. When assessing the effectiveness of a foreign jurisdiction's supervisory compliance program, should the Commission consider factors such as the existence of a dedicated examination program, the expertise of examiners, the existence of a risk monitoring framework and an examination plan; and the existence of a disciplinary program to enforce compliance with laws? Similarly, when assessing the effectiveness of a foreign jurisdiction's enforcement program, should the Commission consider factors such as whether the program is actively administered, resourced, and transparent?

- Is the Commission's holistic approach to making a comparability determination appropriate? Why or why not? Are there specific procedures or comparability considerations that would be useful for the Commission to incorporate in our proposed substituted compliance approach? If so, please describe. What would be the advantages of adopting such measures now? What would be the disadvantages of adopting such measures now?
- What would be the market impact of proposed approach to substituted compliance for regulatory reporting and public dissemination? How would the proposed approach affect the competitiveness of U.S. entities in the global marketplace (both in the United States as well as in foreign jurisdictions)? Would the proposed approach place any market participants at a competitive disadvantage or advantage? If so, please explain. Would the proposed approach be a more general burden on competition? If so, please explain. What other measures should the Commission consider to implement the proposed approach? What would be the market impacts

and competitiveness effects of alternatives to the proposed approach discussed in this release?

- In making substituted compliance determinations for reporting, should the Commission require direct electronic access to data maintained at foreign SDRs or should we only require an information sharing arrangement? Why or why not?

E. Clearing Requirement

Section 3C(a)(1) of the Exchange Act requires a security-based swap that is subject to the mandatory clearing requirement to be cleared at a clearing agency that is either registered with the Commission or exempt from registration.¹¹⁵⁹ The Commission recognizes, however, that in some circumstances counterparties may seek to clear security-based swaps subject to mandatory clearing at a clearing agency that is neither registered with the Commission nor exempt from registration, which would fail to satisfy the Title VII mandatory clearing requirement. This scenario may occur where counterparties seek—either due to their own preference or regulatory requirements in a foreign jurisdiction—to clear a transaction through a clearing agency that does not have any U.S. members and does not clear transactions conducted within the United States, because this type of clearing agency would not be required to register with the Commission or obtain an exemption from registration under the Commission’s proposed interpretation of the clearing agency registration requirement in Section 17A(g), discussed in Section V above.

¹¹⁵⁹ If a counterparty qualifies for the end-user clearing exception, then the security-based swap would not be required to be cleared unless the end user elects that it be cleared. See 15 U.S.C. 78c-3(g)(2) (providing that application of the exception is solely at the discretion of the counterparty to security-based swaps that meets the conditions of the exception in Section 3C(g)(1) of the Exchange Act).

In recognition of this situation and the potential for duplicative or conflicting clearing requirements, the Commission preliminarily believes that it would be appropriate in certain circumstances to permit substituted compliance in this area. Specifically, the Commission is proposing to use our authority, under Section 36 of the Exchange Act,¹¹⁶⁰ to exempt persons from the clearing mandate in Section 3C of the Exchange Act if a relevant transaction is submitted to a foreign clearing agency that is the subject of a substituted compliance determination by the Commission. Because such clearing agencies would not be engaged in activities that trigger the registration requirement, such substituted compliance determination would not be subject to the procedure outlined in Section 17A(k) to obtain an exemption from clearing agency registration, but would instead be considered in the context of an exemption from the clearing mandate. We preliminarily believe that providing substituted compliance in this area could help to facilitate the clearance and settlement of cross-border security-based swaps, while also promoting compliance with clearing mandates.

Under the proposed approach, upon the Commission's issuance of an order making a substituted compliance determination with respect to a particular foreign clearing agency, a counterparty to a security-based swap transaction that is subject to the mandatory clearing requirement would be able to rely on the Commission's substituted compliance determination to satisfy the mandatory clearing requirement by clearing such transaction on the specified foreign clearing agency.

¹¹⁶⁰ See 15 U.S.C. 78mm. Section 36 of the Exchange Act provides that, subject to certain exceptions, the Commission "by rule, regulation, or order may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of person, securities, or transactions from any provision or provisions of [the Exchange Act] or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest and is consistent with the protection of investors."

The Commission's proposed approach to substituted compliance for clearing would be limited to foreign clearing agencies that have no U.S. person members or activities in the United States. A foreign clearing agency that meets these two threshold requirements could initiate the process of making a substituted compliance determination by filing an application, pursuant to the procedures set forth in proposed Rule 0-13,¹¹⁶¹ requesting that the Commission make a substituted compliance determination. Such application would need to include the reasons therefor and such other documentation as the Commission may request. To provide the Commission with enough information to make a substituted compliance determination, the application would have to include sufficiently comprehensive information regarding the clearing agency and the foreign regime such that the Commission has an adequate basis to make the substituted compliance determination.

In making a substituted compliance determination, the Commission expects that our review in such cases would include seeking appropriate assurances from the foreign clearing agency regarding the absence of U.S. person members and relevant activity in the United States, including the volume of clearing activity originating in the United States. In addition, the review would look at the scope and objectives of the applicable foreign jurisdiction's regulatory requirements, as well as the effectiveness of the supervisory compliance program administered, and the enforcement authority exercised, by the relevant foreign financial regulatory authority or authorities to support the oversight of such clearing agency. Thus, the Commission's determination would take into account a foreign jurisdiction's overall regulatory framework, and would focus on the similarity of regulatory objectives in addition to the presence or absence of similar rules. We expect that our review of substituted compliance applications in this area

¹¹⁶¹ See Section XI.B, *supra*.

would be aided by the resources available to the Commission as a result of cooperative relationships with other authorities that we expect would allow us to assess the risk characteristics of such foreign clearing agencies on an ongoing basis.¹¹⁶²

Subsequent to making a substituted compliance determination, the Commission would be able to modify or withdraw, at any time, an order containing such determination, after appropriate notice and opportunity for comment. This would allow the Commission to take action in the event that a foreign clearing agency, for any reason, is no longer suitable for substituted compliance.

The Commission's proposed approach to substituted compliance with respect to the mandatory clearing requirement differs from other Title VII categories where substituted compliance would be permitted in that we are not proposing a specific rule related to substituted compliance. We preliminarily do not believe that a rule is necessary in the clearing space, although we are soliciting comment on the issue in the request for comments below. This belief

¹¹⁶² See, e.g., FMI Principles, note 687, *supra*. Systemically important payment systems, central securities depositories, securities settlement systems, central counterparties and trade repositories ("Financial Market Infrastructures") are expected to observe the standards as soon as possible, and CPSS and IOSCO members are seeking to adopt the standards in their respective jurisdictions by the end of 2012. CPSS and IOSCO have also proposed assessment methodologies to oversee implementation of the FMI Principles, including self-assessments and external assessments, such as those conducted by the International Monetary Fund and the World Bank under the Financial Sector Assessment Program. See CPSS and Technical Committee of IOSCO, Assessment Methodology for the Principles for FMIs and the Responsibilities of Authorities (April 2012), available at: <http://www.bis.org/publ/cpss101b.pdf>. In addition, CPSS and the Technical Committee of IOSCO proposed a disclosure framework to ensure that disclosures made by FMIs are clear and comprehensive. See CPSS and Technical Committee of IOSCO, Disclosure Framework for Financial Market Infrastructures (April 2012), available at: <http://www.bis.org/publ/cpss101c.pdf>. Finally, see Basel III for a discussion of the preferential capital treatment that exposures to a central counterparty will receive if such central counterparty is supervised in a manner consistent with the FMI Principles.

stems in part from the fact that we do not expect a large number of requests for substituted compliance in this area due to the small number of security-based swap clearing agencies in the market. In addition, the Title VII clearing agency registration regime already contains a category of exempt security-based swap clearing agencies, and clearing security-based swaps through these entities satisfies the mandatory clearing requirement. As a result, we preliminarily believe that the proposed approach to substituted compliance in this area, whereby we are proposing a policy and procedural framework for the use of our exemptive authority in Section 36 of the Exchange Act, is sufficient to promote Title VII's clearing mandate while addressing the regulatory complexities that stem from the global scope of the security-based swaps market.

Request for Comment

The Commission requests comment on all aspects of the proposed interpretation, including the following:

- Is substituted compliance related to the mandatory clearing requirement in Section 3C(a)(1) of the Exchange Act needed to prevent conflict with mandatory clearing requirements under foreign law? If so, is the proposed approach to substituted compliance sufficient to address the potential conflicts?
- Should the Commission apply Section 17A(k) of the Exchange Act under such circumstances to exempt particular foreign security-based swap clearing agencies to permit such clearing agencies to be used by counterparties subject to the mandatory clearing requirement in Section 3C(a)(1) of the Exchange Act? Are investor protection considerations sufficiently addressed if transactions are permitted to be cleared on a CCP that is not registered or exempt from registration? What conditions would need to be included to ensure the policy goals in the Dodd-Frank Act regarding

- central clearing are fulfilled? Should the conditions identified in Section 17A(k) that the clearing agency be available for inspection by the Commission and make available information requested by the Commission apply? Why or why not?
- Should the Commission codify the proposed approach to substituted compliance in the mandatory clearing space? Or is the proposed approach's reliance on the Commission's exemptive authority in Section 36 of the Exchange Act, and the procedures set forth in proposed Rule 0-13, sufficient? Why or why not?
 - Are the conditions limiting the potential availability of substituted compliance to foreign clearing agencies that have no U.S. persons as members or activities in the United States appropriate? Are there other approaches that the Commission should consider? Should the Commission only consider a foreign clearing agency's CCP activities with regard to securities based swaps, or all type securities, in making a substituted compliance determination?
 - What would be the market impact of the proposed approach to substituted compliance for the mandatory clearing requirement? How would the proposed approach affect the competitiveness of U.S. entities in the global marketplace (both in the United States as well as in foreign jurisdictions)? Would the proposed approach place any market participants at a competitive disadvantage or advantage? If so, please explain. Would the proposed approach be a more general burden on competition? If so, please explain. What other measures should the Commission consider to implement the proposed approach? What would be the market impacts and competitiveness effects of alternatives to the proposed approach discussed in this release?

F. Trade Execution Requirement

Under the Commission's proposal, substituted compliance would be permitted for certain cross-border security-based swap transactions that would be subject to the mandatory trade execution requirement of Section 3C(h) of the Exchange Act. Specifically, under proposed Rule 3Ch-2(b)(1), the Commission could, conditionally or unconditionally, by order, make a substituted compliance determination with respect to a foreign jurisdiction to permit a person subject to the mandatory trade execution requirement to execute such transaction, or have such transaction executed on their behalf, on a security-based swap market (or class of markets) that is neither registered under the Exchange Act nor exempt from registration under the Exchange Act if the Commission determines that such security-based swap market (or class of markets) is subject to comparable, comprehensive supervision and regulation by a foreign financial regulatory authority or authorities in such foreign jurisdiction. Upon the Commission's issuance of an order making a substituted compliance determination with respect to a particular foreign jurisdiction under proposed Rule 3Ch-2(b), a counterparty to a security-based swap transaction that is subject to the mandatory trade execution requirement would be able to rely on the substituted compliance determination by the Commission to satisfy the mandatory trade execution requirement by executing such transaction on a security-based swap market in such foreign jurisdiction, if such security-based swap market is covered by, or is in a class of markets that is covered by, the Commission's order.¹¹⁶³

Only transactions that meet the requirements of proposed Rule 3Ch-2(a), however, would be eligible for substituted compliance with respect to the mandatory trade execution requirement. Specifically, with respect to a foreign security-based swap market (or class of markets) for which

¹¹⁶³ Proposed Rule 3Ch-2(a) under the Exchange Act.

the Commission has made a substituted compliance determination pursuant to proposed Rule 3Ch-2(b)(1), substituted compliance would only be available for security-based swap transactions where both of the following conditions apply to at least one counterparty to the transaction: (i) the counterparty is either a non-U.S. person or foreign branch of a U.S. bank,¹¹⁶⁴ and (ii) the security-based swap transaction is not solicited, negotiated, or executed by a person within the United States on behalf of such counterparty.

Proposed Rule 3Ch-2(a) is designed to extend the availability of substituted compliance only to security-based transactions where one counterparty to the transaction is not acting directly or through an agent within the United States. The Commission preliminarily believes that transactions in which both counterparties utilize a U.S. person to act on their behalf to execute, solicit, or negotiate the transaction should not be eligible for substituted compliance and that it is appropriate to apply the mandatory trade execution requirement of Section 3C(h) of the Exchange Act to these transactions, and not foreign law. This approach should help mitigate any potential competitive advantage that non-U.S. intermediaries operating within the United States may have over U.S. intermediaries when facilitating security-based swap transactions on behalf of non-U.S. persons. It also should promote regulatory parity for U.S. and non-U.S. counterparties when they enter into security-based swap transactions within the United States. The Commission, however, solicits comments on this approach.

By contrast, for transactions involving at least one counterparty that is a foreign branch or a non-U.S. person and for which no person within the United States is directly involved in executing, soliciting or negotiating the transaction on behalf of such non-U.S. person or foreign

¹¹⁶⁴ Under proposed Rule 3Ch-1(c) under the Exchange Act, the term “foreign branch” would have the same meaning as set forth in proposed Rule 3a71-3(a)(1) under the Exchange Act. See Section III.B.7, supra.

branch, the Commission preliminarily believes that such transactions should be eligible for substituted compliance in the foreign jurisdiction. The Commission believes that limiting eligibility for substituted compliance to such cross-border security-based swap transactions would promote the Title VII goals of transparency, access, competition, and anti-manipulation with respect to transactions that impact U.S. markets and market participants, and address the regulatory complexities that stem from the global scope of the security-based swaps market.

Under proposed Rule 3Ch-2(b)(2), in making a substituted compliance determination, the Commission would take into account such factors as the Commission determines are appropriate, such as the scope and objectives of the applicable foreign jurisdiction's regulatory requirements, as well as the effectiveness of the supervisory compliance program administered, and the enforcement authority exercised, by the relevant foreign financial regulatory authority or authorities to support the oversight of such security-based swap market (or class of markets). Thus, the Commission's determination would take into account a foreign jurisdiction's overall regulatory framework, and would focus on the similarity of regulatory objectives in addition to the presence or absence of similar rules. In addition, in making a substituted compliance determination with respect to a foreign jurisdiction, the Commission's determination could be with respect to a single security-based swap market within such jurisdiction, or a class of security-based swap markets within the jurisdiction. For instance, if a foreign jurisdiction imposes different levels of supervisory oversight with respect to different classes or categories of security-based swap markets, the Commission could apply a substituted compliance determination to an entire class of security-based swap markets in the foreign jurisdiction, enabling each security-based swap market of that class within such jurisdiction to rely on the substituted compliance determination.

Furthermore, under proposed Rule 3Ch-2(b)(3) under the Exchange Act, before issuing a substituted compliance order pursuant to proposed Rule 3Ch-2(b)(1) under the Exchange Act, the Commission would be required to have entered into a supervisory and enforcement MOU or other arrangement with the relevant foreign financial regulatory authority or authorities addressing oversight and supervision of the security-based swap market (or class of markets) under the substituted compliance determination.

Under proposed Rule 3Ch-2(b)(4) under the Exchange Act, the Commission also would be able to modify or withdraw, at any time, an order containing a substituted compliance determination, after appropriate notice and opportunity for comment. This would allow the Commission to take action in the event that a security-based swap market (or class of markets), for any reason, is no longer suitable for substituted compliance.

The Commission notes that the factors the Commission would consider in making a substituted compliance determination with respect to mandatory trade execution would not necessarily be the same factors that the Commission would find relevant to a comparability determination for purposes of an exemption from registration as a SB SEF.¹¹⁶⁵ The Commission preliminarily believes that possible factors, among others, it could consider when assessing the effectiveness of a foreign jurisdiction's supervisory compliance program may include the existence of a dedicated examination program; examiners with proper expertise; the existence of a risk monitoring framework and an examination plan; and a disciplinary program to enforce compliance with laws. The Commission, for example, could find the presence or absence of certain regulatory requirements in a particular foreign jurisdiction to be more relevant to a determination of whether a security-based swap market in that foreign jurisdiction should be

¹¹⁶⁵ See Section VII.C, supra.

exempt from registration as a SB SEF than to a substituted compliance determination with respect to mandatory trade execution. Accordingly, the Commission preliminarily believes that allowing substituted compliance with respect to mandatory trade execution for a foreign security-based swap market (or class of markets) would not necessarily result in a determination to exempt that foreign market (or class of markets) from registration as a SB SEF. However, the Commission generally solicits comments on the appropriateness or feasibility of this approach.

Proposed Rule 3Ch-2(c) under the Exchange Act provides that one or more security-based swap markets could initiate the process of making a substituted compliance determination by filing an application, pursuant to the procedures set forth in proposed Rule 0-13,¹¹⁶⁶ requesting that the Commission make a substituted compliance determination. Such application would need to include the reasons therefor and such other documentation as the Commission may request. To provide the Commission with enough information to make a substituted compliance determination, the application would have to include sufficiently comprehensive information regarding the security-based swap market and the foreign regime such that the Commission has an adequate basis to make the substituted compliance determination set forth in proposed Rule 3Ch-2(b) under the Exchange Act.

Request for Comment

The Commission seeks comment on all aspects of proposed Rule 3Ch-2, including the following:

- The Commission generally solicits comments on the appropriateness and clarity of the proposed rule. Should additional details be included as to any aspect of this

¹¹⁶⁶ See Section XI.B, *supra*.

proposed rule? If so, for what aspects of the proposed rule would additional details be useful and why?

- As discussed above, under proposed Rule 3Ch-2(a) under the Exchange Act, substituted compliance would be permitted only for security-based swap transactions that have at least one counterparty that is a non-U.S. person or a foreign branch and the security-based swap transaction is not solicited, negotiated, or executed by a person within the United States on behalf of such counterparty. The Commission generally solicits comments on the appropriateness of permitting substituted compliance for the transactions described in proposed Rule 3Ch-2(a). Is the Commission's approach to defining the transactions that qualify for substituted compliance appropriate? If not, why not? Should some or all of the transactions described by the proposed rule not be eligible for substituted compliance? Should additional transactions not covered by the proposed rule be eligible for substituted compliance? In either case, please describe the transactions that should be eligible or ineligible for substituted compliance and provide the rationale for each.
- Does the proposed substituted compliance rule appropriately promote the statutory objectives of the mandatory trade execution requirement, as well as the goal of international coordination? If not, how could this be better achieved? Would the objectives of Title VII be hindered by permitting persons to seek substituted compliance for the eligible transactions? If so, how?
- What is the likelihood that cross-border transactions would be subject to the mandatory trade execution requirements of foreign jurisdictions that conflict with the mandatory trade execution requirement of Section 3C(h) of the Exchange Act? For

such transactions, would the complications stemming from such conflicting mandatory trade execution requirements be adequately addressed by permitting substituted compliance for the transactions described in the proposed rule? If not, why not? Please describe the complications, if any, that might still ensue even with substituted compliance. Would any conflicts likely arise for security-based swaps transactions not covered by the proposed substituted compliance rule? If so, please describe those conflicts and how they would arise.

- Under proposed Rule 3Ch-2(b)(1), under the Exchange Act, the Commission may permit substituted compliance with respect to the mandatory trade execution requirement if a security-based swap market (or class of markets) is subject to comparable, comprehensive supervision and regulation by the relevant foreign financial regulatory authority or authorities. Is this comparability standard appropriate and sufficiently clear? Should additional detail be provided as to what would and would not satisfy this standard? If so, what additional detail should be provided? Should a different standard be used? If so, what should be the standard and why?
- In making a substituted compliance determination, under proposed Rule 3Ch-2(b)(2) under the Exchange Act, the Commission would consider such factors it determines are appropriate, such as the factors enumerated in proposed Rule 3Ch-2(b)(2) under the Exchange Act. Are these factors appropriate to such a determination? Are the enumerated factors too broad? Too narrow? Please explain. Should certain of these factors not be considered or should certain additional factors be enumerated in the proposed rule?

- As discussed above, in making a substituted compliance determination, the Commission would focus on the similarity of regulatory objectives in addition to the presence or absence of similar rules. Is this holistic approach to making a substituted compliance determination appropriate? Why or why not? If not, what approach should the Commission take and why?
- As discussed above, the Commission preliminarily believes that the factors relevant to the Commission's substituted compliance determination for mandatory trade execution purposes would not necessarily be the same as the factors that the Commission would find relevant to a comparability determination for purposes of an exemption from registration as a security-based swap execution facility. The Commission generally solicits comments on the appropriateness of distinguishing the two determinations. Should the Commission consider the same factors in making a substituted compliance determination for mandatory trade execution and a comparability determination with respect to an exemption from registration as a security-based swap execution facility? If not, what factors would be relevant and appropriate to both determinations? Please describe. What factors would only be relevant or appropriate to a substituted compliance determination for mandatory trade execution or a comparability determination for an exemption from registration as a security-based swap execution facility, respectively? Please describe.
- Under proposed Rule 3Ch-2(c) under the Exchange Act, one or more security-based swap markets may file an application with the Commission to request that the Commission make a substituted compliance determination with respect to the mandatory trade execution requirement. Should persons other than security-based

swap markets be permitted to file such substituted compliance applications? Why or why not? If so, what other types of persons should be permitted to file such applications? Please explain.

- What would be the market impact of proposed Rule 3Ch-2? How would the application of the proposed rule affect the competitiveness of U.S. entities in the global marketplace (both in the United States as well as in foreign jurisdictions)? Would the proposed rule place any market participants at a competitive disadvantage or advantage? If so, please explain. Would the proposed rule be a more general burden on competition? If so, please explain. What other measures should the Commission consider to implement the proposed approach? What would be the market impacts and competitiveness effects of alternatives to the proposed approach discussed in this release?

XII. Antifraud Authority

The provisions of the proposed rules and interpretive guidance, discussed above, relate solely to the applicability of the registration and mandatory reporting, clearing, and trade execution requirements under Title VII. The proposed rules and interpretive guidance do not limit the cross-border reach of the antifraud or other provisions of the federal securities laws to these entities.

In Section 929P(b) of the Dodd-Frank Act, Congress added provisions to the federal securities laws confirming the Commission's broad cross-border antifraud authority. Congress enacted Section 929P(b) in response to the Supreme Court's decision in Morrison v. National Australia Bank,¹¹⁶⁷ which created uncertainty about the Commission's cross-border enforcement authority under the antifraud provisions of the federal securities laws. Prior to Morrison, the federal courts of appeals for nearly four decades had construed the antifraud provisions to reach cross-border securities frauds when the fraud either involved significant conduct within the United States causing injury to overseas investors, or had substantial foreseeable effects on investors or markets within the United States.¹¹⁶⁸ With respect to the Commission's enforcement authority, Section 929P(b) codified the court of appeals' prior interpretation both as to the scope of the antifraud provisions' cross-border reach and the nature of the inquiry as one of subject-matter jurisdiction.¹¹⁶⁹

¹¹⁶⁷ See 130 S. Ct. 2869, 2888 (2010) (holding in a Section 10(b) class action that "it is ... only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which §10(b) applies").

¹¹⁶⁸ See, e.g., Schoenbaum v. Firstbrook, 405 F.2d 200, 206 (2d Cir. 1968), modified on other grounds, 405 F.2d 215 (1968) (en banc).

¹¹⁶⁹ See 156 Cong. Rec. H5237 (daily ed. June 30, 2010) (statement of Rep. Kanjorski, author of Section 929P(b)) ("In the case of Morrison v. National Australia Bank, the Supreme

Specifically, the Commission’s antifraud enforcement authority under Section 17(a) of the Securities Act and the antifraud provisions of the Exchange Act—including Sections 9(j) and 10(b)—extends to “(1) conduct within the United States that constitutes significant steps in furtherance of [the antifraud violation], even if the securities transaction occurs outside the United States and involves only foreign investors,” and “(2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.”¹¹⁷⁰ Similarly, the Commission’s enforcement authority under Section 206 of the Investment Advisers Act applies broadly to reach “(1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the violation is committed by a foreign adviser and involves only foreign investors,” and “(2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.”¹¹⁷¹

The Commission’s broad antifraud enforcement authority reflects the strong interest of the United States in applying the antifraud provisions to cross-border frauds that implicate U.S.

Court last week held that section 10(b) of the Exchange Act applies only to transactions in securities listed on United States exchanges and transactions in other securities that occur in the United States. In this case, the Court also said that it was applying a presumption against extraterritoriality. This bill’s provisions concerning extraterritoriality, however, are intended to rebut that presumption by clearly indicating that Congress intends extraterritorial application in cases brought by the SEC or the Justice Department. Thus, the purpose of the language of section 929P(b) of the bill is to make clear that in actions and proceedings brought by the SEC or the Justice Department, the specified provisions of the Securities Act, the Exchange Act and the Investment Advisers Act may have extraterritorial application, and that extraterritorial application is appropriate, irrespective of whether the securities are traded on a domestic exchange or the transactions occur in the United States, when the conduct within the United States is significant or when conduct outside the United States has a foreseeable substantial effect within the United States.”). See also 156 Cong. Rec. S5915-16 (daily ed. July 15, 2010) (statement of Senator Reed).

¹¹⁷⁰ Section 22 of the Securities Act, 15 U.S.C. § 77v(a); Section 27 of the Exchange Act, 15 U.S.C. § 78aa.

¹¹⁷¹ Section 214 of the Investment Advisers Act, 15 U.S.C. § 80b-14.

territory, U.S. markets, U.S. investors or other U.S. market participants, or other U.S. interests.¹¹⁷² Doing so is necessary to ensure honest securities markets and high ethical standards in the U.S. securities industry, and thereby to promote confidence in our securities markets among both domestic and foreign investors. Cross-border application of the antifraud provisions is also critical for the protection of U.S. investors from securities frauds executed outside of the United States, but that threaten to produce, foreseeably do produce, or were otherwise intended to produce effects upon U.S. markets, U.S. investors or other U.S. market participants, or other U.S. interests.

¹¹⁷² See generally Restatement (Third) of Foreign Relations Law of the United States § 402 (1987), stating that “the United States has authority to prescribe law with respect to ... conduct that, wholly or in substantial part, takes place within its territory; the status of persons, or interests in things, present within its territory” and “conduct outside its territory that has or is intended to have substantial effect within its territory”).

XIII. General Request for Comment

A. General Comments

In responding to the specific requests for comment above, interested persons are encouraged to provide supporting data and analysis and, when appropriate, suggest modifications to proposed rule text. Responses that are supported by data and analysis provide great assistance to the Commission in considering the practicality and effectiveness of proposed new requirements as well as assessing the benefits and costs of proposed requirements. In addition, commenters are encouraged to identify in their responses a specific request for comment by indicating the section number of the release.

The Commission also seeks comment on the proposals as a whole. In particular, the Commission seeks comment on the following questions:

- How would the proposals integrate with provisions in other Titles and Subtitles of the Dodd-Frank Act and any domestic or global regulations or proposed regulations under those other Titles and Subtitles of the Dodd-Frank Act? For example, the Commission invites comment on how certain aspects of the proposals, such as registration and regulation of foreign security-based swap dealers and major security-based swap participants, and application of the transaction-level requirements, would integrate with regulation of systemically important financial institutions in Title I of the Dodd-Frank Act, regulation of registered broker-dealers and investment advisers, regulation of bank holding companies in the Bank Holding Company Act, and regulation of global systemically important financial institutions in other jurisdictions.
- For what aspects of the proposal should the Commission consider invoking our authority under Section 30(c) of the Exchange Act to prevent evasion? Please

explain.

B. Consistency with CFTC's Cross-Border Approach

The CFTC has proposed interpretative guidance and a policy statement describing the cross-border application of certain swaps provisions of the CEA that were enacted by Title VII, and the CFTC's regulations promulgated thereunder.¹¹⁷³ Specifically, the proposal addresses the registration requirement for swap dealers and major swap participants that are not U.S. persons, the application of Title VII requirements appurtenant to such registered entities, and the application of the clearing, trade execution, and certain reporting provisions under the CEA to cross-border swap transactions involving counterparties that are not swap dealers or major swap participants.

Understanding that the Commission and the CFTC regulate different products, participants, and markets, and have different statutory authority, and thus, appropriately may take different approaches to various issues, we nevertheless are guided by the objective of establishing consistent and comparable requirements to U.S. market participants. Accordingly, we request comments generally on (i) the impact of any differences between the Commission and CFTC approaches to the application of Title VII to cross-border activities, including the application of registration requirements and the substantive requirements of Title VII, (ii) whether the Commission's proposed application of Title VII in the cross-border context should

¹¹⁷³ The CFTC's guidance interprets Section 2(i) of the Commodity Exchange Act ("CEA"), as revised by Section 722(d) of the Dodd-Frank Act. Section 2(i) provides that Title VII's provisions relating to swaps, "(including any rule prescribed or regulation promulgated under that Act), shall not apply to activities outside the United States unless those activities—(1) have a direct and significant connection with activities in, or effect on, commerce of the United States; or (2) contravene such rules or regulations as the Commission may prescribe or promulgate as are necessary or appropriate to prevent the evasion of any provision of this Act that was enacted by the [Dodd-Frank Act]."

be modified to conform to the proposals made by the CFTC, and (iii) whether any cross-border interpretations proposed by the CFTC, but not proposed by the Commission (whether as interpretations or rules), should be adopted by the Commission.

XIV. Paperwork Reduction Act

A. Introduction

The Paperwork Reduction Act of 1995 (“PRA”)¹¹⁷⁴ imposes certain requirements on Federal agencies in connection with their conducting or sponsoring any “collection of information.”¹¹⁷⁵ An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. In addition, 44 U.S.C. 3507(a)(1)(D) provides that before adopting (or revising) a collection of information requirement, an agency must, among other things, publish a notice in the Federal Register stating that the agency has submitted the proposed collection of information to the Office of Management and Budget (“OMB”) and setting forth certain required information, including: (1) a title for the collection of information; (2) a summary of the collection of information; (3) a brief description of the need for the information and the proposed use of the information; (4) a description of the likely respondents and proposed frequency of response to the collection of information; (5) an estimate of the paperwork burden that shall result from the collection of information; and (6) notice that comments may be submitted to the agency and director of OMB.¹¹⁷⁶

¹¹⁷⁴ 44 U.S.C. 3501 *et seq.*

¹¹⁷⁵ 44 U.S.C. 3502(3).

¹¹⁷⁶ 44 U.S.C. 3507(a)(1)(D) (internal formatting omitted); see also 5 CFR § 1320.5(a)(1)(iv).

Certain provisions of proposed Rule 3a71-3, proposed Rule 3a71-5, proposed Rule 3Ch-2, re-proposed Forms SBSE, SBSE-A, and SBSE-BD, proposed Rule 18a-4, and re-proposed Rules 242.900 through 242.911 of Regulation SBSR contain “collection of information requirements” within the meaning of the PRA. Accordingly, the Commission is submitting these requirements to OMB for review in accordance with 44 U.S.C. 3507 and 5 CFR § 1320.11. The title of these collections are [“Registration Rules for Security-Based Swap Entities,” “Disclosures by Certain Foreign Security-Based Swap Dealers and Major Security-Based Swap Participants,” “Reliance on Counterparty Representations Regarding Activity Within the United States,” “Requests for Cross-Border Substituted Compliance Determinations,” and “Reporting and Dissemination of Security-Based Swap Information.”] We are applying for OMB Control Numbers for the collections listed above in accordance with 44 U.S.C. 3507(j) and 5 CFR § 1320.13.

B. Re-proposal of Form SBSE, Form SBSE-A, and Form SBSE-BD

1. Summary of Collection of Information

On October 24, 2011, the Commission proposed Rules 15Fb1-1 through 15Fb6-1 and Forms SBSE, SBSE-A, SBSE-BD, SBSE-C, and SBSE-W to facilitate registration of, certification by, and withdrawal of SBS Entities, as required by Section 15F of the Exchange Act.¹¹⁷⁷ In light of the Commission’s proposed rules regarding substituted compliance, the Commission is re-proposing Forms SBSE, SBSE-A, and SBSE-BD to add three questions to Form SBSE and Form SBSE-A, one question to Form SBSE-BD, and to amend Schedule F to

¹¹⁷⁷ See Registration Proposing Release, 76 FR 65784.

those Forms as described in more detail below.¹¹⁷⁸ The Commission is not proposing to amend any of the other Forms, or any of the rules, proposed in the Registration Proposing Release. The burden estimates described below are designed to update our burden estimates for proposed Forms SBSE and SBSE-A to account for the revisions we are proposing to those two re-proposed forms. For information regarding the other burdens associated with proposed Rules 15Fb1-1 through 15Fb6-1 and Forms SBSE, SBSE-A, SBSE-BD, SBSE-C, and SBSE-W, please refer to the Registration Proposing Release.¹¹⁷⁹

Pursuant to paragraph (a) of proposed Rule 15Fb2-1, each SBS Entity would be required to file an application to register with the Commission.¹¹⁸⁰ The Commission sought to reduce burdens and costs associated with the application process by providing alternate registration forms for certain types of SBS Entities (including Forms SBSE-A and SBSE-BD). Each SBS Entity would only need to research, complete, and file one of the proposed Forms.

Proposed Rule 15Fb2-3 would require that SBS Entities promptly amend their applications if they find that the information contained therein has become inaccurate.¹¹⁸¹ While SBS Entities may need to update their Forms periodically, each firm would only need to amend that aspect of the Form that has become inaccurate.

¹¹⁷⁸ See Proposed Rule 3a71-5(c) under the Exchange Act; see also Section III.C, *supra*. The Commission is not proposing any changes to Form SBSE-BD, Form SBSE-C, or Form SBSE-W.

¹¹⁷⁹ See Registration Proposing Release, 76 FR at 65807.

¹¹⁸⁰ *Id.* at 65820-21.

¹¹⁸¹ *Id.* at 65822.

Proposed Rules 15Fb1-1 through 15Fb6-1 and re-proposed Forms SBSE, SBSE-A, and SBSE-BD would require that each respondent retain certain records and information for three years.¹¹⁸²

2. Proposed Use of Information

Re-proposed Forms SBSE, SBSE-A, and SBSE-BD, as applicable, are applications through which SBS Entities would register with the Commission. Information collected through these re-proposed Forms SBSE, SBSE-A, and SBSE-BD would allow the Commission to determine whether applicants meet the standards for registration, including provisions regarding substituted compliance, and would help the Commission to fulfill our oversight responsibilities.

The Commission intends to make the information collected pursuant to proposed Rule 15Fb1-1 through 15Fb6-1 and re-proposed Forms SBSE, SBSE-A, and SBSE-BD public.

Any collections of information required pursuant to proposed Rules 15Fb1-1 through 15Fb6-1 and re-proposed Forms SBSE, SBSE-A, and SBSE-BD would be mandatory to permit the Commission to determine whether applicants meet the standards for registration, and to fulfill our oversight responsibilities.

3. Respondents

In the Intermediary Definitions Adopting Release and Registration Proposing Release the Commission staff estimated, based on data obtained from DTCC and conversations with market participants, that approximately 50 entities would fit within the definition of a security-based swap dealer.¹¹⁸³ The Commission staff also estimated in the Registration Proposing Release that

¹¹⁸² See *id.* at 65821.

¹¹⁸³ See Intermediary Definitions Adopting Release, 77 FR at 30725; Registration Proposing Release, 76 FR at 65808; see also Trade Acknowledgment Proposing Release, 76 FR at 3868; External Business Conduct Standards Proposing Release, 76 FR at 46668.

up to five entities fit within the definition of major security-based swap participant.¹¹⁸⁴ The Commission sought comment on the reasonableness and accuracy of our estimates, but received no comments regarding these estimates.

Of the 55 entities likely to be either security-based swap dealers or major security-based swap participants, the Commission staff estimates that 18 entities will be registered foreign security-based swap dealers, as defined in proposed Rule 3a71-3(a)(3) or foreign major security-based swap participants, as defined in proposed Rule 3a67-10(a)(1) (collectively, “Nonresident SBS Entities”).¹¹⁸⁵ The Commission staff expects that most registered Nonresident SBS Entities will be based in one of a small number of non-U.S. jurisdictions; however, the Commission understands that approximately 19 jurisdictions are in the process of developing regulations and/or infrastructure for swaps, security-based swaps, and other OTC derivatives.¹¹⁸⁶ In addition, the Commission anticipates that a small number of security-based swap market participants could be based in other jurisdictions. As a result, the Commission staff estimate that cross-border issues may arise in connection with security-based swap market participants and transactions in and between up to 30 discrete jurisdictions.¹¹⁸⁷

¹¹⁸⁴ See Registration Proposing Release, 76 FR at 65821; see also Intermediary Definitions Proposing Release, 75 FR at 80209 n.188; Trade Acknowledgment Proposing Release, 76 FR at 3868; External Business Conduct Standards Proposing Release, 76 FR at 46668.

¹¹⁸⁵ While the Commission estimated in the Registration Proposing Release that 22 non-resident entities would likely register with the Commission as SBS Entities (see Registration Proposing Release, 76 FR at 65807-12), our estimates have changed based on the staff’s further analysis of the cross-border issues and likely respondents.

¹¹⁸⁶ See FSB Progress Report April 2013. These 19 jurisdictions are: Argentina, Australia, Brazil, Canada, China, the European Union, Hong Kong, India, Indonesia, Japan, Mexico, the Republic of Korea, Russia, Saudi Arabia, Singapore, South Africa, Switzerland, Turkey, and the United States. See also notes 35 and 36, *supra*.

¹¹⁸⁷ The European Union is regulating OTC derivatives reporting, clearing, and bilateral risk management on a pan-European basis. Accordingly, the Commission may treat the

In the Registration Proposing Release, Commission staff further estimated, based on its experience and understanding of the swap and security-based swap markets that of the firms that may register as SBS Entities, approximately 35 also will register with the CFTC as swap dealers or major swap participants, approximately 16 would also be registered with the Commission as broker-dealers, and approximately 4 firms not otherwise registered with the CFTC or the Commission will seek to become an SBS Entity.¹¹⁸⁸ The Commission sought comment on the reasonableness and accuracy of our estimates, but has received no comments regarding these estimates to date.

The Commission again seeks comment on the reasonableness and accuracy of our estimates as to the number of participants in the security-based swap market that will be required to register with the Commission through the use of re-proposed Forms SBSE, SBSE-A, and SBSE-BD, including the number of registered foreign security-based swap dealers. The Commission also seeks comment on our estimate of the number of jurisdictions with security-based swap participants or infrastructure that may transact with or be used by U.S.-regulated entities.

4. Total Initial and Annual Reporting and Recordkeeping Burdens

(a) Paperwork Burden Associated With Filing Application Forms

As indicated in the Registration Proposing Release, proposed Rule 15Fb2-1 would require that each SBS Entity register with the Commission by filing an application on Form

European Union as a single jurisdiction for purposes of certain cross-border issues. However, the Commission notes that there may be variation between individual European countries even within this consolidated approach (e.g., privacy laws or supervisory oversight or enforcement may differ in various European countries).

¹¹⁸⁸ See External Business Conduct Standards Proposing Release, 76 FR at 46668.

SBSE, Form SBSE-A, or Form SBSE-BD, as appropriate. Each SBS Entity would only need to research, complete, and file one form.¹¹⁸⁹ The Commission is not proposing to amend this rule, but is re-proposing the Forms that would be filed to facilitate registration. The modifications to re-proposed Forms SBSE, SBSE-A, and SBSE-BD would add two questions to Form SBSE and Form SBSE-A, add one question to all three Forms, and would modify Schedule F to all the Forms.

The Commission staff does not believe that the addition of these questions will significantly increase the burdens associated with the filing of these forms. In the Registration Proposing Release, the Commission staff estimated that approximately four firms would need to register using proposed Form SBSE and that the total paperwork burden associated with filing each proposed Form SBSE (including the Schedules¹¹⁹⁰ and disclosure reporting pages (“DRPs”)) would be approximately 40 hours for each firm that would use this Form.¹¹⁹¹ The Commission staff acknowledged that it is likely that the time necessary to complete these forms would vary depending on the nature and complexity of an entity’s business.¹¹⁹² The Commission staff believes, based on its experience with Form BD, that the addition of three new questions to Form SBSE included in the re-proposed Form SBSE could increase the amount of time it would take for an SBS Entity to complete this form by about two hours. Thus, the Commission staff estimates that it would take all 4 SBS Entities who may use Form SBSE to register with the

¹¹⁸⁹ Id. at 65820-21.

¹¹⁹⁰ Except Schedule G (which we are not proposing to amend) and Schedule F (which is dealt with separately below).

¹¹⁹¹ Registration Proposing Release, 76 FR at 65808.

¹¹⁹² Id.

Commission a total of approximately 168 hours to register using re-proposed Form SBSE.¹¹⁹³

As each SBS Entity would only be required to file 1 complete form once, this would be a one-time burden associated with registration¹¹⁹⁴ (the burden associated with amendments to the form are discussed below).

As proposed, Form SBSE-A contains fewer questions than the proposed Form SBSE and is available only to firms that are (or will be) familiar with the registration process because they are registered (or will be registering) with the CFTC as a swap dealer or major swap participant. As a result, the Commission staff estimated in the Registration Proposing Release that it would take SBS Entities filing proposed Form SBSE-A approximately 80% of the time that it would take for an unregistered entity to research, complete, and file proposed Form SBSE (including the Schedules and DRPs).¹¹⁹⁵ Accordingly, the Commission staff estimated that the total paperwork burden associated with filing each proposed Form SBSE-A across 35 firms would be approximately 32 hours for each firm who would use this Form.¹¹⁹⁶ The Commission staff

¹¹⁹³ 42 hours * 4 firms = 168 hours.

¹¹⁹⁴ While it is possible that another firm may choose to register as an SBS Entity at some future time, we presently estimate for purposes of this PRA that no additional firms will register in the next three years. This is because the Dodd-Frank Act imposed regulation on an existing industry and we expect those industry participants presently engaged in this business to either register when the rules become effective or decide to withdraw from this business. In addition, the costs to start-up an SBS Entity will likely be high, which may discourage new entrants. Finally, as the Commission has not yet promulgated rules to register or regulate these entities and we have no experience with the registration trends of SBS Entities over time, any estimate regarding the number of possible new entrants over time would be speculative.

¹¹⁹⁵ Registration Proposing Release, 76 FR at 65808. This estimate assumes that an entity that is familiar with an analogous registration process would require approximately 20% less time to complete Form SBSE-A compared to an unregistered entity completing Form SBSE.

¹¹⁹⁶ Id.

believes, based on its experience with Form BD, that the addition of 3 new questions to Form SBSE-A included in the re-proposed Form SBSE-A could increase the amount of time it would take for an SBS Entity to complete this form by about two hours. Thus, the Commission staff estimates that it would take all 35 SBS Entities who may use Form SBSE-A to register with the Commission a total of approximately 1,190 hours to register using re-proposed Form SBSE-A.¹¹⁹⁷ As each SBS Entity would only be required to file 1 complete form once, this would be a one-time burden associated with registration¹¹⁹⁸ (the burden associated with amendments to the form are discussed below).

As proposed, Form SBSE-BD contains fewer questions than both the proposed Form SBSE and Form SBSE-A and is available only to firms that are (or will be) familiar with the registration process because they are registered (or will be registering) with the Commission as a broker-dealer. As a result, the Commission staff estimated in the Registration Proposing Release that it would take SBS Entities filing proposed Form SBSE-BD approximately 25% of the time that it would take for an unregistered entity to research, complete, and file proposed Form SBSE (including the Schedules and DRPs).¹¹⁹⁹ Accordingly, the Commission staff estimated that the total paperwork burden associated with filing each proposed Form SBSE-BD across sixteen firms would be approximately ten hours for each firm that would use this Form.¹²⁰⁰ The Commission staff believes, based on its experience with Form BD, that the addition of one new question to Form SBSE-BD included in the re-proposed Form SBSE-BD could increase the

¹¹⁹⁷ 34 hours * 35 firms = 1,190 hours.

¹¹⁹⁸ See note 1194, *supra*.

¹¹⁹⁹ Registration Proposing Release, 76 FR at 65808.

¹²⁰⁰ *Id.*

amount of time it would take for an SBS Entity to complete this form by about one half hour. Thus, the Commission staff estimates that it would take all sixteen SBS Entities that may use Form SBSE-BD to register with the Commission a total of approximately 168 hours to register using re-proposed Form SBSE-BD.¹²⁰¹ As each SBS Entity would only be required to file one complete form once, this would be a one-time burden associated with registration¹²⁰² (the burden associated with amendments to the form are discussed below).

(b) Paperwork Burden Associated With Amending Schedule F

As indicated in the Registration Proposing Release, proposed Rule 15Fb2-4 would require that each nonresident SBS Entity file an additional schedule (Schedule F) with its Form SBSE, Form SBSE-A, or Form SBSE-BD, as appropriate, to identify its U.S. agent for service of process and to certify that the firm can, as a matter of law, provide the Commission with access to its books and records and can, as a matter of law, submit to onsite inspection and examination by the Commission.¹²⁰³ The Commission is not proposing to amend this rule, but is re-proposing Schedule F. The modifications to re-proposed Schedule F would divide Schedule F into two sections. Section I would include the full text of the originally proposed Schedule F. Section II would elicit additional information regarding foreign regulators with which the applicant may be registered or that otherwise have jurisdiction over the applicant.

The Commission staff does not believe that the addition of this new Section would significantly increase the burdens associated with the filing of Schedule F because information regarding the foreign regulators with jurisdiction over the entity should be known and readily

¹²⁰¹ 10½ hours * 16 firms = 168 hours.

¹²⁰² See note 1194, *supra*.

¹²⁰³ Registration Proposing Release, 76 FR at 65822.

available. In the Registration Proposing Release, the Commission staff estimated, based on its experience relative to the securities industry and Form BD, that the average time necessary for each Nonresident SBS Entity to complete and file Schedule F would be approximately one hour.¹²⁰⁴ The Commission staff believes, based on its experience with Form BD, that adding the new section to Schedule F could increase the amount of time it would take for an SBS Entity to complete this form by about one-half hour. Thus, the Commission staff estimates that it would take all 18 Non-resident SBS Entities who may use Schedule F to register with the Commission a total of approximately 27 hours complete Schedule F.¹²⁰⁵ As each SBS Entity would only be required to file Schedule F once, this would be a one-time burden associated with registration¹²⁰⁶ (the burden associated with amendments to the form – including the schedules – are discussed below).

(c) Paperwork Burden Associated With Amending Application Forms

As discussed in the Registration Proposing Release, proposed Rule 15Fb2-3 would require that SBS Entities amend their applications if they find that information contained in a prior filing has become inaccurate.¹²⁰⁷ The Commission is not proposing to amend this rule; however, the addition of three questions to proposed Forms SBSE and SBSE-A, the addition of one question to Form SBSE-BD, and the revisions to Schedule F would provide additional information that could change over time and require amendment of these Forms. As indicated in the Registration Proposing Release, the staff does not expect that the requirement to amend these

¹²⁰⁴ Id. at 65811.

¹²⁰⁵ 1½ hours * 18 Non-resident SBS Entities = 27 hours.

¹²⁰⁶ See note 1194, supra.

¹²⁰⁷ Registration Proposing Release, 76 FR at 65809.

Forms would impose a significant burden because each SBS Entity would have already completed proposed Forms SBSE, SBSE-A, or SBSE-BD, as applicable, and would only need to amend those aspects of the Forms that may become inaccurate. In the Registration Proposing Release, the staff estimated, based on the number of amendments the Commission receives annually on Form BD, that each SBS Entity would file approximately three amendments annually.¹²⁰⁸ The staff also estimated in the Registration Proposing Release that, although the time necessary to file an amendment to proposed Forms SBSE, SBSE-A, or SBSE-BD, as applicable, would vary depending on the nature and complexity of the amendment, the Commission staff estimates the average total annual burden associated with amending proposed Forms SBSE, SBSE-A, and SBSE-BD would be approximately one hour for each amendment.¹²⁰⁹ The staff does not believe the addition of 3 questions included in each of re-proposed Forms SBSE and SBSE-A, the addition of one new question to re-proposed Form SBSE-BD, and the revision of Schedule F would increase either the number of amendments each firm may be required to file or the amount of time it would take for a firm to file an amendment.¹²¹⁰ Thus we continue to believe the annual burden for associated with Rule 15Fb2-3 would be approximately 165 hours.¹²¹¹

¹²⁰⁸ Id.

¹²⁰⁹ Id.

¹²¹⁰ The estimated number of amendments filed by each SBS Entity in the Registration Proposing Release was based on the number of amendments to Form BD filed annually by broker-dealers. See Registration Proposing Release, 76 FR at 65809. We did not base our estimate on a comparison of the number or content of the questions, because we have no data upon which to base that type of estimate and we believe it would be too speculative.

¹²¹¹ 1 hour * 3 amendments per year * 55 SBS Entities = 165 hours.

As indicated in the Registration Proposing Release, the collection of information relating to Forms SBSE, SBSE-A, SBSE-BD and Schedule F would be mandatory, and the Commission intends to make the information provided through these forms and Schedule F public.

5. Request for Comment on Paperwork Burden Estimates

The Commission seeks comment on the paperwork burdens associated with proposed Rules 15Fb1-1 through 15Fb6-1 and re-proposed Forms SBSE, SBSE-A, and SBSE-BD, as applicable.

- What burdens, if any, would respondents incur with respect to system design, programming, expanding systems capacity, and establishing compliance programs to comply with re-proposed Forms SBSE, SBSE-A, and SBSE-BD, as applicable?
- Is it likely that SBS Entities would complete re-proposed Forms SBSE, SBSE-A, and SBSE-BD, as applicable, themselves or is it more likely that they would obtain assistance in completing these forms from some outside entity (e.g., outside counsel)? If an SBS Entity obtains assistance in completing the forms from an outside entity, what type of entity may be utilized and what may the relative costs to employ such an entity for this purpose be?
- The Commission estimates that no new SBS Entities will register after year 1 because the security-based swap market is already well-developed and because of potentially significant barriers to entry for prospective market participants. Is this estimate accurate? If not, how many SBS Entities will register after year 1?
- Would there be different or additional paperwork burdens associated with the collection of information under re-proposed Forms SBSE, SBSE-A, and SBSE-BD, as applicable, that a respondent does not currently undertake in the ordinary course of

business that the Commission has failed to identify? If so, please both describe and quantify any additional burden(s).

C. Disclosures by Certain Foreign Security-Based Swap Dealers and Major Security-Based Swap Participants

1. Summary of Collection of Information

A registered foreign security-based swap dealer must disclose to any counterparty that is a U.S. person, prior to accepting any assets from, for, or on behalf of such counterparty to margin, guarantee, or secure a security-based swap, the potential treatment of any assets segregated by the registered foreign security-based swap dealer pursuant to Exchange Act Section 3E in an insolvency proceeding under U.S. bankruptcy law and any applicable foreign insolvency laws.¹²¹²

2. Proposed Use of Information

The required disclosures would give U.S. counterparties important information regarding the treatment of their collateral and the role of U.S. and foreign law in any insolvency proceedings. The Commission preliminarily believes that this information would promote transparency and help counterparties in fully assessing the risks associated with their transactions. Moreover, without these disclosures, the Commission preliminarily believes that there is a risk that some U.S. counterparties could assume, incorrectly, that any security-based swap transaction with a registered foreign security-based swap dealer or major security-based swap participant is automatically and fully subject to Title VII and other potentially applicable U.S. laws (e.g., U.S. bankruptcy law). These disclosures would make such confusion less likely

¹²¹² Proposed Rule 18a-4(e)(3) under the Exchange Act.

and, as a result, help to ensure that U.S. counterparties conduct appropriate due diligence when transacting with foreign security-based swap dealers.

The disclosures required pursuant to proposed Rule 18a-4(e) under the Exchange Act would be mandatory for all registered foreign security-based swap dealers that enter into security-based swaps with counterparties that are not U.S. persons.

Registered foreign security-based swap dealers are required to disclose information pursuant to proposed Rule 18a-4(e) to their U.S. counterparties. Therefore, the Commission would not typically receive confidential information as a result of this collection of information. However, to the extent that the Commission receives confidential information pursuant to proposed Rule 18a-4(e) through our examination and oversight program, an investigation, or some other means, such information would be kept confidential, subject to the provisions of applicable law.¹²¹³

3. Respondents

As discussed in Section B.3 above, the Commission staff estimates that there will be 18 Nonresident SBS Entities and that most of these firms will be based in one of a small number of non-U.S. jurisdictions.¹²¹⁴ In addition, the Commission staff anticipates that a small number of security-based swap market participants could be based in other jurisdictions.¹²¹⁵ As a result, the

¹²¹³ See, e.g., 5 U.S.C. 552 (Exemption 4 of the Freedom of Information Act provides an exemption for “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. 552(b)(4). Exemption 8 of the Freedom of Information Act provides an exemption for matters that are “contained in or related to examination, operating, or condition reports prepare by, or on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.” 5 U.S.C. 552(b)(8)).

¹²¹⁴ See Section XIV.B.3, *supra*.

¹²¹⁵ *Id.*

Commission staff estimates that cross-border issues may arise in connection with security-based swap market participants and transactions in and between up to 30 discrete jurisdictions.¹²¹⁶

4. Total Initial and Annual Reporting Burdens

The estimates in this section reflect the Commission's experience with burden estimates for similar disclosure requirements and our staff's discussions with market participants.¹²¹⁷ Pursuant to proposed Rule 18a-4(e)(3), registered foreign security-based swap dealers would be required to provide disclosures to their U.S. counterparties. The Commission believes that, in most cases, these disclosures would be made through amendments to the registered foreign security-based swap dealer's existing trading documentation. Because these disclosures relate to new regulatory requirements, the Commission anticipates that all registered foreign security-based swap dealers would need to incorporate new language into their existing trading documentation with U.S. counterparties. Disclosure of the potential treatment of segregated assets in insolvency proceedings under U.S. bankruptcy law and foreign insolvency laws pursuant to proposed Rule 18a-4(e)(3) would likely vary depending on the counterparty's jurisdiction. Accordingly, the Commission expects that these disclosures often may need to be tailored to address the particular circumstances of each trading relationship. However, in some cases, trade associations or industry working groups may be able to develop standard disclosure forms that can be adopted by foreign security-based swap dealers with little or no modification.

¹²¹⁶ Id.

¹²¹⁷ See External Business Conduct Standards Proposing Release, 76 FR at 42396; see also Disclosure of Accounting Policies for Derivative Financial Instruments and Derivative Commodity Instruments and Disclosure of Quantitative and Qualitative Information about Market Risk Inherent in Derivative Financial Instruments, Other Financial Instruments and Derivative Commodity Instruments, Securities Act Release No. 7386 (Jan. 31, 1997), 62 FR 6044 (Feb. 10, 1997).

In either case, the paperwork burden associated with developing new disclosure language and incorporating this language into a registered foreign security-based swap dealer's trading documentation will vary depending on: (1) the number of non-U.S. counterparties with whom the registered foreign security-based swap dealer trades; (2) the number of jurisdictions represented by the registered foreign security-based swap dealer's counterparties; and (3) the availability of standardized disclosure language. To the extent standardized disclosures become available, the paperwork burden on registered foreign security-based swap dealers would be limited to amending existing trading documentation to incorporate the standardized disclosures. Conversely, more time will be necessary where a greater degree of customization is required to develop the required disclosures and incorporate this language into existing documentation.

The Commission estimates the maximum total paperwork burden associated with developing new disclosure language would be approximately 2,700 hours, plus \$2.1 million for all 18 foreign security-based swap dealers and 30 jurisdictions.¹²¹⁸ This estimate assumes little or no reliance on standardized disclosure language. In addition, the Commission estimates the total paperwork burden associated with incorporating new disclosure language into each foreign security-based swap dealer's trading documentation would be approximately 9,000 hours for all 18 foreign security-based swap dealers.¹²¹⁹

¹²¹⁸ The Commission staff estimates the total paperwork burden associated with developing new disclosure language for each foreign security-based swap dealer would be 150 hours of in-house counsel time (5 hours of in-house counsel time * up to 30 potential jurisdictions), plus \$120,000 (based on 10 hours of outside counsel time * \$400 * up to 30 potential jurisdictions).

¹²¹⁹ The Commission staff estimate that the average Nonresident SBS Entity will have 50 active non-U.S. counterparties. Accordingly, the Commission staff estimates the cost of incorporating new disclosure language into the trading documentation of an average foreign security-based swap participant would be 500 hours per foreign security-based

The Commission expects that the majority of the paperwork burden associated with the new disclosure requirements will be experienced during the first year as language is developed, whether by individual foreign security-based swap dealers or through collaborative efforts, and trading documentation is amended. After the new disclosure language is developed and incorporated into trading documentation, the Commission believes that the ongoing burden associated with proposed Rule 18a-4(e) would be limited to periodically updating the disclosures to reflect changes in the applicable law or to incorporate new jurisdictions with security-based swap counterparties. The Commission estimates that this ongoing paperwork burden would not exceed 100 hours per year for all 18 foreign security-based swap dealers (approximately 5 hours per foreign security-based swap dealer per year).

5. Request for Comment on Paperwork Burden Estimates

The Commission seeks comment on the paperwork burdens associated with proposed Rule 18a-4(e).

- Is it likely that foreign security-based swap participants will have more than 50 active non-U.S. counterparties?
- In how many discrete jurisdictions do most foreign security-based swap participants have counterparties?
- In general, is the proposed collection of information necessary for the proper performance of the Commission's functions? Will the proposed collection of information have practical utility to the Commission and Commission staff?

swap participant (based on 10 hours of in-house counsel time * 50 active non-U.S. counterparties).

- Are the Commission's estimates of the paperwork burden of the proposed collection accurate?
- Is the Commission's estimate of the expected ongoing burden associated with updating and maintaining the disclosures in proposed Rule 18a-4(e) reasonable? If not, why?
- Are there ways for the Commission to enhance the quality, utility, and clarity of the information collected? Are there ways for the Commission to minimize the paperwork burden of the proposed collection of information (e.g., through the use of automated collection techniques or other forms of information technology)? If so, please describe.

D. Reliance on Counterparty Representations Regarding Activity Within the United States

1. Summary of Collection of Information

When determining whether a security-based swap is a "transaction conducted through a foreign branch," as defined in proposed Rule 3a71-3(a)(4)(i) under the Exchange Act, a party may rely on a representation from its counterparty indicating that "no person within the United States is directly involved in soliciting, negotiating, or executing" the transaction on behalf of the counterparty, unless the party receiving the representation knows that it is not accurate.¹²²⁰

Similarly, when determining whether a security-based swap is a "transaction conducted within the United States," as defined in proposed Rule 3a71-3(a)(5)(i), a party may rely on a representation from its counterparty indicating that the transaction "is not solicited, negotiated,

¹²²⁰ Proposed Rule 3a71-3(a)(4)(ii) under the Exchange Act.

executed, or booked within the United States by or on behalf of such counterparty,” unless the party receiving the representation knows that it is not accurate.¹²²¹

2. Proposed Use of Information

Under the proposed rules, certain Title VII requirements would not apply to cross-border transactions conducted through a foreign branch of a U.S. bank where the foreign branch is the named counterparty to the transaction and no person within the United States is directly involved in soliciting, negotiating, or executing the security-based swap on behalf of the foreign branch or its counterparty. For example, under the proposed rules, a non-U.S. person would not be required to count toward the de minimis threshold in the security-based swap dealer definition its transactions with the foreign branch of a U.S. bank. Conversely, certain Title VII requirements would apply to transactions conducted within the United States, even if both counterparties are non-U.S. persons.

The Commission acknowledges that verifying whether a security-based swap falls within the definition of a “transaction conducted through a foreign branch” or a “transaction conducted within the United States” could require significant due diligence. The Commission preliminarily believes that the representations described in proposed Rule 3a71-3(a)(4)(ii) and proposed Rule 3a71-3(a)(5)(ii) would mitigate the operational difficulties that could arise in connection with investigating the activities of a counterparty to ensure compliance with the corresponding rules.

The representations described in proposed Rule 3a71-3(a)(4)(ii) and proposed Rule 3a71-3(a)(5)(ii) would be provided voluntarily by the counterparties to certain security-based swap transactions; therefore, the Commission would not typically receive confidential information as a result of this collection of information. However, to the extent that the Commission receives

¹²²¹ Proposed Rule 3a71-3(a)(5)(ii) under the Exchange Act.

confidential information described in proposed Rule 3a71-3(a)(4)(ii) or proposed Rule 3a71-3(a)(5)(iii) through our examination and oversight program, an investigation, or some other means, such information would be kept confidential, subject to the provisions of applicable law.¹²²²

3. Respondents

Based on our understanding of the OTC derivatives markets, including the size of the market, the number of counterparties that are active in the market, and how market participants currently structure security-based swap transactions, the Commission preliminarily estimates that 50 entities may include a representation that a security-based swap is a “transaction conducted through a foreign branch” in their trading relationship documentation (e.g., the schedule to a master agreement). Similarly, the Commission preliminarily estimates that 250 entities may include a representation that a security-based swap is not a “transaction conducted within the United States.”¹²²³

4. Total Initial and Annual Reporting and Recordkeeping Burdens

The estimates in this section reflect the Commission’s experience with burden estimates for similar requirements and our discussions with market participants.¹²²⁴ Pursuant to proposed Rules 3a71-3(a)(4)(ii) and 3a71-3(a)(5)(iii), parties to security-based swaps would be permitted

¹²²² See, e.g., 5 U.S.C. 552 (Exemption 4 of the Freedom of Information Act provides an exemption for “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. 552(b)(4). Exemption 8 of the Freedom of Information Act provides an exemption for matters that are “contained in or related to examination, operating, or condition reports prepared by, or on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.” 5 U.S.C. 552(b)(8)).

¹²²³ For a more detailed discussion, see discussion of the number of market participants that may be reporting counterparties in Section XIV.F.2.d.ii, *infra*.

¹²²⁴ See External Business Conduct Standards Proposing Release, 76 FR at 42396.

to rely on certain representations from their counterparties when determining whether a transaction falls within the definition of a “transaction conducted through a foreign branch” or a “transaction conducted within the United States.” The Commission preliminarily believes that, in most cases, these representations would be made through amendments to the parties’ existing trading documentation (e.g., the schedule to a master agreement).¹²²⁵ Because these representations relate to new regulatory requirements, the Commission anticipates that counterparties may elect to develop and incorporate these representations in trading documentation soon after the effective date of the Commission’s security-based swap regulations, rather than incorporating specific language on a transactional basis. The Commission believes that parties would be able to adopt, where appropriate, standardized language across all of their security-based swap trading relationships. This language may be developed by individual firms or through a combination of trade associations and industry working groups.

The Commission estimates the maximum total paperwork burden associated with developing new representations would be, for each entity, no more than approximately three to five hours, plus between \$1,200 and \$2,000 for the services of outside professionals, for a maximum of approximately 1,500 hours and \$600,000 across all security-based swap counterparties.¹²²⁶ This estimate assumes little or no reliance on standardized disclosure

¹²²⁵ The Commission preliminarily believes that because trading relationship documentation is established between two counterparties, whether one or both counterparties is able to represent that it is entering into a “transaction conducted through a foreign branch” or a “transaction conducted within the United States” would not change on a transaction-by-transaction basis and, therefore, such representations would generally be made in the schedule to a master agreement, rather than in individual confirmations.

¹²²⁶ Because the representations will be short and based on facts that should be known and readily available to the entity making the representation, the Commission staff estimates

language. In addition, the Commission estimates the total paperwork burden associated with incorporating new disclosure language would be no more than approximately three to five hours per counterparty, for a maximum of approximately 15,000 hours across all applicable security-based swap counterparties.¹²²⁷

The Commission expects that the majority of the burden associated with the new disclosure requirements will be experienced during the first year as language is developed and trading documentation is amended. After the new representations are developed and incorporated into trading documentation, the Commission believes that the annual paperwork burden associated with this requirement would be no more than approximately 10 hours per counterparty for verifying representations with existing counterparties and onboarding new counterparties, for a maximum of approximately 3,000 hours across all applicable security-based swap counterparties.¹²²⁸

the paperwork burden associated with developing new representations would range from three to five hours of in-house counsel time, plus \$1,200 to 2,000 for the services of outside professionals (based on three to five hours of outside counsel time * \$400). The Commission staff estimates that the burden for counterparties that only require one of the two representations would be at the lower end of this range.

¹²²⁷ The Commission staff estimates that the average security-based swap counterparty (including security-based swap dealers and buy-side counterparties) will have no more than 10 active counterparties able to represent that a transaction is conducted through a foreign branch, not conducted within the United States, or both. Accordingly, the Commission staff estimates the total burden associated with incorporating new disclosure language into the relevant trading documentation would be 15,000 hours (based on five hours per counterparty * 300 respondents * 10 applicable security-based swap counterparties).

¹²²⁸ The Commission staff estimates that this burden would consist of 10 hours of in-house counsel time for each security-based swap market participant.

5. Request for Comment on Paperwork Burden Estimates

The Commission seeks comment on the paperwork burdens associated with proposed Rules 3a71-3(a)(4)(ii) and 3a71-3(a)(5)(ii).

- Are the Commission's estimates of the numbers of market participants that will include a representation that a security-based swap is a "transaction conducted through a foreign branch" or not a "transaction conducted within the United States" reasonable? Are these estimates likely to become incorrect as a result of changes in the OTC derivatives markets? If so, how?
- Is the Commission's estimate that a representation that a security-based swap is a "transaction conducted through a foreign branch" or not a "transaction conducted within the United States" will be made in a schedule to a master agreement rather than in individual confirmations reasonable? If not, where will these representations be made?
- In general, is the proposed collection of information necessary for the proper performance of the Commission's functions? Will the proposed collection of information have practical utility to the Commission and Commission staff?
- Are the Commission's estimates of the paperwork burden of the proposed collection accurate?
- Is the Commission's estimate of the cost of outside counsel reasonable?
- Are there ways for the Commission to enhance the quality, utility, and clarity of the information collected? Are there ways for the Commission to minimize the paperwork burden of the proposed collection of information (e.g., through the use of

automated collection techniques or other forms of information technology)? If so, please describe.

E. Requests for Cross-Border Substituted Compliance Determinations

1. Summary of Collection of Information

The Commission is proposing to apply various Title VII provisions to SBS Entities and related market infrastructures on a cross-border basis. However, as noted above, the Commission would permit, in appropriate circumstances, compliance with comparable regulatory requirements in a foreign jurisdiction to substitute for compliance with certain requirements of the Exchange Act, and rules and regulations thereunder, relating to security-based swaps. As proposed, the Commission would consider making substituted compliance determinations with respect to four distinct categories of rules: (1) requirements applicable to registered foreign security-based swap dealers under Section 15F of the Exchange Act and the rules and regulations thereunder pursuant to proposed Rule 3a71-5(c) under the Exchange Act; (2) requirements relating to regulatory reporting and public dissemination of security-based swaps pursuant to re-proposed Rule 242.908(c)(2)(ii) of Regulation SBSR; (3) requirements relating to clearing for security-based swaps;¹²²⁹ and (4) requirements relating to trade execution for security-based swaps pursuant to proposed Rule 3Ch-2(c) under the Exchange Act.

Requests for a substituted compliance determination would come from registered foreign security-based swap dealers or other persons.¹²³⁰ However, under the proposed rules noted above, the Commission would make any determinations with respect to particular requirements

¹²²⁹ The Commission is not proposing a rule regarding the substituted compliance process for the mandatory clearing requirement. See Section XI.E, supra.

¹²³⁰ As discussed above, the Commission is not proposing to permit substituted compliance for registered foreign major security-based swap participants.

on a class or jurisdiction basis, depending on the specific characteristics of the foreign regulatory regime, rather than on a firm-by-firm basis.¹²³¹ Once the Commission has made a substituted compliance determination, other similarly situated market participants would be able to rely on that determination to the extent applicable and subject to any corresponding conditions. Accordingly, the Commission expects that requests for a substituted compliance determination would be made only where an entity seeks to rely on particular requirements of a foreign jurisdiction that have not previously been the subject of a substituted compliance request. The Commission believes that this approach would substantially reduce the burden associated with requesting substituted compliance determinations for an entity that relies on a previously issued determination, and, therefore, complying with the Commission's rules and regulations more generally.¹²³²

When applying for a substituted compliance determination under one of the proposed rules, an entity would be required to provide the Commission with any supporting documentation as the Commission may request, in addition to information that the entity believes is necessary for the Commission to make a determination, such as information demonstrating that the requirements applied in the foreign jurisdiction are comparable to the Commission's and describing the methods used by relevant foreign financial regulatory authorities to monitor compliance with those requirements. A foreign security-based swap dealer (or a group of foreign security-based swap dealers of the same class) seeking a substituted compliance

¹²³¹ Requests for substituted compliance determinations under proposed Rule 3a71-5(c) under the Exchange Act must come directly from a foreign security-based swap dealer (or a group of such dealers); foreign financial regulatory authorities may not request such a determination. Proposed Rule 3a71-5(c) under the Exchange Act.

¹²³² The paperwork burden associated with requesting substituted compliance determinations is discussed in detail in Section XIV.E.4 below.

determination with respect to one or more requirements in Section 15F of the Exchange Act and the rules and regulations thereunder also must demonstrate that it is directly supervised by the foreign financial regulatory authority (with respect to requirements relating to the applicable requirements in Section 15F of the Exchange Act) and provide the certification and opinion of counsel, as described in Rule 15Fb2-4(c).¹²³³

The Commission is proposing that applicants follow the procedures set forth in proposed Rule 0-13 under the Exchange Act for an application requesting a substituted compliance determination.¹²³⁴

2. Proposed Use of Information

The Commission would use the information collected pursuant to proposed Rule 3a71-5(c) under the Exchange Act to evaluate requests for substituted compliance with respect to requirements applicable to registered security-based swap dealers (or classes thereof) under Section 15F of the Exchange Act and the rules and regulations thereunder. The Commission would use the information collected pursuant to re-proposed Rule 242.908(c)(2)(ii) of Regulation SBSR to evaluate requests for substituted compliance with regard to requirements applicable to regulatory reporting and public dissemination of security-based swaps. Finally, the Commission would use the information collected pursuant to proposed Rule 3Ch-2(c) under the Exchange Act to evaluate requests for substituted compliance with regard to requirements relating to trade execution for security-based swaps.

¹²³³ Proposed Rule 3a71-5(c); see also Section XIV.B, supra.

¹²³⁴ See Section XI.B, supra (discussing proposed Rule 0-13 under the Exchange Act).

The requests for substituted compliance determinations in proposed Rule 3a71-5, re-proposed Rule 242.908(c)(2)(ii), and proposed Rule 3Ch-2(c) under the Exchange Act are required when a person seeks a substituted compliance determination.

The Commission intends to make public the information submitted to it pursuant to any request for a substituted compliance determination under proposed Rules 3a71-(5), re-proposed Rule 242.908(c)(2)(ii), and proposed Rule 3Ch-2(c) under the Exchange Act, including supporting documentation provided by the requesting party.

3. Respondents

As discussed in Section XIV.B.3 above, the Commission preliminarily estimates that there will be 22 Nonresident SBS Entities and that most of these firms will be based in one of a small number of non-U.S. jurisdictions.¹²³⁵ In addition, the Commission staff anticipates that a small number of security-based swap market participants could be based in other jurisdictions.¹²³⁶ As a result, the Commission staff estimates that requests for substituted compliance determinations may arise in connection with security-based swap market participants and transactions in and between up to 30 discrete jurisdictions.¹²³⁷

4. Total Initial and Annual Reporting and Recordkeeping Burdens

Proposed Rule 3a71-5 under the Exchange Act, proposed Rule 3Ch-2(c) under the Exchange Act, and re-proposed Rule 242.908(c)(2)(ii) of Regulation SBSR would require submission of certain information to the Commission to the extent entities elect to request a

¹²³⁵ See Section XIV.B.3, *supra*.

¹²³⁶ *Id.*

¹²³⁷ *Id.*

substituted compliance determination with respect to one or more areas where the Commission has issued rules under the Dodd-Frank Act.

(a) Proposed Rule 3a71-5

Proposed Rule 3a71-5(c) under the Exchange Act would apply only to registered foreign security-based swap dealers (or classes thereof) that request a substituted compliance determination with regard to one or more requirements in Section 15F of the Exchange Act and the rules and regulations thereunder. As discussed above, in connection with each request, a registered foreign security-based swap dealer would be required to provide the Commission with any supporting documentation it believes necessary for the Commission to make a determination that its foreign financial regulatory authority or authorities have established requirements that are comparable to requirements otherwise applicable to a U.S. security-based swap dealer. Among other things, a foreign security-based swap dealer would be required to provide the Commission with information regarding applicable requirements established by the foreign financial regulatory authority or authorities, as well as the methods used by the foreign financial regulatory authority or authorities to monitor compliance with these rules. All such supporting documentation would be made public.¹²³⁸

A registered foreign security-based swap dealer would not be required to make a request with respect to rules and regulations of a foreign jurisdiction that have previously been the subject of a substituted compliance determination. Given that only a relatively small number of jurisdictions have substantial OTC derivatives markets and are implementing OTC derivatives reforms, the Commission estimates that it will receive no more than 50 requests for substituted

¹²³⁸ See Section XIV.B, supra.

compliance determinations pursuant to proposed Rule 3a71-5.¹²³⁹ This estimate accounts for the fact that the Commission may receive multiple requests from each jurisdiction (e.g., separate requests from bank and nonbank entities).¹²⁴⁰ Because the Commission preliminarily expects that registered foreign security-based swap dealers will seek to rely on substituted compliance upon registration, the Commission believes that these requests will be made during the first year following the effective date.¹²⁴¹

The Commission staff estimates that the total paperwork burden associated with preparing and submitting a request for a substituted compliance determination pursuant to proposed Rule 3a71-5(c) would be approximately 4,000 hours, plus \$4 million for the services of outside professionals for all 50 requests.¹²⁴² These total costs include all collection burdens associated with the proposed rule, including burdens associated with analyzing and comparing

¹²³⁹ See Section XIV.B.3, *supra*.

¹²⁴⁰ The Commission preliminarily estimates that it may receive requests for substituted compliance determinations for up to 30 different jurisdictions. In approximately two-thirds of those jurisdictions, the Commission preliminarily estimates that it may receive requests from more than one type of market participant (e.g., a bank and a non-bank security-based swap dealer).

¹²⁴¹ For purposes of this estimate, the Commission has assumed that proposed Rules 3a71-3 and 3a71-5 will be implemented contemporaneously. If the Commission requires registration before certain substituted compliance determinations are finalized, the Commission staff may receive requests for substituted compliance determinations pursuant to proposed Rule 3a71-5 after the first year following the effective date.

¹²⁴² The Commission staff estimates that the paperwork burden associated with making each substituted compliance request pursuant to proposed Rule 3a71-5 would be approximately 80 hours of in-house counsel time, plus \$80,000 for the services of outside professionals (based on 200 hours of outside counsel time * \$400). The paperwork burden associated with the opinion of counsel referenced in proposed Rule 3a71-5 is discussed in the Registration Proposing Release in connection with proposed Rule 15Fb2-4(c). See Registration Proposing Release, 76 FR at 65811.

the regulatory requirements of the foreign jurisdiction with the requirements in Section 15F of the Exchange Act and the rules and regulations thereunder.

(b) Re-proposed Rule 242.908(c)(2)(ii) of Regulation SBSR

Re-proposed Rule 242.908(c)(2)(ii) of Regulation SBSR would apply to any person that requests a substituted compliance determination with respect to a foreign jurisdiction's rules regarding regulatory reporting and public dissemination of security-based swaps. In connection with each request, the requesting party would be required to provide the Commission with any supporting documentation that the entity believes is necessary for the Commission to make a determination, including information demonstrating that the requirements applied in the foreign jurisdiction are comparable to the Commission's and describing the methods used by relevant foreign financial regulatory authorities to monitor compliance with those requirements.¹²⁴³ The Commission preliminarily estimates that the total paperwork burden associated with submitting a request for a substituted compliance determination with respect to regulatory reporting and public dissemination would be approximately 1,120 hours, plus \$1,120,000 for 14 requests.¹²⁴⁴ This estimate includes all collection burdens associated with the request, including burdens associated with analyzing whether the regulatory requirements of the foreign jurisdiction impose a comparable, comprehensive system for the regulatory reporting and public dissemination of all security-based swaps. Furthermore, this estimate assumes that each request would be prepared de novo, without any benefit of prior work on related subjects. The Commission notes, however,

¹²⁴³ See Section VIII.C, *supra*.

¹²⁴⁴ The Commission staff estimates that the paperwork burden associated with making a substituted compliance request pursuant to re-proposed Rule 242.908(c)(2)(ii) of Regulation SBSR would be approximately 80 of in-house counsel time, plus \$80,000 for the services of outside professionals (based on 200 hours of outside counsel time * \$400).

that as such requests are developed with respect to certain jurisdictions, the cost of preparing such requests with respect to other foreign jurisdictions could decrease.

Because only a small number of jurisdictions have substantial OTC derivatives markets and are implementing OTC derivatives reforms, the Commission preliminarily estimates that it would receive approximately 10 requests in the first year for substituted compliance determinations with respect to regulatory reporting and public dissemination pursuant to re-proposed Rule 242.908(c)(2)(ii) of Regulation SBSR. Assuming 10 requests in the first year, the Commission staff estimates an aggregated burden for the first year would be 800 hours, plus \$800,000 for the services of outside professionals.¹²⁴⁵ The Commission preliminarily estimates that it would receive 2 requests for substituted compliance determinations pursuant to re-proposed Rule 242.908(c)(2)(ii) in each subsequent year. Assuming the same approximate time and costs, the aggregate burden for each year following the first year would be up to 160 hours of company time and \$160,000 for the services of outside professionals.¹²⁴⁶

(c) Proposed Rule 3Ch-2(c)

Finally, proposed Rule 3Ch-2(c) under the Exchange Act would apply to any person who requests a substituted compliance determination with respect to the rules of a foreign jurisdiction relating to trade execution for security-based swaps. In connection with each request, the

¹²⁴⁵ The Commission staff estimates that the paperwork burden associated with making a substituted compliance request pursuant to re-proposed Rule 242.908(c)(2)(ii) of Regulation SBSR would be up to approximately 800 hours (80 hours of in-house counsel time * 10 respondents), plus \$800,000 for the services of outside professionals (based on 200 hours of outside counsel time * \$400 * 10 respondents).

¹²⁴⁶ The Commission staff estimates that the paperwork burden associated with making a substituted compliance request pursuant to re-proposed Rule 242.908(c)(2)(ii) of Regulation SBSR would be up to approximately 160 hours (80 hours of in-house counsel time * two respondents) + plus \$160,000 for the services of outside professionals (based on 200 hours of outside counsel time * \$400 * two respondents).

requesting party would be required to provide the Commission with certain supporting information.¹²⁴⁷ However, a person would not be required to make a request with respect to rules and regulations of a foreign jurisdiction related to trade execution that have previously been the subject of a substituted compliance determination. As discussed above, because only a relatively small number of jurisdictions have substantial OTC derivatives markets and are implementing OTC derivatives reforms, the Commission estimates that it will receive no more than 25 requests for substituted compliance determinations pursuant to proposed Rule 3Ch-2(c).¹²⁴⁸ Moreover, because market participants will likely seek to rely on substituted compliance upon registration, the Commission believes that many of these requests will be made during the first year following the effective date. However, because some jurisdictions may not fully implement their trade execution requirements in the immediate future, the Commission staff estimates that it may receive requests for substituted compliance determinations pursuant to proposed Rule 3Ch-2(c) for several years following the effective date.¹²⁴⁹

The Commission preliminarily believes that the total paperwork burden associated with preparing and submitting a request for a substituted compliance determination pursuant to proposed Rule 3Ch-2(c) will be 2,000 hours and associated costs of \$2 million for the services of

¹²⁴⁷ See Section XIV.E.1, *supra*.

¹²⁴⁸ See Section XIV.B.3, *supra*. The Commission notes that it may not receive requests for substituted compliance determinations pursuant to proposed Rule 3Ch-2(c) from every jurisdiction will have a security-based swap market that is potentially eligible for such a determination.

¹²⁴⁹ The Commission notes that certain jurisdictions may implement OTC derivatives reforms incrementally. Accordingly, the Commission's estimates in this section are based on the assumption that certain jurisdictions may implement trade execution requirements later in time than other OTC derivatives reforms (*e.g.*, dealer regulation, reporting, and mandatory clearing requirements).

outside professionals, including attorneys.¹²⁵⁰ These total costs include all collection burdens associated with the proposed rule, including burdens associated with analyzing whether the regulatory requirements of the foreign jurisdiction impose a comparable, comprehensive system for the regulatory reporting and public dissemination of all security-based swaps.

Assuming 17 requests in the first year, the Commission staff estimates an aggregated burden for the first year would be 1,360 hours, plus approximately \$1,360,000 for the services of outside professionals.¹²⁵¹ The Commission preliminarily estimates that it would receive 4 requests for substituted compliance determinations pursuant to re-proposed Rule 3Ch-2(c) in each subsequent year. Assuming the same approximate time and costs, the aggregate burden for each year following the first year would be up to 320 hours of company time and \$320,000 for the services of outside professionals.¹²⁵²

Request for Comment

¹²⁵⁰ The Commission staff estimates that the paperwork burden associated with making each substituted compliance request pursuant to proposed Rule 3Ch-2(c) would be approximately 2,000 hours of in-house counsel time (80 hours * 25 respondents), plus \$2,000,000 for the services of outside professionals (based on 200 hours of outside counsel time * \$400 * 25 respondents).

¹²⁵¹ The Commission staff estimates that the paperwork burden associated with making a substituted compliance request pursuant to proposed Rule 3Ch-2(c) would be up to approximately 1,360 hours (80 hours of in-house counsel time * 17 respondents), plus approximately \$1,360,000 for the services of outside professionals (based on 200 hours of outside counsel time * \$400 * 17 respondents).

¹²⁵² The Commission staff estimates that the paperwork burden associated with making a substituted compliance request pursuant to proposed Rule 3Ch-2(c) would be up to approximately 320 hours (80 hours of in-house counsel time * four respondents), plus \$320,000 for the services of outside professionals (based on 200 hours of outside counsel time * \$400 * four respondents).

The Commission seeks comment on the paperwork burdens associated with proposed Rules 3a71-5(c) under the Exchange Act, re-proposed Rule 242.908(c)(2)(ii) of Regulation SBSR, and proposed Rule 3Ch-2(c) under the Exchange Act.

- Are the Commission's estimates of the numbers of substituted compliance determinations reasonable? Are these estimates likely to become incorrect as a result of changes in the OTC derivatives markets? If so, how?
- In general, is the proposed collection of information necessary for the proper performance of the Commission's functions? Will the proposed collection of information have practical utility to the Commission and Commission staff?
- Are the Commission's estimates of the paperwork burden of the proposed collection accurate? Is the Commission's estimate of the cost of outside counsel reasonable?
- Are there ways for the Commission to enhance the quality, utility, and clarity of the information collected? Are there ways for the Commission to minimize the paperwork burden of the proposed collection of information (e.g., through the use of automated collection techniques or other forms of information technology)? If so, please describe.

F. Reporting and Dissemination of Security-Based Swap Information

1. Background on the Re-proposed Rules

The Commission is re-proposing Regulation SBSR to address a number of cross-border issues, many of which were discussed in comments to the cross-border provisions of the initial proposal. The changes made between the proposed and re-proposed versions of Regulation SBSR, and the Commission's preliminary estimates of the paperwork burdens that would result from re-proposed Regulation SBSR, are described below.

2. Modifications to “Reporting Party” Rules

Proposed Rule 901 of Regulation SBSR, as amended herein, contains “collection of information requirements” within the meaning of the PRA. The title of this collection is “Rule 901 – Reporting Obligations.”

(a) Summary of Collection of Information

Under Rule 901(a), as initially proposed, a non-U.S. person security-based swap dealer or major security-based swap participant might incur the duty to report only if the security-based swap was executed in the United States or through any means of interstate commerce, or was cleared through a clearing agency having its principal place of business in the United States. If a non-U.S. person security-based swap dealer or major security-based swap participant entered into a swap with an unregistered U.S. person, the unregistered U.S. person would have incurred the duty to report. As set forth in more detail above, the Commission is re-proposing Rule 901(a) to provide that a security-based swap dealer or major security-based swap participant that is not a U.S. person could incur the duty to report a security-based swap in various cases. Re-proposed Rule 901(a) now provides as follows:

- If both sides of the security-based swap include a security-based swap dealer, the sides would be required to select the reporting side.
- If only one side of the security-based swap includes a security-based swap dealer, that side would be the reporting side.
- If both sides of the security-based swap include a major security-based swap participant, the sides would be required to select the reporting side.
- If one side of the security-based swap includes a major security-based swap participant and the other side includes neither a security-based swap dealer nor a

major security-based swap participant, the side including the major security-based swap participant would be reporting side.

- If neither side of the security-based swap includes a security-based swap dealer or major security-based swap participant: (i) If both sides include a U.S. person or neither side includes a U.S. person, the sides would be required to select the reporting side; and (ii) If only one side includes a U.S. person, that side would be the reporting side.

In addition, in re-proposed Rule 901, the Commission is proposing certain technical or conforming changes. Specifically, the Commission is proposing certain changes to proposed Rules 901(c) and 901(d), which address the data elements to be reported to a registered SDR, to reflect that, under the re-proposal, certain security-based swaps might be subject to regulatory reporting but not public dissemination. Rule 901(c), as initially proposed, was titled “Information to be reported in real time.” Under Rule 902(a), as originally proposed, the registered SDR to which such information was reported would be required to promptly disseminate to the public such information (except in the case of a block trade). However, the Commission preliminarily believes that, if a security-based swap were subject to regulatory reporting but not public dissemination, there is no need to require that information about the security-based swap be reported in real time. Therefore, the introductory language to Rule 901(c) is being re-proposed as follows: “For any security-based swap that must be publicly disseminated pursuant to §§ 242.902 and 242.908 and for which it is the reporting side, the reporting side shall report the following information in real time. If a security-based swap is required by §§ 242.901 and 242.908 to be reported but not publicly disseminated, the reporting side shall report the following information no later than the time that the reporting side is

required to comply with paragraph (d) of this section.” In addition, re-proposed Rule 901(c) would be retitled “Primary trade information,” thus eliminating the reference to real-time reporting—since the information required to be reported under Rule 901(c) would no longer in all cases be required to be reported in real time. Furthermore, re-proposed Rule 901(d) would be retitled “Secondary trade information.”

Rule 901(c)(10), as initially proposed, provided that the following data element would be required to be reported: “If both counterparties to a security-based swap are security-based swap dealers, an indication to that effect.” As the Commission stated in the Regulation SBSR Proposing Release: “Prices of transactions involving a dealer and a non-dealer are typically ‘all-in’ prices that include a mark-up or mark-down, while interdealer transaction prices typically do not. Thus, the Commission believes that requiring an indication of whether a [security-based swap] was an interdealer transaction or a transaction between a dealer and a non-dealer counterparty would enhance transparency by allowing market participants to more accurately assess the reported price for a [security-based swap].”¹²⁵³ The Commission is now re-proposing Rule 901(c)(10) as follows: “If both sides of the security-based swap include a security-based swap dealer, an indication to that effect.” The re-proposed rule clarifies that a security-based swap dealer might be a direct or indirect counterparty to a security-based swap. The Commission continues to believe that, in either case, a security-based swap having a security-based swap dealer on each side could, all other things being equal, be priced differently than a security-based swap having a security-based swap dealer on only one side. Therefore, the Commission continues to believe that the existence of a security-based swap dealer on each side should be reported to the registered SDR and made known to the public.

¹²⁵³ See Regulation SBSR Proposing Release, 75 FR at 75214.

The Commission is re-proposing Rule 901(d)(1)(ii) to require reporting of the broker ID, desk ID, and trader ID, as applicable, only of the direct counterparty on the reporting side. The Commission preliminarily believes that it would be impractical and unnecessary to report such data elements with respect to an indirect counterparty, as such elements might not be applicable to an indirect counterparty. Similarly, Rule 901(d)(1)(iii) is being re-proposed to require reporting of a description of the terms and contingencies of the payment streams only of each direct counterparty to the other. The Commission is including the word “direct” to avoid extending Rule 901(d)(1)(iii) to indirect counterparty relationships, where payments might not (except in unusual circumstances) flow to or from an indirect counterparty.

Proposed Rule 901(e) set forth provisions for reporting life cycle events of a security-based swap. The basic approach set forth in proposed Rule 901(e) was that, generally, the original reporting party of the initial transaction would have the responsibility to report any subsequent life cycle event; this approach remains unchanged in the re-proposal. However, if the life cycle event were an assignment or novation that removed the original reporting party, either the new counterparty or the original counterparty would have to be the reporting party. Further, Rule 901(e), as initially proposed, would provide that the new counterparty would be the reporting party if it were a U.S. person, whereas the other counterparty would be the new reporting party if the new counterparty were not a U.S. person.

However, as discussed above, the Commission is now proposing the concept of a “reporting side,” which would include the direct and any indirect counterparty. Further, as discussed above, the Commission is proposing that non-U.S. person security-based swap dealers or major security-based swap participants would, in certain instances, incur a duty to report. Thus, the Commission is re-proposing Rule 901(e) to provide that the duty to report would

switch to the other side only if the new side did not include a U.S. person (as in the originally proposed rule) or a security-based swap dealer or major security-based swap participant (references to which are being added to Rule 901(e)). The Commission preliminarily believes that, if the new side includes a registered person such as a security-based swap dealer or major security-based swap participant, the new side should retain the duty to report. This approach is designed to align reporting duties with the market participants that the Commission preliminarily believes are better suited to carrying them out because non-U.S. security-based swap dealers and major security-based swap participants likely have already taken significant steps to establish and maintain the systems, processes and procedures, and staff resources necessary to report security-based swaps currently.¹²⁵⁴

Aside from some technical changes to the titles of Rules 901(c) and (d) and to the introductory language to Rule 901(c) noted above, the Commission is not proposing to add or delete any data elements from Rules 901(c) and 901(d). Therefore, no revisions to the Commission's paperwork estimates are being made to increase or decrease paperwork burdens because of more or fewer required data elements to be reported. However, other changes to the paperwork burdens initially proposed for Rule 901 are necessitated by the other changes to the proposed rule noted above.

(b) Proposed Use of Information

As described by the Commission in the Regulation SBSR Proposing Release, the security-based swap transaction information required to be reported pursuant to re-proposed Rule 901 would be used by SDRs, market participants, the Commission, and other regulators. The information reported by reporting parties pursuant to re-proposed Rule 901 would be used by

¹²⁵⁴ See note 913 and accompanying text, *supra*; see also 15 U.S.C. 78m-1(a)(3).

SDRs to publicly disseminate real-time reports of security-based swap transactions, as well as to offer a resource for regulators to obtain detailed information about the security-based swap market. Market participants would use the public market data feed, among other things, to assess the current market for security-based swaps and to mark their own positions. The Commission and other regulators would use information about security-based swap transactions reported to and held by SDRs to monitor and assess prudential and systemic risks, as well as to examine for improper behavior and to take enforcement actions, as appropriate.

(c) Respondents

Re-proposed Rule 901(a) would designate which side of a security-based swap transaction would be the reporting side.¹²⁵⁵ In the Regulation SBSR Proposing Release, the Commission stated our preliminary belief that up to 1,000 entities could incur duties to report transactions under proposed Rule 901(a), and that it was reasonable to use the figure of 1,000 respondents for estimating collection of information burdens under the PRA.¹²⁵⁶ As discussed in more detail below, the Commission now preliminarily estimates there would be 300 respondents to re-proposed Rule 901.

In the Regulation SBSR Proposing Release, the Commission noted that proposed Rule 901 would impose certain duties on SDRs. The Commission preliminarily estimated that the number of SDRs would not exceed 10. The Commission continues to believe that it is reasonable to use 10 as an estimate of the number of SDRs for the purpose of estimating collection of information burdens for re-proposed Regulation SBSR.

¹²⁵⁵ See Section VIII.D, *supra* (discussing the use of the term “reporting side”).

¹²⁵⁶ See Regulation SBSR Proposing Release, 75 FR at 75247.

(d) Total Initial and Annual Reporting and Recordkeeping Burdens

i. Baseline Burdens

In the Regulation SBSR Proposing Release, the Commission estimated that respondents would face 3 categories of burdens to comply with proposed Rule 901. First, each entity that would incur a duty to report security-based swap transactions pursuant to Regulation SBSR would have to develop an internal order and trade management system (“OMS”) capable of capturing the relevant transaction information. Second, each reporting party would have to implement a reporting mechanism. Third, each reporting party would have to establish an appropriate compliance program and support for the operation of the OMS and reporting mechanism. In the Regulation SBSR Proposing Release, the Commission preliminarily estimated that the initial, aggregate annualized burden associated with proposed Rule 901 would be 1,438 hours per reporting party—for a total of 1,438,300 hours for all reporting parties—in order to develop an OMS, implement a reporting mechanism, and establish an appropriate compliance program and support system.¹²⁵⁷ The Commission preliminarily estimated that the ongoing aggregate annualized burden associated with proposed Rule 901 would be 731 hours per reporting party, for a total of 731,300 hours for all reporting parties.¹²⁵⁸ The Commission further estimated that the initial aggregate annualized dollar cost burden on reporting parties associated with Rule 901 would be \$201,000 per reporting party, for a total of \$201,000,000 for all reporting parties.¹²⁵⁹

¹²⁵⁷ See *id.* at 75250.

¹²⁵⁸ See *id.*

¹²⁵⁹ See *id.* The Commission notes that the Regulation SBSR Proposing Release incorrectly stated this total as \$301,000 per reporting party. The correct number is \$201,000 per reporting party (\$200,000 + \$1,000).

ii. Re-proposed Burdens

For the reasons discussed above, the Commission now believes that it is appropriate to re-propose those aspects of Regulation SBSR that would set out who must report security-based swaps. First, the Commission is proposing to redefine the counterparties to a security-based swap. Specifically, “counterparty” would be defined as “a direct or indirect counterparty of a security-based swap.” Re-proposed Rule 900 would define “direct counterparty” as “a person that enters directly with another person into a contract that constitutes a security-based swap” and “indirect counterparty” as “a person that guarantees the performance of a direct counterparty to a security-based swap or that otherwise provides recourse to the other side for the failure of the direct counterparty to perform any obligation under the security-based swap.” Second, proposed Rule 900 would revise the term “reporting party” to “reporting side” and would further define “reporting side” as “the side of a security-based swap having the duty to report information in accordance with re-proposed rules 242.900-911 of Regulation SBSR to a registered security-based swap data repository, or if there is no registered security-based swap data repository that would receive the information, to the Commission.” “Side” would be defined as “a direct counterparty and any indirect counterparty that guarantees the direct counterparty’s performance of any obligation under a security-based swap.”

As re-proposed, Rule 901(a) would provide that a security-based swap dealer or major security-based swap participant that is not a U.S. person could incur the duty to report a security-based swap in various cases, as detailed above. The Commission preliminarily believes that no aspect of the re-proposal would significantly affect the burdens that an entity with a duty to report would incur to establish the systems, policies and procedures, and staff resources

necessary to comply with Regulation SBSR. Therefore, the Commission is not revising these initial infrastructure-related burdens on a per-entity basis.

However, the Commission is revising our initial estimate of the total infrastructure-related burdens of re-proposed Rule 901(a) due to a reduction in the estimate of the number of reporting counterparties. In the Regulation SBSR Proposing Release, the Commission stated our preliminary belief that up to 1,000 respondents could be reporting parties under proposed Rule 901(a), and that it was reasonable to use the figure of 1,000 respondents for estimating collection of information burdens under the PRA.¹²⁶⁰ Since issuing the Regulation SBSR Proposing Release, the Commission has obtained additional and more granular data regarding participation in the security-based swap market from DTCC-TIW. These historical data suggest that approximately 30 counterparties—which are likely to be required to register with the Commission as security-based swap dealers—account for the vast majority of recent security-based swap transactions and transaction reports. These data further suggest that there are only a limited number of security-based swap transactions that do not include at least one of these larger counterparties on either side. In other words, the vast majority of recent transactions have included a larger counterparty that reports the transaction currently, and that would likely be required to report a similar transaction in the future.

In addition, the Commission is attempting in re-proposed Regulation SBSR to further align reporting obligations to larger market participants that are better able to bear them. As a result of all of these factors, and to the extent that recent security-based swap market activity may be indicative of future activity, the Commission preliminarily believes that the more

¹²⁶⁰ See Regulation SBSR Proposing Release, 75 FR at 75247. The Commission did not receive any comments related to its preliminary belief that up to 1,000 respondents could be reporting parties under proposed Rule 901(a) of Regulations SBSR.

appropriate estimate of reporting counterparties is 300, 700 fewer than in the original proposal.¹²⁶¹ This revised estimate continues to include some smaller counterparties to security-based swaps that would incur a reporting duty, but many fewer than estimated in the PRA of the initial Regulation SBSR proposal.

As a result of the revision to the number of reporting counterparties, the Commission preliminarily believes that the one-time burdens of Regulation SBSR could decrease by 1,006,600 aggregated hours and \$140,700,000.¹²⁶² In addition, the Commission preliminarily believes that the annual ongoing burden of Regulation SBSR could decrease by 511,700 aggregated hours and \$140,700,000.¹²⁶³ The Commission seeks comment on and data to quantify these potential cost reductions.

¹²⁶¹ The Commission is basing this new estimate on CDS data from the DTCC-TIW, but not from data from data repositories for other security-based swap asset classes, which are not currently available to the Commission. The Commission preliminarily believes that entities that are likely to incur obligations to report security-based swaps in other asset classes are already likely to be reporting CDS transactions to DTCC-TIW. The Commission also preliminarily believes that, to avoid duplicative compliance costs, such entities are likely to leverage their existing infrastructure for reporting CDS transactions to carry out reporting obligations for other asset classes, even though these other asset classes might be booked in different affiliated entities. The Commission preliminarily estimates that these other security-based swap asset classes consist of less than one-fifth of the overall security-based swap market. Therefore, the Commission preliminarily believes that reporting counterparties across all security-based swap asset classes should not exceed the estimate of 300 derived from the DTCC-TIW CDS data. See note 1301, *infra*.

¹²⁶² The Commission estimates: $((1,000 \text{ reporting parties} - 300 \text{ reporting sides}) * 1,438 \text{ hours}) = 1,006,600$ burden reduction for all reporting counterparties. The Commission estimates: $((1,000 \text{ reporting parties} - 300 \text{ reporting sides}) * \$201,000) = \$140,700,000$ burden reduction for all reporting counterparties.

¹²⁶³ The Commission estimates: $((1,000 \text{ reporting parties} - 300 \text{ reporting sides}) * 731 \text{ hours}) = 511,700$ burden reduction for all reporting counterparties. The Commission estimates: $((1,000 \text{ reporting parties} - 300 \text{ reporting sides}) * \$201,000) = \$140,700,000$ burden reduction for all reporting counterparties.

Although re-proposed Rule 901(a) could result in a significant reduction in aggregate costs due to reduction in the number of reporting counterparties that would be required to establish the systems, policies and procedures, and staff resources to carry out the reporting function, the Commission preliminarily believes that there may be a slight increase in burden for certain individual reporting counterparties due to a re-allocation of reportable security-based swap transactions among those reporting counterparties that continue to be covered. Specifically, small unregistered counterparties that may have been required to report a small number of security-based swaps under the original proposal would be less likely to incur the reporting duty under re-proposed Rule 901(a). Thus, the counterparties that would continue to have the reporting duty under re-proposed Rule 901(a), primarily security-based swap dealers and major security-based swap participants, would likely incur the reporting duty for most of these transactions. Consequently, re-proposed Rule 901(a) could result in each reporting counterparty being required to report, on average, a larger percentage of the total security-based swap transactions than envisioned under the original proposal. In the Regulation SBSR Proposing Release, the Commission estimated that, collectively, the reporting parties would spend 77,300 hours reporting specific security-based swap transactions to a registered SDR, as required by proposed Rule 901.¹²⁶⁴ Nonetheless, as explained below, the Commission's estimate of the anticipated number of security-based swap transactions to be reported pursuant to Regulation SBSR is being revised significantly downward.

¹²⁶⁴ See Regulation SBSR Proposing Release, 75 FR 75248-49. In arriving at this figure, the Commission preliminarily estimated that 1,000 reporting parties would be responsible for reporting 15,458,824 security-based swap transactions. The Commission further estimated that each transaction would take 0.005 hours to report for a total burden of 77,300 hours, or 77.3 burden hours per reporting party. The Commission preliminarily believes that the hourly burden of reporting individual security-based swap transactions would not change.

In the Regulation SBSR Proposing Release, the Commission preliminarily estimated that 15.5 million security-based swap transactions per year would be required to be reported.¹²⁶⁵ In addition to revising our estimate of the number of reporting sides from 1,000 to 300, as discussed above, the Commission is now also revising our estimate of the number of reportable security-based swap transactions covered by re-proposed Regulation SBSR, for the following reasons. First, the Commission notes that the Regulation SBSR Proposing Release inadvertently overstated the number of historical security-based swap transactions such that the number of security-based swap transactions based on data available at the time of the Regulation SBSR Proposing Release should have been stated as approximately 2,200,000.¹²⁶⁶ Second, since issuing the Regulation SBSR Proposing Release, the Commission has obtained additional and more granular data regarding participation in the credit default swap market from DTCC-TIW. These more recent data further suggest that the Commission initially overestimated both the number of reporting counterparties and the number of security-based swap transactions that would be reportable to DTCC-TIW. As a result, the Commission now estimates that 300 reporting sides would be required to report approximately 5 million new security-based swaps

¹²⁶⁵ See Regulation SBSR Proposing Release, 75 FR at 75248.

¹²⁶⁶ See *id.* at 75248 nn.182-85 and accompanying text. Specifically, in the SBSR Proposing Release, the Commission misinterpreted weekly CDS volume data as daily volume data. Based on the weekly data available at the time, a more accurate estimate for the number of CDS transactions per year would have been 1,872,000. This number is based on the following: $(36,000 \text{ (estimated CDS transactions per week)} * 52 \text{ (weeks/year)}) = 1,872,000 \text{ CDS transactions/year}$. Based on the Commission's preliminary assumption in the SBSR Proposing Release that CDS transactions represent approximately eight- to nine- tenths of all security-based swap transactions, a more accurate estimate for the number of security-based swap transactions per year would have been 2,202,353. This number was based on the following: $(1,872,000 \text{ (number of CDS transactions per year)} / 0.85) = 2,202,353 \text{ security-based swap transactions/year}$.

and life cycle events (collectively, “reportable events”) under re-proposed Regulation SBSR per year.¹²⁶⁷

The Commission notes that the change in the estimate of the number of reportable events per year since the initial proposal of Regulation SBSR from more than 2,000,000 to approximately 5 million may be due to better and more precise data available from the industry on the scope, size, and composition of the security-based swap market. As a result, and to the extent that the available data regarding recent security-based swap market activity may be indicative of future activity, the Commission now preliminarily believes that a more appropriate estimate of the number of reportable events would be approximately 5 million per year.

The Commission preliminarily believes that, once a respondent’s reporting infrastructure and compliance systems are in place, the burden of reporting a single reportable event would be de minimis when compared to the burdens of establishing the reporting infrastructure and compliance systems.¹²⁶⁸ The Commission now preliminarily estimates that re-proposed Regulation SBSR would result in total burden hours of 5,080 attributable to the reporting to

¹²⁶⁷ The Commission now estimates that single-name CDS transactions for 2012 were approximately 4 million transactions. The data studied by the Commission cover CDS transactions, which the Commission continues to preliminarily believe account for approximately eight- to nine-tenths of the security-based swap market. As a result, and to the extent that recent security-based swap market activity may be indicative of future activity, the Commission preliminarily estimates that 300 reporting sides will have the duty to report 5 million security-based swap transactions (i.e., $4,000,000/0.82 = 4,878,049$ reportable events). See also note 1641, *infra*.

¹²⁶⁸ In the Regulation SBSR Proposing Release, the Commission preliminarily estimated that reporting specific security-based swap transactions to a registered SDR would impose an annual aggregate cost of approximately \$5,400,000. See Regulation SBSR Proposing Release, 75 FR 75265. The Commission further estimated that Regulation SBSR would impose an aggregate total first-year cost of approximately \$1,039,000,000 and an ongoing annualized aggregate cost of approximately \$703,000,000. See *id.* at 75280.

security-based swap data repositories all reportable events over the course of a year.¹²⁶⁹ The Commission preliminarily believes that many reportable events would be reported through electronic means and that the ratio of electronic reporting to manual reporting is likely to increase over time. The Commission further preliminarily believes that the bulk of the burden hours estimated above would be attributable to manually reported transactions. Thus, reporting counterparties that capture and report transactions electronically would likely incur bear fewer burden hours than those reporting counterparties that capture and report transactions manually.

iii. Summary of Re-proposed Burdens

Based on the foregoing, the Commission preliminarily estimates that re-proposed Regulation SBSR would impose an estimated total first-year burden of approximately 1,444 hours¹²⁷⁰ per reporting counterparty for a total first-year burden of 433,200 hours for all reporting counterparties.¹²⁷¹ The Commission preliminarily estimates that re-proposed Regulation SBSR would impose ongoing annualized aggregate burdens of approximately 737 hours¹²⁷² per reporting counterparty for a total aggregate annualized cost of 221,100 hours for all reporting

¹²⁶⁹ The Commission estimates: $((5 \text{ million} * 0.005) / (300 \text{ reporting sides})) = 83.3$ burden hours per reporting side or 25,000 total burden hours. Since the number of respondents would decline from 1,000 reporting parties to 300 reporting sides, the transaction based reporting burden would be concentrated among fewer respondents.

¹²⁷⁰ The Commission derived its estimate from the following: $(1,438 \text{ (Regulation SBSR Proposing Release estimated total burden)} - 77.3 \text{ (Regulation SBSR Proposing Release estimated transaction reporting burden)} + 83.3 \text{ (revised estimated transaction reporting burden)}) = 1,444$ hours. See Section XIV.F.2(d)ii.

¹²⁷¹ The Commission derived its estimate from the following: $(1,444 * 300 \text{ reporting counterparties}) = 433,200$ hours.

¹²⁷² The Commission derived its estimate from the following: $(731 \text{ (Regulation SBSR Proposing Release estimated total burden)} - 77.3 \text{ (Regulation SBSR Proposing Release estimated transaction reporting burden)} + 83.3 \text{ (revised estimated transaction reporting burden)}) = 737$ hours. See Section XIV.F.2(d)ii, *infra*.

counterparties.¹²⁷³ The Commission further estimates that re-proposed Regulation SBSR would impose initial and ongoing annualized dollar cost burdens of \$201,000 per reporting counterparty, for total aggregate initial and ongoing annualized dollar cost burdens of \$60,300,000.¹²⁷⁴

The Commission does not preliminarily believe that the proposed changes to Regulation SBSR would have any material impact on SDRs not discussed in Regulation SBSR, as originally proposed. The changes discussed herein do not impact the previously estimated burdens for SDRs. The Commission preliminarily believes that re-proposed Rule SBSR would not result in the registration of additional SDRs, and would not require existing SDRs to bear the burden of connecting to additional reporting counterparties. SDRs would already be required under proposed Regulation SBSR to have established mechanisms to receive and process security-based swap transaction reports, and none of the costs identified in the Regulation SBSR Proposing Release relating to SDRs were dependent upon the number of security-based swap transactions or the number of reporting counterparties.

iv. Recordkeeping Requirements

Concurrently with proposed Regulation SBSR, the Commission issued the SDR Proposing Release, which includes (among other things) recordkeeping requirements for security-based swap transaction data received by a registered SDR pursuant to proposed Regulation SBSR. Specifically, proposed Rule 13n-5(b)(4) under the Exchange Act would require a registered SDR to maintain the transaction data that it collects for not less than five

¹²⁷³ The Commission derived its estimate from the following: $(737 * 300 \text{ reporting counterparties}) = 221,000 \text{ hours}$.

¹²⁷⁴ The Commission derived its estimate from the following: $(\$201,000 * 300 \text{ reporting counterparties}) = \$60,300,000$.

years after the applicable security-based swap expires, and historical positions and historical market values for not less than five years.¹²⁷⁵ Accordingly, security-based swap transaction reports received by a registered SDR pursuant to proposed Rule 901 would be required to be retained by the registered SDR for not less than five years.

(e) Collection of Information is Mandatory

Each collection of information discussed above would be a mandatory collection of information.

(f) Confidentiality

Re-proposed Rule 901(a) would not affect the confidentiality of responses to the collection of information provided under Rule 901 of Regulation SBSR as originally proposed. As described in the Regulation SBSR Proposing Release, information collected pursuant to proposed Rule 901(c) would be widely available to the public to the extent it is incorporated into security-based swap transaction reports that are publicly disseminated by a registered SDR pursuant to proposed Rule 902. A registered SDR, pursuant to Sections 13(n)(5) of the Exchange Act and proposed Rule 13n-9 thereunder, would be under an obligation to maintain the confidentiality of any information reported pursuant to proposed Rule 901(d) of Regulation SBSR. To the extent that the Commission receives confidential information pursuant to this collection of information, such information would be kept confidential, subject to the provisions of applicable law.

Request for Comment

¹²⁷⁵ See SDR Proposing Release, 75 FR 77369.

The Commission requests public comment on our analysis of burdens associated with re-proposed Rule 901(a) and proposed Rule 901 generally. The Commission also seeks comment on the following:

- Would re-proposed Rule 901(a) impose burdens on parties additional to those imposed by Rule 901, as originally proposed? If so, what are these additional burdens? Please describe fully and quantify to the extent possible.
- Would re-proposed Rule 901(a) reduce overall burdens by aligning the security-based swap transaction reporting obligation with those market participants better able to carry out the reporting function? Why or why not?
- Are there any methods to enhance Rule 901 while minimizing the overall burdens associated with that rule?
- Would re-proposed Rule 901(a) reduce the total number of entities potentially subject to the reporting requirements? Is the Commission's revised estimate of 300 reporting sides reasonable?
- Would re-proposed Rule 901(a) have any impact on the burden imposed on SDRs? Are those costs dependent upon the number of reporting counterparties or the number of transactions submitted to SDRs?

3. Rules 902, 905, 906, 907, and 909

Regulation SBSR, as originally proposed, contained certain proposed rules, each of which was considered a "collection of information" within the meaning of the PRA, but that now either remains unchanged—or contains only technical, or conforming changes—as a result of re-proposed SBSR.

(a) Rule 902

In the Regulation SBSR Proposing Release, the Commission stated our preliminary belief that certain provisions of proposed Rule 902 contained “collection of information requirements” within the meaning of the PRA.¹²⁷⁶ As such, the Commission preliminarily estimated certain burdens resulting from the proposed rule.¹²⁷⁷

As set forth in more detail above, the Commission is now proposing technical or conforming revisions to proposed Rule 902.

Rule 902(a), as initially proposed, would require a registered SDR to publicly disseminate a transaction report of any security-based swap immediately upon receipt of information about the security-based swap, except in the case of a block trade. Re-proposed Rule 908, however, contemplates situations where a security-based swap would be required to be reported to a registered SDR but not publicly disseminated.¹²⁷⁸ Therefore, the Commission is re-proposing Rule 902(a) to provide that a registered SDR would not have an obligation to publicly disseminate a transaction report for any such security-based swap.

(b) Rule 905

In the Regulation SBSR Proposing Release, the Commission stated our preliminary belief that certain provisions of proposed Rule 905 contained “collection of information requirements”

¹²⁷⁶ See Regulation SBSR Proposing Release, 75 FR at 75251.

¹²⁷⁷ See *id.* at 75251-52.

¹²⁷⁸ See Section VIII.C, *supra*.

within the meaning of the PRA.¹²⁷⁹ As such, the Commission preliminarily estimated certain burdens resulting from the proposed rule.¹²⁸⁰

As set forth in more detail in Section VIII above, in re-proposed Regulation SBSR, the Commission has proposed technical or conforming revisions to proposed Rule 905. Rule 905(b)(2) is being re-proposed to clarify that, if a registered SDR receives corrected information relating to a previously submitted transaction report, it would be required to publicly disseminate a corrected transaction report only if the initial security-based swap were subject to public dissemination.¹²⁸¹ In addition, re-proposed Rule 905 conforms the rule language to incorporate the use of the term “side.”

(c) Rule 906

In the Regulation SBSR Proposing Release, the Commission stated our preliminary belief that certain provisions of proposed Rule 906 contained “collection of information requirements” within the meaning of the PRA.¹²⁸² As such, the Commission preliminarily estimated certain burdens on reporting parties and SDRs resulting from the proposed rule.¹²⁸³

As set forth in more detail above, the Commission is now proposing technical revisions to proposed Rule 906. Re-proposed Rule 906 conforms the rule language to incorporate the use of the term “side.”

¹²⁷⁹ See Regulation SBSR Proposing Release, 75 FR at 75254.

¹²⁸⁰ See *id.* at 75254-56.

¹²⁸¹ Re-proposed Rule 905(b)(2) of Regulation SBSR also substitutes the word “counterparties”—which is a formally defined term in the regulation—for the word “parties,” which was used in the initial proposal but was not a formally defined term.

¹²⁸² See Regulation SBSR Proposing Release, 75 FR at 75256.

¹²⁸³ See *id.* at 75256-58.

(d) Rule 907

In the Regulation SBSR Proposing Release, the Commission stated our preliminary belief that certain provisions of proposed Rule 907 contained “collection of information requirements” within the meaning of the PRA.¹²⁸⁴ As such, the Commission preliminarily estimated certain burdens on reporting parties and SDRs resulting from the proposed rule.¹²⁸⁵

As set forth in more detail above, the Commission is now proposing technical or conforming revisions to proposed Rule 907. Re-proposed Rule 907(a)(6) would require a registered SDR to establish and maintain written policies and procedures “[f]or periodically obtaining from each participant information that identifies the participant’s ultimate parent(s) and any other participant(s) which the counterparty is affiliated, using ultimate parent IDs and participant IDs” (emphasis added). The Commission now is re-proposing Rule 907(a)(6) with the word “participant” in place of the word “counterparty.” Re-proposed Rule 907 also conforms the rule language to incorporate the use of the term “side.”

(e) Rule 909

In the Regulation SBSR Proposing Release, the Commission stated our preliminary belief that certain provisions of proposed Rule 909 contained “collection of information requirements” within the meaning of the PRA.¹²⁸⁶ As such, the Commission preliminarily estimated certain burdens SDRs resulting from the proposed rule.¹²⁸⁷

¹²⁸⁴ See id. at 75258.

¹²⁸⁵ See id. at 75258-60.

¹²⁸⁶ See id. at 75260.

¹²⁸⁷ See id. at 75260-61.

i. Impact of Re-proposed Rules 902, 905, 906, 907, and 909 on the Commission's PRA Analysis

Since re-proposed Rules 902, 905, 906, 907, and 909 of Regulations SBSR either remain unchanged from the Regulation SBSR Proposing Release or contain only technical or conforming changes, the Commission preliminarily believes that our original PRA analysis, as set forth in the Regulation SBSR Proposing Release, continues to apply. The Commission preliminarily believes that our original analysis does not require revision, in part, because the burdens described in the Regulation SBSR Proposing Release are not dependent upon the number of respondents or the number of security-based swap transactions that would be reported to a registered SDR. In addition, the Commission preliminarily believes that the burdens described in relation to Rule 906 would not change because the number of reports required under and the universe of respondents subject to Rule 906 would not change. Furthermore, the Commission preliminarily believes that these re-proposed rules would not result in a change in the Commission's original estimate of SDRs.

The Commission requests public comment on our analysis of burdens associated with these re-proposed rules, and whether re-proposed Rule 902, 905, 906, 907, or 909 would impose any collection of information requirements that the Commission has not considered. If so, please describe them.

4. Rules 900, 903, 908, 910, and 911

Regulation SBSR, as originally proposed, contained certain proposed rules that were not considered a "collection of information" within the meaning of the PRA.

(a) Modification of the Definition of "U.S. Person"

In the Regulation SBSR Proposing Release, the Commission stated our belief that proposed Rule 900, since it contains only definitions of relevant terms, would not be a

“collection of information” within the meaning of the PRA.¹²⁸⁸ Rule 900 of re-proposed Regulation SBSR contains a revised definition of “U.S. person” that cross-references proposed Rule 3a71-3(a)(7) under the Exchange Act. Re-proposed Rule 900 also contains definitions for new terms such as “side,” “reporting side,” and “direct electronic access.” The Commission continues to believe that, because Rule 900 contains only definitions of relevant terms, it would not be a “collection of information” within the meaning of the PRA.

(b) Rule 903

In the Regulation SBSR Proposing Release, the Commission stated our belief that proposed Rule 903 would not be a “collection of information” within the meaning of the PRA because the rule would merely permit reporting parties and SDRs to use codes in place of certain data elements, subject to certain conditions.¹²⁸⁹ Re-proposed Rule 903 conforms the rule language to incorporate the use of the term “side.” Because these are only technical changes to the proposed rule, the Commission continues to believe that re-proposed Rule 903 would not be a “collection of information” within the meaning of the PRA.

(c) Re-proposed Rules 908(a) and 908(b)

Rule 908(a), as initially proposed, provided that a security-based swap would be subject to regulatory reporting and public dissemination under Regulation SBSR if the security-based swap: (1) has at least one counterparty that is a U.S. person; (2) is executed in the United States or through any means of interstate commerce; or (3) is cleared through a registered clearing agency having its principal place of business in the United States. Thus, original Rule 908(a) would not impose reporting requirements in connection with a security-based swap solely

¹²⁸⁸ See *id.* at 75246.

¹²⁸⁹ See *id.* at 75252-53.

because one of the counterparties were guaranteed by a U.S. person or were a non-U.S. person security-based swap dealer or major security-based swap participant.

The Commission stated our preliminary belief that proposed Rule 908 would not be a “collection of information” within the meaning of the PRA, as the rule merely described the jurisdictional reach of proposed Regulation SBSR.

As set forth in more detail above, the Commission now believes that, where a security-based swap is executed outside the United States by a non-U.S. person direct counterparty but performance of any duties under that security-based swap is guaranteed by a U.S. person, the security-based swap should be subject to Title VII regulatory reporting requirements.¹²⁹⁰ In addition, a security-based swap dealer or major security-based swap participant that is a non-U.S. person would, under Rule 908(a) of re-proposed Regulation SBSR, be required to report a security-based swap executed outside the United States with a non-U.S. person counterparty (assuming no guarantee extended by a U.S. person).

Re-proposed Rule 908(a) is now divided into subparagraphs (1) and (2), which address regulatory reporting and public dissemination, respectively. The Commission also is re-proposing Rule 908(a) to require reporting and public dissemination in certain cases not required by the original proposal, and to make certain other changes described above (such as eliminating the “interstate commerce clause”). Because re-proposed Rule 908(a) continues merely to describe the situations to which proposed Regulation SBSR would apply, the Commission continues to believe that re-proposed Rule 908(a) would not be a “collection of information” within the meaning of the PRA. However, to the extent that additional types of security-based

¹²⁹⁰ However, as discussed above, the Commission preliminarily believes that certain of these cross-border security-based swaps need not be subject to Title VII’s public dissemination requirements. See Section VIII.C.1, supra.

swaps would be subject to regulatory reporting and public dissemination under re-proposed Regulation than under the initial proposal, the additional burdens on respondents are considered under re-proposed Rule 901 above.

Rule 908(b), as initially proposed, described when duties would be imposed on foreign counterparties of security-based swaps when some connections to the United States might be present. Rule 908(b), as initially proposed, provided that no duties would be imposed on a counterparty unless one of the following conditions were true: (1) the counterparty is a U.S. person; (2) the security-based swap is executed in the United States or through any means of interstate commerce; or (3) the security-based swap is cleared through a clearing agency having its principal place of business in the United States.

The Commission stated our preliminary belief that proposed Rule 908 would not be a "collection of information" within the meaning of the PRA, as the rule merely described the jurisdictional reach of proposed Regulation SBSR.

As set forth in more detail above, the Commission is proposing several technical revisions to proposed Rule 908(b). Specifically, Rule 908(b) is being revised to account for the possibility that a non-U.S. person registered with the Commission as a security-based swap dealer or major security-based swap participant could incur a duty to report. Moreover, the "interstate commerce clause" is being replaced with the new concept of a "transaction conducted within the United States."

Since re-proposed Rule 908(b) continues merely to describe the jurisdictional reach of Regulation SBSR, the Commission continues to believe that re-proposed Rule 908(b) would not be a "collection of information" within the meaning of the PRA. However, the Commission notes that re-proposed Rule 908(b) could result in a non-U.S. person security-based swap dealer

or major security-based swap participant incurring a duty to report. To the extent that this could result in a change in the number of reporting counterparties, such burdens are considered in connection with re-proposed Rule 901 above.

The Commission requests public comment on our analysis of burdens associated with re-proposed Rules 908(a) and 908(b) generally. In particular:

- Would re-proposed Rules 908(a) and 908(b) impose any collection of information requirements that the Commission has not considered? If so, please describe.

Re-proposed Rule 908 contains a new subparagraph (c), dealing with substituted compliance, a subject that was not addressed in the original proposal. The PRA analysis for re-proposed Rule 908(c) is provided elsewhere, together with the PRA analysis of the substituted compliance provisions of the other Title VII proposed rules described in this release.¹²⁹¹

(d) Rule 910

As originally proposed, the Commission stated our belief that proposed Rule 910 would not be a “collection of information” within the meaning of the PRA, as it merely describes when a registered SDR and its participants would be required to comply with the various parts of proposed Regulation SBSR, and would not create any additional collection of information requirements.

As set forth in more detail above, the Commission is now proposing technical, or conforming revisions to proposed Rule 910. Rule 910(b)(4), as originally proposed, would provide that, in Phase 4 of the Regulation SBSR compliance schedule, “[a]ll security-based swaps reported to the registered security-based swap data repository shall be subject to real-time public dissemination as specified in § 242.902.” As noted above, under re-proposed Rule 908,

¹²⁹¹ See Section XIV.E.4, *supra*.

certain security-based swaps would be subject to regulatory reporting but not public dissemination requirements. Therefore, the Commission is re-proposing Rule 910(b)(4) to provide that, "All security-based swaps received by the registered security-based swap data repository shall be treated in a manner consistent with §§ 242.902, 242.905, and 242.908." Re-proposed Rule 910 also conforms the rule language to incorporate the use of the term "side."

The Commission continues to believe that re-proposed Rule 910 would not be a "collection of information" within the meaning of the PRA.

(e) Rule 911

Rule 911, as originally proposed, would restrict the ability of a reporting party to report a security-based swap to one registered SDR rather than another, but would not otherwise create any duties or impose any collection of information requirements beyond those already required by proposed Rule 901. Therefore, the Commission stated our belief that proposed Rule 911 would not be a "collection of information" within the meaning of the PRA.¹²⁹² As set forth in more detail above, the Commission is now proposing technical revisions to proposed Rule 911. Re-proposed Rule 911 conforms the rule language to incorporate the use of the term "side." The Commission continues to believe that re-proposed Rule 911 would not be a "collection of information" within the meaning of the PRA.

G. Request for Comments by the Commission and Director of OMB

Pursuant to 44 U.S.C. 3505(c)(2)(B), the Commission solicits comment to:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of our functions, including whether the information shall have practical utility;

¹²⁹² See Regulation SBSR Proposing Release, 75 FR at 75261.

2. Evaluate the accuracy of our estimate of the burden of the proposed collection of information;

3. Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and

4. Evaluate whether there are ways to minimize the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons submitting comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should also send a copy of their comments to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090, with reference to File Number S7-02-13, and File Numbers S7-34-10 (Regulation SBSR) and/or S7-40-11 (registration of security-based swap dealers and major security-based swap participants), as applicable. Requests for materials submitted to OMB by the Commission with regard to this collection of information should be in writing, with reference to File Number S7-02-13, and File Numbers S7-34-10 (Regulation SBSR) and/or S7-40-11 (registration of security-based swap dealers and major security-based swap participants), as applicable, and be submitted to the Securities and Exchange Commission, Office of FOIA/PA Operations, 100 F Street, NE., Washington, DC 20549-2736. As OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

XV. Economic Analysis

A. Introduction

The Commission is sensitive to the economic consequences and effects, including costs and benefits, of our rules. In proposing the rules and interpretations in this release, the Commission has been mindful of the economic consequences of the decisions it makes regarding the scope of application of the Title VII requirements to cross-border activities pursuant to the proposed rules. The Commission has taken into account the costs and benefits associated with applying the Title VII regulatory requirements to cross-border transactions and market participants who would be required to register pursuant to these proposed rules and interpretations, as well as the costs associated with determining whether Title VII applies to a specific person or transaction, which we refer to as direct assessment costs these rules and interpretations would impose on market participants, if adopted as proposed. Some of these economic consequences and effects stem from statutory mandates, while others are affected by the discretion we exercise in implementing the mandates. Further, Section 3(f) of the Exchange Act requires the Commission, whenever we engage in rulemaking pursuant to the Exchange Act and are required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.¹²⁹³ In addition, Section 23(a)(2) of the Exchange Act requires the Commission, when making rules under the Exchange Act, to consider the impact such rules would have on competition. Section 23(a)(2) also prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or

¹²⁹³ 15 U.S.C. 78c(f).

appropriate in furtherance of the purposes of the Exchange Act.¹²⁹⁴ The Commission requests comment on all aspects of the economic analysis of the proposed rules, including their costs and benefits, as well as any effect these rules may have on competition, efficiency, and capital formation.

As stated above, the Commission is proposing rules and interpretations regarding the application of Title VII to cross-border activities holistically in a single proposing release to provide market participants, foreign regulators, and other interested parties with an opportunity to consider, as an integrated whole, the Commission's proposed approach to the application of various Title VII requirements to cross-border security-based swap transactions and to persons whose cross-border security-based swap activity is regulated under Title VII.¹²⁹⁵

In analyzing the economic consequences and effects of the rules and interpretations proposed in this release, the Commission has been guided by the objectives of the Dodd-Frank Act to mitigate risks to the U.S. financial system, promote counterparty protection, increase swap market transparency, and facilitate financial stability. We have also taken into account the importance of maintaining a well-functioning security-based swap market. In evaluating these rules the Commission has considered the importance of avoiding unnecessary market disruption, and preserving market participants' access to liquidity irrespective of geography. This analysis also reflects the importance of regulatory harmonization and maintaining consistent international standards. In this regard, we recognize that regulators in other jurisdictions are currently engaged in implementing their own regulatory reforms of the OTC derivatives markets and that our proposed application of Title VII to cross-border activities may affect the policy decisions of

¹²⁹⁴ 15 U.S.C. 78w(a)(2).

¹²⁹⁵ See Section I, supra.

these other regulators as they seek to address potential conflicts or duplication in the regulatory requirements that apply to market participants under their authority.

In addition, the Commission is aware of the development of OTC derivatives regulatory reform in other jurisdictions. In particular, the EU and certain other G20 members have taken various steps to develop and implement new regulations with respect to OTC derivatives.¹²⁹⁶ Moreover, market participants, foreign regulators, and other interested parties have provided views on the application of Title VII requirements to cross-border activities through both written comment letters to the Commission and/or the CFTC and meetings with Commissioners and Commission staff.¹²⁹⁷ These developments, comments, and discussions have been informative in the Commission's consideration of our proposed approach to the application of Title VII in the cross-border context and the economic consequences of the proposed rules and interpretations.

B. Economic Baseline

1. Overview

To assess the economic impact of the proposed rules described in this release, the Commission is using as our baseline the security-based swap market as it exists at the time of this proposal, including applicable rules adopted by the Commission but excluding the rules and interpretations proposed here. The analysis incorporates the statutory and regulatory provisions that currently govern the security-based swap market pursuant to the Dodd-Frank Act. Many of the resulting costs and benefits are difficult to quantify with any degree of certainty, especially as the practices of market participants are expected to evolve and adapt to changes in technology and market developments.

¹²⁹⁶ See Section I and notes 35–35, *supra*.

¹²⁹⁷ See Section I and notes 24–25, *supra*.

In assessing the economic impact of the rules, we refer to the broader costs and benefits associated with the application of the proposed rules and interpretations as “programmatic” costs and benefits. These include the costs and benefits of applying the substantive Title VII requirements to transactions by market participants active in the cross-border context, as well as to the functions performed by infrastructure participants (clearing agencies, SDRs, and SB SEFs) in the global security-based swap market. In several places we also consider how the programmatic costs and benefits might change when comparing the proposed approach to the other alternatives suggested by industry comment letters and the other regulators. Our analysis also considers “assessment costs.”

Our analysis also recognizes that certain market participants may be subject to Title VII requirements under the proposed rules and interpretations while potentially also being subject to another set of foreign regulatory requirements. Concurrent, and potentially duplicative or conflicting, regulatory requirements could be imposed on persons because of their resident or domicile status or because of the place their security-based swap transactions are conducted. In certain circumstances, the Commission is proposing to consider permitting substituted compliance subject to certain conditions. In determining whether to propose rules that would permit market participants to seek substituted compliance determinations for particular requirements in certain circumstances, the Commission has considered the programmatic benefits intended by the specific Title VII requirements with respect to which substituted compliance may be permitted, the programmatic costs associated with such Title VII requirements when they become fully effective, and the relevant assessment costs.¹²⁹⁸

¹²⁹⁸

The Commission is proposing to permit market participants to seek a substituted compliance determination in connection with certain requirements—it has not yet made

The proposed rules and interpretations reflect the Commission's preliminary determination regarding which participants and transactions in the security-based swap market warrant regulation under Title VII, and in making this determination, we have focused on whether a market participant is incorporated or resident, or has its principal place of business, within the United States and whether a transaction occurs within the United States. The economic impact of these proposed rules and interpretations will occur predominantly through the application in a cross-border context of the substantive requirements outlined in other releases, without, as a general matter, altering the nature of those substantive requirements.¹²⁹⁹ We have already analyzed many of the costs and benefits of the proposed substantive requirements in separate proposing and adopting releases. As a result, the following analysis focuses on the economic impacts and trade-offs of application of these substantive requirements in a cross-border context, that is, the economic implications of the decisions to include certain persons that reside or are organized (or have their principal place of business), or transactions that occur, within the United States within the scope of Title VII and the economic effects arising from that inclusion.

any such specific determinations. The Commission does not believe it is possible at this point to estimate the number of such determinations that it is likely to make for any given set of requirements, as such estimate would depend on information that is generally not yet available. However, the maximum programmatic benefits and costs associated with substituted compliance could occur in circumstances where the Commission grants every substituted compliance request. This does not in any way indicate that the Commission will make any number of substituted compliance determinations. Accordingly, the following analysis does not assume that such substituted compliance will be allowed. Where appropriate, however, we do discuss the economic implications if such substituted compliance were ultimately to be allowed.

¹²⁹⁹ We recognize that we are re-proposing Regulation SBSR in this release, which would have an impact on the security-based swap reporting obligations beyond the cross-border context, and we discuss these effects in our economic analysis of the re-proposal below.

To the extent that future adopting releases implementing the substantive requirements under Title VII reflect substantive changes to the proposals, those releases will incorporate the relevant economic analysis. We also expect that our respective adopting releases for each of these substantive areas will discuss the economic consequences of the final substantive rules together with our final rules on the application of those rules in the cross-border context.

2. Current Security-Based Swap Market

Our analysis of the state of the current security-based swap market is based on data obtained from DTCC-TIW, especially data regarding the activity of market participants in the single-name credit default swap (or CDS) market during the years of 2008 to 2011. Because of the lack of market data in the context of total return swaps on equity and debt, we do not have the same amount of information regarding those products (or other products that are security-based swaps) as we have in connection with the present market for single-name CDS. With the exception of the analysis regarding the level of security-based swap clearing, we did not consider data regarding index credit default swaps for purposes of the analysis below. The data for index CDS encompasses both broad-based security indices and narrow-based security indices, and “security-based swap” in relevant part encompasses swaps based on single securities or on narrow-based security indices.¹³⁰⁰ We previously noted that the definition of security-based swaps is not limited to single-name CDS but we believed that the single-name CDS data are sufficiently representative of the market to help inform the analysis of the state of the current security-based swap market.¹³⁰¹

¹³⁰⁰ See Section 3(a)(68)(A) of the Exchange Act, 15 U.S. C. 78c(a)(68)(A).

¹³⁰¹ According to data published by BIS, the global notional amount outstanding in equity forwards and swaps as of June 2012 was \$1.88 trillion. The notional amount outstanding in single-name CDS was approximately \$15.57 trillion, in multi-name index CDS was

We believe that the data underlying our analysis here provide reasonably comprehensive information regarding the single-name CDS transactions and composition of the single-name CDS market participants. In our analysis of market participants and their domiciles in subsections (a) and (c) below, we base our analysis on firms and accounts that have engaged in one or more trades with a U.S.-person counterparty or involving a U.S. reference entity according to data obtained from DTCC-TIW. Our analysis of trading activity in the security-based swap market in subsections (b) and (d) focuses on transactions involving a single-name CDS referencing a U.S. entity ("U.S. single-name CDS"). We note that the data available to us from DTCC-TIW do not encompass those CDS transactions that both: (i) do not involve U.S. counterparties; and (ii) are based on non-U.S. reference entities. Notwithstanding this limitation, we preliminarily believe that the DTCC-TIW data provides sufficient information to identify the types of market participants active in the security-based swap market and the general pattern of deal flow within that market.

approximately \$9.73 trillion, and in multi-name, non-index CDS was approximately \$1.63 trillion. See Semi-annual OTC derivatives statistics at end-June 2012 (Nov. 2012), Table 19, available at: <http://www.bis.org/statistics/otcder/dt1920a.pdf>. For the purposes of this analysis, we assume that multi-name index CDS are not narrow-based index CDS and therefore, do not fall within the security-based swap definition. See Section 3(a)(68)(A) of the Exchange Act; see also the Product Definitions Adopting Release, 77 FR 48208. We also assume that all instruments reported as equity forwards and swaps are security-based swaps, potentially resulting in underestimation of the proportion of the security-based swap market represented by single-name CDS. Therefore, single-name CDS appear to constitute roughly 82% of the security-based swap market. Although the BIS data reflects the global OTC derivatives market, and not just the U.S. market, we have no reason to believe that these ratios differ significantly in the U.S. market.

(a) Security-Based Swap Market Participants

Although most security-based swap activity is concentrated among a relatively small number of dealer entities,¹³⁰² there are thousands of security-based swap market participants, including, but not limited to, investment companies, pension funds, private (hedge) funds, sovereign entities, and industrial companies.¹³⁰³ In the analysis below, we observe that most end users of security-based swaps do not engage directly in the trading of swaps, but use dealers, banks, or investment advisers as agents to establish their positions. Based on an analysis of the counterparties to trades reported to the DTCC-TIW, there were 1,489 entities¹³⁰⁴ engaged in trading of single-name CDS shortly after the enactment of the Dodd-Frank Act. Table 1, below, highlights that nearly three-quarters of these entities (DTCC-defined “firms” shown in DTCC-TIW, which we refer to here as “transacting agents”) were identified as investment advisers, of which 40% (30% of all transacting agents) were registered investment advisers under the Investment Advisers Act.¹³⁰⁵ Although investment advisers comprise the vast majority of transacting agents, the transactions they executed account for only 10.2% of all single-name

¹³⁰² See Intermediary Definitions Adopting Release, 77 FR at 30636-37, 30740, and the accompanying notes 485 and 1573.

¹³⁰³ Staff of the Division of Risk, Strategy, and Financial Innovation review of DTCC-defined “firms” shown in DTCC-TIW as transaction counterparties.

¹³⁰⁴ The 1,489 entities included all DTCC-defined “firms” shown in DTCC-TIW as transaction counterparties that report at least one transaction to DTCC-TIW as of October, 2010. The staff in the Division of Risk, Strategy, and Financial Innovation classified these firms that are shown as transaction counterparties by machine matching names to known third-party databases and by manual classification. Manual classification included searching the EDGAR and Bloomberg databases, the SEC’s Investment Adviser Public Disclosure database, and the firm’s public website or the public website of the account represented by the firm. The staff also referred to ISDA protocol adherence letters available on the ISDA website. All but 52 of the 1,489 DTCC-defined “firms” were identified and classified.

¹³⁰⁵ As identified through matches to Form ADV.

CDS trading activity reported to the DTCC-TIW, measured by number of transaction-sides (each transaction has two transaction sides, *i.e.*, two transaction counterparties). The vast majority of transactions (83.7%) measured by number of transaction-sides were executed by ISDA-recognized dealers.¹³⁰⁶

Table 1. The number of transacting agents by counterparty type and the fraction of total trading activity, from November, 2006 through October, 2010, represented by each counterparty type.

Transacting Agents	Number	Percent	Transaction share
Investment advisers	1,099	73.8%	10.2%
- SEC registered	446	30.0%	5.3%
Banks	239	16.1%	4.9%
Pension Funds	23	1.5%	0.0%
Insurance Companies	22	1.5%	0.3%
ISDA-Recognized Dealers	16	1.1%	83.7%
Other	90	6.0%	0.8%
Total	1,489	100.0%	100.0%

The staff's further analysis of the "accounts" in DTCC-TIW shows that transaction agents classified in Table 1 represent over 8,500 accounts and funds who are the principal risk holders of the transactions. Table 2, below, classifies these "accounts" or principal risk holders by their counterparty type and whether they are represented by a registered or unregistered investment adviser.¹³⁰⁷ For instance, 239 banks in Table 1 allocated transactions to 353 accounts, of which

¹³⁰⁶ For the purpose of this analysis, the ISDA-recognized dealers are those defined as G14 by ISDA. See http://www.isda.org/c_and_a/pdf/ISDA-Operations-Survey-2010.pdf. G14 refers to JP Morgan Chase NA (and Bear Stearns), Morgan Stanley, Bank of America NA (and Merrill Lynch), Goldman Sachs, Deutsche Bank AG, Barclays Capital, Citigroup, UBS, Credit Suisse AG, RBS Group, BNP Paribus, HSBC Bank, Lehman Brothers, and Société Générale.

¹³⁰⁷ Unregistered investment advisers include all investment advisers not registered under the Investment Advisers Act, and may include investment advisers registered with a state or a foreign authority.

29 were represented by investment advisers and 324 were represented directly by banks, while 16 ISDA-recognized dealers in Table 1 allocated transactions to 69 accounts.

Among the accounts, there are over 1,400 Dodd-Frank Act-defined special entities and 482 investment companies registered under the Investment Company Act of 1940.¹³⁰⁸ Private funds comprise the largest type of account holders that we were able to classify, and although not verified through a recognized database, most of the funds we were not able to classify appear to be private funds. The data analyzed here largely predate the effectiveness of our rules implementing the Dodd-Frank Act's requirement that previously exempt advisers to hedge funds and certain other private investment funds register with the Commission.¹³⁰⁹

¹³⁰⁸ There remain 3,746 DTCC "accounts" unclassified by type. Although unclassified, each was manually reviewed to verify that it was not likely to be a special entity within the meaning of the Dodd-Frank Act and instead was likely to be an entity such as a corporation, an insurance company, or a bank.

¹³⁰⁹ See Rules Implementing Amendments to the Investment Advisers Act of 1940, Investment Advisers Act Release No. 3221 (June 22, 2011), 76 FR 42950 (July 19, 2011).

Table 2. The number and percentage of account holders—by type—who participate in the security-based swap market through a registered investment adviser, an unregistered investment adviser, or directly as a transacting agent, from November 2006 through October 2010.

Account Holders by Type	Number	Represented by a registered investment adviser		Represented by an unregistered investment adviser		Participant is transacting agent ¹³¹⁰	
		Number	Percentage	Number	Percentage	Number	Percentage
Private Funds	2,154	952	44%	1,202	56%	0	0%
DFA Special Entities	1,474	1,359	92%	46	3%	69	5%
Registered Investment Companies	482	477	99%	5	1%	0	0%
Banks (non G14)	353	25	7%	4	1%	324	92%
Insurance Companies	192	145	76%	19	10%	28	15%
ISDA-recognized Dealers	69	0	0%	0	0%	69	100%
Foreign Sovereigns	53	35	66%	6	11%	12	23%
Non-financial Corporations	37	26	70%	1	3%	10	27%
Finance Companies	7	1	14%	0	0%	6	86%
Other/unclassified	3,746	2,522	67%	1,158	31%	66	2%
All	8,567	5,542	65%	2,441	28%	584	7%

(b) Levels of Security-Based Swap Trading Activity

CDS contracts make up the vast majority of security-based swap products and most are written on corporate issuers, corporate securities, sovereign countries, or sovereign debt (reference entities and reference securities).¹³¹¹ Figure 1 below describes the percentage of global, notional transaction volume¹³¹² in U.S. single-name CDS reported to the DTCC-TIW

¹³¹⁰ This column reflects the number of participants who are also trading on their own accounts.

¹³¹¹ See Intermediaries Adopting Release, 77 FR at 30636 n.476. See also Chen, Kathryn, Michael Flemming, John Jackson, Ada Li, and Asani Sarkar, "An Analysis of CDS Transactions: Implications for Public Reporting," Federal Reserve Bank of New York Staff Report, No. 517 (Sep. 2011) (decomposing single-name CDS contracts into corporate, sovereign, and other).

¹³¹² This volume includes all price-forming CDS transactions (trades, assignments, and terminations) on U.S.-based reference entities reported to the DTCC-TIW during

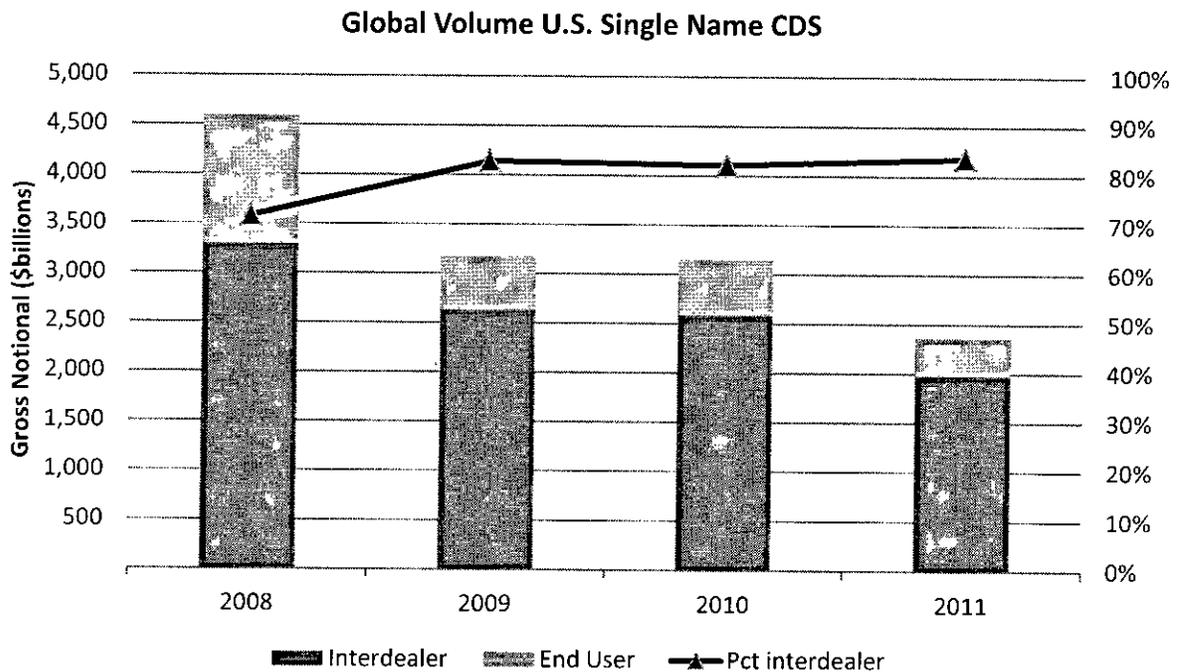
between January 2008 and December 2011, separated by whether transactions are between two ISDA-recognized dealers (interdealer transactions) or whether a transaction has at least one non-dealer counterparty.

The level of trading activity with respect to U.S. single-name CDS in terms of notional volume has declined from more than \$5 trillion in 2008 to less than \$2.5 trillion in 2011. The start of this decline predates the enactment of the Dodd-Frank Act and the rules proposed thereunder. For the purpose of establishing an economic baseline, this seems to indicate that CDS market demand shrank prior to the enactment of the Dodd-Frank Act, and therefore the causes of trading volume declines may be independent of those related to the development of security-based swap market regulation. If the security-based swap market experiences further declines in trading activity, it would be difficult to isolate the effects of the newly-developed security-based swap market regulation and to identify whether the changes in trading activity are due to natural market forces or the anticipation of (or reaction to) proposed (or adopted) Title VII requirements.

Although notional volume had declined over the past four years, the percentage of interdealer transactions has remained fairly constant, at a little more than 80% of the total notional volume. This is consistent with the 83.7% of transactions involving ISDA-recognized dealers on one side of the transactions executed from November 2006 through October 2010 as shown in Table 1.

calendar years 2008 through 2011, including those executed between two foreign counterparties. "Price-forming transactions" include all new transactions, assignments, modifications to increase the notional amounts of previously executed transactions, and terminations of previously executed transactions. Transactions terminated, transactions entered into in connection with a compression exercise, and expiration of contracts at maturity are not considered price-forming and are therefore excluded, as are replacement trades and all bookkeeping-related trades.

Figure 1. Global, notional trading volume in U.S. single-name CDS by calendar year and the fraction of volume that is interdealer.



(c) Market Participant Domiciles

In analyzing data to identify an economic baseline of trading activity for purposes of this proposal, we found that there has been a distinct shift in country of domicile since the enactment of the Dodd-Frank Act. Prior to the enactment of the Dodd-Frank Act, the majority of the funds and accounts¹³¹³ that were allocated CDS transactions reported to the DTCC-TIW were domiciled within the United States, according to self-reported registered office location recorded

¹³¹³ The DTCC accounts are not the same as entities. One entity may have multiple accounts and, depending on where accounts are located, may report multiple domicile locations. For example, a bank may have one DTCC account for its U.S. headquarters and one DTCC account for one of its foreign branches. The self-reported registered office location for the U.S. headquarters account is different from that for the foreign branch account.

by the DTCC-TIW.¹³¹⁴ Since the enactment of Dodd-Frank Act, there has been a significant shift in reported domiciles, with far fewer funds and accounts reporting a U.S. domicile. Figure 2, left, shows that more than two-thirds of funds and accounts in existence as of October of 2010 reported a U.S. domicile.¹³¹⁵ Figure 2, right, reports the domicile of the more than 2,600 new funds and accounts that were allocated trades reported to the DTCC-TIW for the first time since October 2010. For these funds and accounts, only 43% report a registered office location in the United States, a decline of 25 percentage points. While the fraction of foreign domiciled funds increases by nine percentage points, most of the shift in domicile is a result of funds and accounts reporting a foreign registered office location while being managed by an adviser in the United States, or a result of accounts of foreign branches of U.S. banks or subsidiaries of U.S. entities, an increase from 3% prior to the enactment of the Dodd-Frank Act to 19% after the enactment of the Dodd-Frank Act.¹³¹⁶

While it is likely that some of the shift in domicile is in reaction to development of the new Title VII regulatory regime, with many funds shifting their registered office locations offshore in anticipation of potential future compliance costs and burdens, some of the activity could be attributed to more precise reporting of domicile by funds and accounts relative to

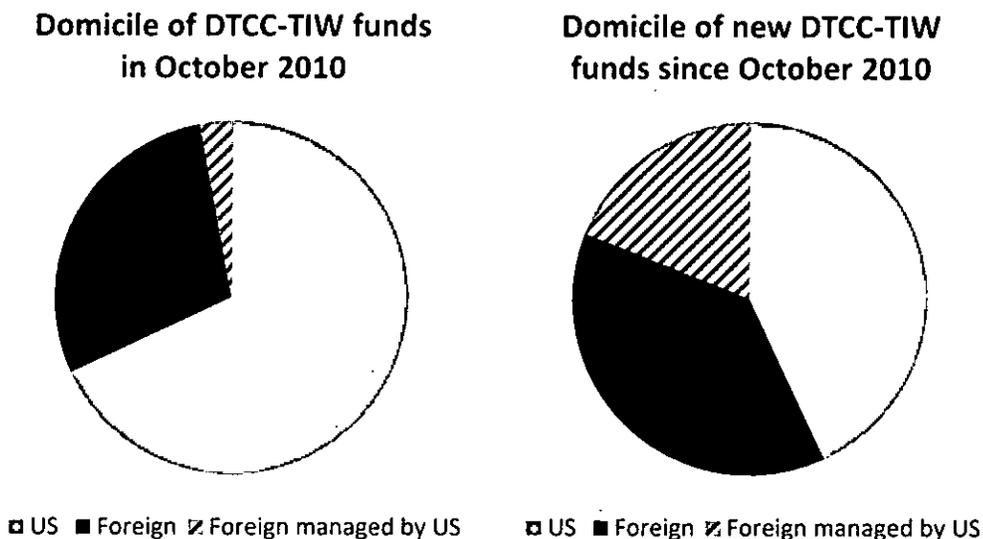
¹³¹⁴ Following the Warehouse Trust Guidance on CDS data access (see text accompanying notes 83–85, *supra*), the DTCC-TIW surveyed market participants, asking for the physical address associated with each of their accounts (*i.e.*, where the account is incorporated as a legal entity). This is designated the registered office location. For purposes of this discussion, we have assumed that the registered office location reflects the place of domicile for the fund or account.

¹³¹⁵ When the fund does not report a registered office location, we assume that the settlement country reported by the investment adviser or parent entity to the fund or account is the place of domicile.

¹³¹⁶ In these instances, the fund or account lists a non-U.S. registered office location while the investment adviser, U.S. bank, or U.S. parent lists the United States as its settlement country.

information that was on record for older funds and accounts. In particular, prior to the enactment of the Dodd-Frank Act, funds and accounts did not formally report their domicile because there was no systematic requirement to do so. Since Dodd-Frank Act enactment, the DTCC-TIW has collected the account or fund registered office location, which is self-reported and voluntary.¹³¹⁷ Among funds and accounts that signed up for DTCC-TIW services for the first time after October 2010, most have self-reported domiciles that are outside the United States (57% of first-time DTCC-TIW users), but a sizeable proportion of these are managed from within the United States (19% of all first-time DTCC-TIW users).

Figure 2. The fraction of (1) accounts and funds with domicile in the United States (referred to as “US”), (2) accounts and funds with domicile outside the United States (referred to below as “Foreign”), and (3) funds outside the United States but managed by a U.S. entity, account of a foreign branch of a U.S. bank, and account of a foreign subsidiary of a U.S. entity (collectively referred to below as “Foreign managed by US”). Left chart represents all funds as of October 2010; Right chart represents all new funds created between October 2010 and December 2011.



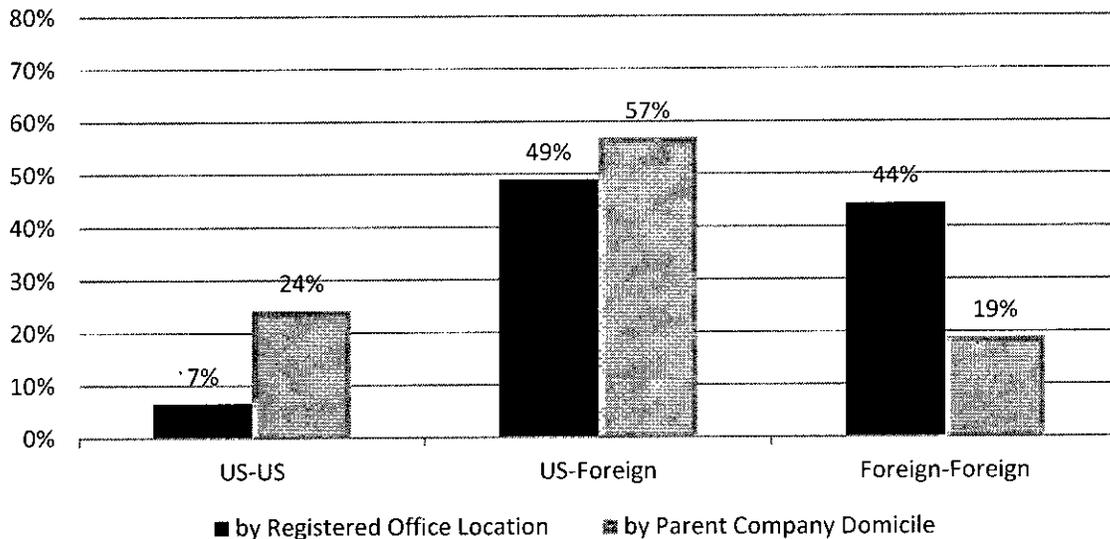
¹³¹⁷ SEC Staff discussions with DTCC.

(d) Level of Current Cross-Border Activity in Single-Name CDS

About half of the trading activity in U.S. single-name CDS reflected in the set of data we analyzed was between counterparties domiciled in the United States and counterparties domiciled abroad. When counterparty domicile is based on the registered office location¹³¹⁸ of the DTCC-TIW accounts, only 7% of the global transaction volume by notional volume in 2011 was between two U.S.-domiciled counterparties, compared to 49% entered into between one U.S.-domiciled counterparty and a foreign-domiciled counterparty and 44% entered into between two foreign-domiciled counterparties (see figure 3). When the domicile locations of DTCC-TIW accounts are defined according to the domicile of their ultimate parent, headquarters or home office (e.g., classifying a foreign bank branch or foreign subsidiary of a U.S. entity as domiciled in the United States), the fraction of transactions entered into between two U.S.-domiciled counterparties increases to 25%, and to 57% for transactions entered into between a U.S.-domiciled counterparty and a foreign-domiciled counterparty.

¹³¹⁸ DTCC-TIW collects certain information from its users, including registered office location, which is defined as the “place of organization of the legal entity.” DTCC, “Multifund User Agreement Form & Key Contacts,” at 5, available at: <http://www.dtcc.com/customer/membership/derivserv/derivserv.php>.

**Figure 3. 2011 U.S. Single Name CDS Transactions by Domicile
(% of notional volume)**



By either definition of domicile, the data indicate that a large fraction of U.S. single-name CDS transaction volume is entered into between counterparties domiciled in two different jurisdictions or between counterparties domiciled outside the United States. For the purpose of establishing an economic baseline, this observation indicates that a large fraction of security-based swap activity would be affected by the scope of any cross-border approach we could propose to take in applying the Title VII requirements. The large fraction of U.S. single-name CDS transactions between U.S.-domiciled and foreign-domiciled counterparties also highlights the extent to which security-based swap activity transfers risk across geographical boundaries. Moreover, the legal domicile of a counterparty may not represent the only location of risk.

(e) Levels of Security-Based Swap Clearing

Although no mandatory clearing regime yet exists, a substantial proportion of single name CDS and index CDS are cleared on a voluntary basis. Voluntary clearing of security-based swaps in the United States is currently limited to CDS products, including single-name CDS and

index CDS. At present, there is no central clearing in the United States for security-based swaps that are not CDS products.

The analysis below is based on information reported by ICE Clear Credit on its public website and is based on price-forming transactions,¹³¹⁹ which includes the clearing of transactions on the same day as the transaction was executed as well as the clearing of transactions submitted for clearing on a retroactive basis. The data presented here do not include transactions that result from the compression¹³²⁰ of transactions previously submitted for clearing.

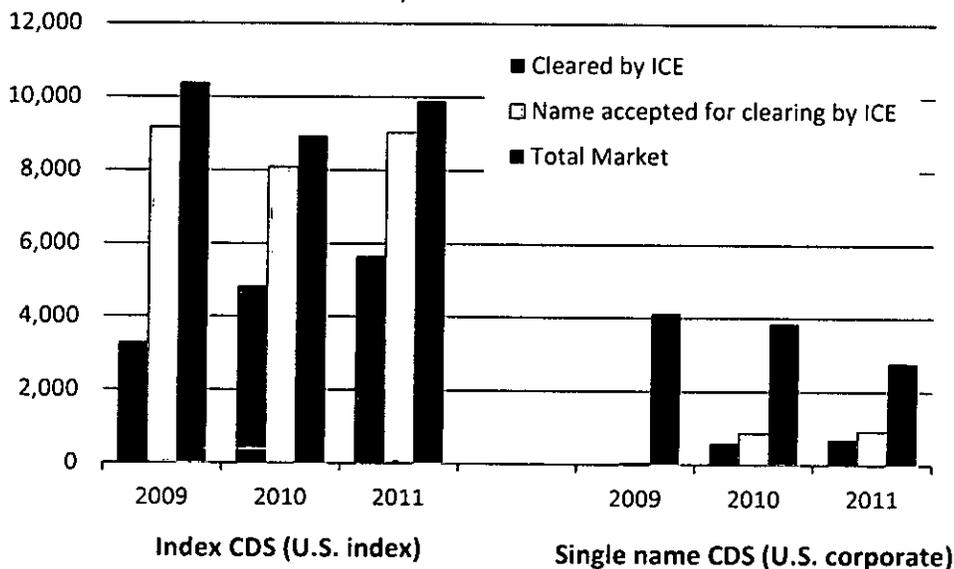
Figure 4 shows that index CDS in U.S. names account for the bulk of current voluntary clearing activity. The proportion of transactions in names accepted for clearing that are ultimately cleared also appears to be higher in index CDS in U.S. names than in single-name CDS referencing U.S. corporate issuers or securities. In calendar years 2010 and 2011, Figure 4 indicates that 90% of the total notional volume of transactions is in index names that are accepted for clearing as of the end of each calendar year and that cleared index transactions correspond to more than 50% of the total notional volume during the same period. By contrast, the figure suggests that the proportion of transactions in single-name corporate CDS referencing names that were accepted for clearing was only 33% of the total single-name CDS during 2011,

¹³¹⁹ See note 1312, *supra*. Transactions reported to the DTCC-TIW used for this analysis reflect all global activity, including transactions between two foreign counterparties. See Clearing Procedures Adopting Release, 77 FR at 41636-37.

¹³²⁰ In compression, counterparties agree to terminate or change the notional amount of some or all of their outstanding contracts and replace any terminated contracts with new contracts. Compression reduces counterparties' gross notional amount, while leaving their net notional amount unchanged. Transactions entered into in connection with a compression exercise are not considered price-forming and are therefore excluded from the analysis here.

with cleared transactions during the same year totaling only 25% of all the single-name CDS executed during the same period.

Figure 4. Gross notional transaction volume (\$billions)



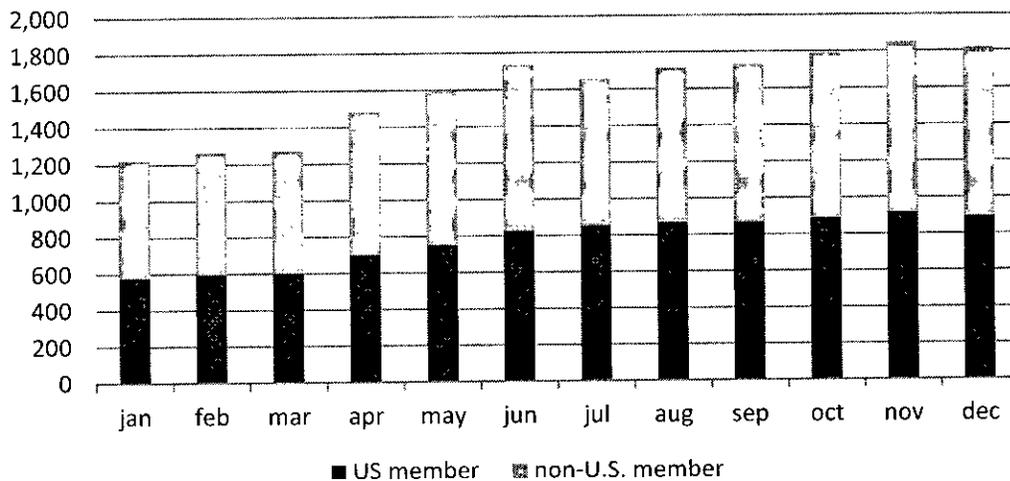
*Source: DTCC-TIW

While a large fraction of CDS trading activity continues to settle bilaterally, particularly in light of limited eligibility to clear among market participants, clearing activity has steadily increased alongside the Title VII rulemaking process, and in advance of mandatory clearing requirements.¹³²¹ Figure 5 shows that member positions at ICE Clear Credit in the United States are roughly half held by foreign-domiciled dealing members.¹³²² Hence, there is considerable credit exposure between ICE Clear Credit and these foreign-domiciled clearing members, in both directions.

¹³²¹ See Clearing Procedures Adopting Release, 77 FR at 41636-38.

¹³²² Positions represent each side of an original swap contract such that the aggregated numbers reported here are twice the amount of the notional exposure from the original contract.

Figure 5. 2011 monthly notional positions at ICE Clear Credit
(\$ billions)



C. Analysis of Potential Effects on Efficiency, Competition, and Capital Formation

1. Introduction

In developing our approach to the application of Title VII to cross-border activities, we have focused on meeting the goals of Title VII, including the promotion of the financial stability of the United States by improving accountability and transparency in the U.S. financial system, the reduction of systemic risk, and the protection of counterparties to security-based swaps.¹³²³ We also have sought to take into account a range of principles relevant to regulation of this market, as described above.¹³²⁴ As reflected in our discussion of the various policy choices we are proposing above¹³²⁵ and of the potential costs and benefits associated with our proposed

¹³²³ See note 4, *supra*.

¹³²⁴ See Section II.C, *supra*.

¹³²⁵ See Sections III - XI, *supra*.

approach in the economic analyses below,¹³²⁶ we also have considered effects on competition, efficiency, and capital formation.¹³²⁷

In this section, we focus particularly on these effects. Given the complexity and inter-relatedness of the potential effects of the proposed rules—both on a rule-by-rule basis and taken together as a whole—on the market for security-based swaps, we provide a framework for a general analysis of the effects of the proposed rules on competition, efficiency, and capital formation. We then use this framework to engage in an analysis of the possible effects of our proposed approach.

In developing the general analytical framework for considering the effects of our proposed cross-border approach on competition, efficiency, and capital formation, we have noted certain distinct analytical issues. First, various proposed rules may give rise to similar or overlapping effects. Second, each proposed rule or interpretation is a component of the Title VII regulatory framework and operates in tandem with the other Title VII components to form a comprehensive regulatory regime. To the extent that the proposed rules interact with each other, it is appropriate to broaden the analysis beyond a single rule. For example, although each of the rules and interpretations regarding registration of security-based swap dealers and the application

¹³²⁶ See Sections XV.D-I, *infra*.

¹³²⁷ As noted above, Section 3(f) of the Exchange Act requires that whenever pursuant to the Exchange Act the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. 15 U.S.C. 78c(f). In addition, Section 23(a)(2) of the Exchange Act requires the Commission, when making rules under the Exchange Act, to consider the impact such rules would have on competition and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. 15 U.S.C. 78w(a)(2)

of the public dissemination, regulatory reporting, mandatory clearing, and mandatory trade execution requirements in the cross-border context serve distinct regulatory purposes,¹³²⁸ together they may have combined effects on dealer participation in the U.S. security-based swap market and on the ability of certain market participants to access other parts of the global security-based swap market.

The analytical framework we establish here for considering the effects of our proposed approach to analyzing effects related to competition, efficiency, and capital formation is premised upon our understanding of the existing state of the security-based swap market. Two important features of the security-based swap market inform our analysis.

First, the security-based swap market is global in nature, and dealers and other market participants are highly interconnected within this global market. While most end users have only a few counterparties, dealers can have hundreds of counterparties, consisting of both end users and other dealers.¹³²⁹ This interconnectedness provides a myriad of paths for liquidity and risk to move throughout the financial system. As a result, it can be difficult to attribute liquidity and risk to a particular entity. The interconnected nature of the global security-based swap market

¹³²⁸ For example, registration of security-based swap dealers is intended, among other things, to increase the safety and soundness of security-based swap dealers and improve the stability of the U.S. financial system, while application of the public dissemination and mandatory trade execution requirements in the cross-border context are intended, among other things, to increase the transparency of the U.S. security-based swap market.

¹³²⁹ See Section XV.B.2(a), supra (discussing current security-based swap market participants). In addition, based on an analysis of 2011 transaction data by staff in the Division of Risk, Strategy, and Financial Innovation, the entities recognized by ISDA as dealers had on average 292 counterparties, with a minimum of 17 and a maximum of 695. All other entities (*i.e.*, those more likely to be end users), averaged 4 counterparties, with a minimum of 1 and a maximum of 52.

contributes to an increased potential for sequential counterparty failures, liquidity shocks, and market dislocation during times of financial market stress.¹³³⁰

In other words, the failure of one firm can have consequences beyond the firm itself, and the loss of trading confidence and willingness to trade in one market can have consequences beyond the firm's home jurisdiction or market. If firms consider the implications of security-based swap activity only on their own operations, without considering aggregate financial sector risk, including lack of liquidity and market disruption or the possibility of spillover effects, the financial system may end up bearing more risk than the aggregate capital of the intermediaries in the system can support and may cease to function normally.¹³³¹

Second, the security-based swap market developed as an over-the-counter market, without transparent pricing or volume information.¹³³² In markets without transparent pricing, access to information confers a competitive advantage. Within the security-based swap market, large dealers and other large market participants with a large share of order flow have an informational advantage over smaller dealers and end users who observe a smaller subset of the market. Greater private order flow enables better assessment of current market values that

¹³³⁰ "Rethinking the financial network," speech by Andrew G. Haldane, Executive Director for Financial Stability at the Bank of England, delivered to Financial Student Association, Amsterdam (Apr. 28, 2009), available at: <http://www.bis.org/review/r090505e.pdf?frames=0>.

¹³³¹ See Viral V. Acharya, Lasse H. Pedersen, Thomas Philippon, and Matthew Richardson, "Measuring Systemic Risk" (May 2010), available at: <http://vlab.stern.nyu.edu/public/static/SR-v3.pdf>. The authors use a theoretical model of the banking sector to show that, unless the external costs of their trades are considered, financial institutions will have an incentive to take risks that are borne by the aggregate financial sector). Under this theory, in the context of Title VII, the relevant external cost is systemic risk (i.e., the potential for risk spillovers and sequential counterparty failure), leading to an aggregate systemic capital shortfall and breakdown of financial intermediation in the financial sector.

¹³³² See SB SEF Proposing Release, 76 FR at 10949.

dealers may use to extract rents from counterparties who are less informed.¹³³³ End users are aware of this information asymmetry, and certain end users—particularly larger entities who transact with many dealers—may be able to obtain access to competitive pricing. Typically, however, the value of private information will be captured by those who have the information—in this case, predominantly dealers who observe the greatest order flow.

In sum, the security-based swap market is a global market characterized by a high level of interconnectedness and spillover risk and by significant information asymmetries that result from the opacity of the OTC market. The global nature of this market, combined with the interconnectedness of market participants, means that it is difficult to isolate risk and liquidity problems to one geographical segment of the market, or to one asset class. Because U.S. market participants and transactions regulated under Title VII are a subset of the overall global security-based swap market, concerns surrounding these types of spillovers are part of the framework in which we analyze the competitive effects of our proposed rules and interpretations.

The interconnectedness of this market also highlights the need for coordination among international regulators.¹³³⁴ Because liquidity and risk spillovers, even from entities that engage in security-based swap activity entirely outside the United States, have the potential to put the U.S. market at risk, consistent regulation of the security-based swap market across jurisdictions

¹³³³ Martin D. D. Evans and Richard K. Lyons, “Exchange Rate Fundamentals and Order Flow,” NBER Working Paper No. 13151 (June 2007), available at: http://128.97.165.17/media/files/evans_lyons.pdf. Using data on end-user currency trades, the authors find evidence that transaction flows forecast future macro variables such as output growth, money growth, and inflation.

¹³³⁴ The Commission has entered into bilateral and multilateral discussions with foreign regulatory authorities concerning the regulation of OTC derivatives. See Section I and notes 34 and 35, supra.

may be necessary to effectively reduce those risks. However, the regulatory developments in various jurisdictions are not necessarily consistent in pace and scope, which may result in certain types of risks being addressed in different ways.

In our assessment of the economic effects of the proposed rules and interpretations, we also are mindful that these differences in scope and timing may affect the behavior of some market participants. In particular, the United States being first-mover in many areas of security-based swap market regulation presents unique challenges to maintaining high regulatory standards and avoiding disruptions in the global security-based swap market.

We also recognize that regulations designed to mitigate systemic risk and improve transparency can impose a barrier to entry and access for foreign participants, which could have an effect on liquidity in the security-based swap market. For example, regulatory requirements in the U.S. that conflict with foreign laws may preclude foreign entities from participating in U.S. markets. We also recognize that regulators in other jurisdictions are currently engaged in implementing their own regulatory reforms of the OTC derivatives markets and are faced with a similar tradeoff between preserving market access and reducing risks to their financial systems. Our proposed application of Title VII to cross-border activities may affect the policy decisions of these other regulators as they seek to address this tradeoff under their authority.

Regulatory differences among jurisdictions in the global security-based swap markets driven by lack of coordination could create incentives for business restructuring solely for the purposes of operating outside of Title VII regulation. Furthermore, barriers to market access may produce competitive distortions and lead to fragmented markets.¹³³⁵ We also note that the

¹³³⁵ See, e.g., Arnoud W.A. Boot, Silva Dezelan, and Todd T. Milbourn, "Regulatory Distortions in a Competitive Financial Services Industry," J. of Fin. Serv. Res., Vol. 17,

potential effects of our proposed application of Title VII in the cross-border context on competitive frictions and market fragmentation would be moderated or amplified by the substantive requirements ultimately adopted by the Commission. The Commission is reopening the comment periods for our outstanding rulemaking releases that concern security-based swaps and security-based swap market participants and were proposed pursuant to certain provisions of the Exchange Act, as amended by Title VII of the Dodd-Frank Act.¹³³⁶

2. Competition

The proposed rules and interpretations discussed in this release will likely affect competition in the U.S. security-based swap market and potentially change the set of available counterparties that would compete for business and provide liquidity to U.S. market participants. Some of these proposed rules and interpretations will likely enhance competition and participation in the U.S. market, as application of Title VII requirements to entities that are engaged in security-based swap activity conducted with U.S. persons or otherwise conducted within the United States will likely promote safety and soundness, transparency, and competition within the U.S. security-based swap market and the U.S. financial system as a whole. At the same time, these proposed rules and interpretations may impose certain costs or other burdens that may reduce the level of competition in this market.

No. 1 (2000) (showing that, in a simple industrial organization model of bank lending, a change in the cost of capital resulting from regulation results in a greater loss of profits when regulated banks face competition from non-regulated banks than when regulations apply equally to all competitors). See also Victor Fleischer, "Regulatory Arbitrage," 89 Tex. L. Rev. 227 (Mar. 4, 2010) (discussing how, when certain firms are able to choose their regulatory structure, regulatory burdens are shifted onto those entities that cannot engage in regulatory arbitrage).

¹³³⁶

See note 29, supra.

Assessing the net effect of these proposed rules and interpretations on competition is particularly complicated in the cross-border context. As already noted, cross-border activity involving market participants domiciled in different jurisdictions accounts for the vast majority of transactions in the security-based swap market. U.S. persons routinely enter into security-based swap transactions with market participants located in other jurisdictions or have operations outside the United States that engage in security-based swap activity; similarly, non-U.S. persons routinely enter into transactions with U.S. persons and maintain operations within the United States. The global nature of the market and of market participants' operations may lead to differences in the application of Title VII to firms active in the global security-based swap market and may create incentives for firms to restructure their operations to minimize contact with the United States that would be less likely in a less global market.

In our preliminary view, there are three key factors that will contribute to the effects our proposed cross-border rules and interpretations will have on competition in the security-based swap market: (1) how Title VII requirements apply to U.S. persons and non-U.S. persons when they transact security-based swaps within the United States; (2) how these requirements apply to U.S. persons and non-U.S. persons when they transact security-based swaps outside the United States; and (3) whether the regulatory requirements that foreign jurisdictions impose on U.S. persons and non-U.S. persons are comparable to those that we are proposing in this release. In addition, as noted above, the magnitude of any competitive effects flowing from our proposed application of the Title VII requirements described in this release will also be determined by the substantive rules we ultimately adopt to implement Title VII.

For example, in response to our proposal to impose Title VII requirements on non-U.S. persons that engage in security-based swap activity with U.S. persons or within the United

States, some non-U.S. persons may seek to restructure their operations to minimize their contact with the United States in an effort to avoid having to comply with Title VII; some non-U.S. persons may determine to exit the U.S. market entirely. Similarly, to the extent that our proposed rules treat the foreign business of U.S. persons and non-U.S. persons differently from their U.S. business, these entities may have incentives to restructure their business to separate their foreign and U.S. operations. Both of these potential responses to our proposal may result in lessened competition in the security-based swap market within the United States. The decision to restructure and move operations outside the United States does not necessarily indicate reduction of the exposures of the U.S. financial system to systemic risk if, for example, the foreign operations are supported by a guarantee provided by a U.S. person, which provides a path for the transmission of risk to transmit to the United States.

The competitive effects of our proposal will also be affected by whether entities potentially subject to Title VII are also subject to similar regulations in foreign jurisdictions when they transact security-based swaps or perform infrastructure functions in the security-based swap market, and, if so, whether those regulations are inconsistent with, or duplicative of applicable Title VII regulations. Many other jurisdictions are implementing reforms of the OTC derivatives market (including those products defined as security-based swaps within the United States), but this regulation can be expected to develop along different timelines and impose different substantive requirements.

To the extent that these timelines or requirements are different, market participants may have the opportunity to take advantage of these differences by making strategic choices, at least in the short term, with respect to their transaction counterparties and operating business models. For example, at a larger scale, firms may choose whether to withdraw from, or participate in the

U.S. security-based swap market. This may change the number of participants in the U.S. market and could have a direct impact on competition in the U.S. market. In addition, differences in regulatory requirements may make it difficult for U.S. dealers to provide competitive spreads relative to foreign dealers. While we do not anticipate that this disadvantage would cause U.S. dealers to exit foreign markets, it could have a direct effect on competition in foreign markets unless U.S. dealers restructure their business to conduct foreign transactions through subsidiaries that satisfy the requirements to be considered non-U.S. persons.

In developing the approach we are proposing in this release, we have considered the potential for competitive distortions as a result of these inconsistencies. At the same time, the Commission believes that, while the potential of regulatory arbitrage is real, the effects of these strategic choices may be mitigated to some extent as regulators in other jurisdictions implement the G20 commitments.¹³³⁷ Efforts are underway to achieve robust derivatives market regulation, including regulations of the security-based swap markets, in various jurisdictions.¹³³⁸ As jurisdictions progress toward full implementation of the G20 commitments, competitive distortions should decline to some extent, blunting the incentives for this type of strategic behavior.

¹³³⁷ See note 32 and accompanying text, *supra*.

¹³³⁸ See, e.g., Joint Press Statement of Leaders on Operating Principles and Areas of Exploration in the Regulation of the Cross-Border OTC Derivatives Market, available at: <http://www.sec.gov/news/press/2012/2012-251.htm>.

(a) Security-Based Swap Dealers

Our proposed approach would generally apply dealer registration and other Title VII requirements to entities that conduct dealing activity with U.S. persons¹³³⁹ or in the United States.¹³⁴⁰ Because the full range of Title VII requirements are applied generally to activity in the United States regardless of the counterparty's U.S.-person status,¹³⁴¹ persons choosing to transact a security-based swap in the United States may have no incentive to favor a non-U.S. counterparty over a U.S. counterparty.¹³⁴²

At the same time, some entities may determine that the compliance costs arising from the requirements of Title VII warrant exiting the security-based swap market in the United States. Non-U.S. persons may find this option more attractive than U.S. persons because they may find it easier to structure their foreign business so as to prevent it from falling within the scope of Title VII. To the extent that entities engaged in dealing activity exit the U.S. security-based swap market, the level of competition in the market may decline. These exits could result in

¹³³⁹ See the proposed definition of "U.S. person" in proposed Rule 3a71-3(a)(7) under the Exchange Act.

¹³⁴⁰ See the proposed definition of "transaction conducted within the United States" in proposed Rule 3a71-3(a)(5) under the Exchange Act.

¹³⁴¹ See the proposed *de minimis* rule in proposed Rule 3a71-3(b) under the Exchange Act, the proposed application of the mandatory clearing requirement to cross-border security-based swap transactions in proposed Rule 3Ca-3, as discussed in Section IX above; the proposed application of the mandatory trade execution requirement to cross-border security-based swap transactions in proposed Rule 3Ch-1, as discussed in Section X above; and the proposed application of the regulatory reporting and public dissemination requirements in proposed Rule 908 of Regulation SBSR, as discussed in Section VIII above.

¹³⁴² This is in general the case, however, proposed Rules 3Ca-3(b) and 3Ch-1(b) would not apply the mandatory clearing and mandatory trade execution requirements to transactions between two non-U.S. persons who are not security-based swap dealers and whose performances under security-based swaps are not guaranteed by a U.S. person, even though such transactions are conducted in the United States.

higher spreads and affect the ability and willingness of end users to engage in security-based swaps.¹³⁴³

We noted in the Intermediary Definitions Adopting Release that the registration requirement would impose dealer registration costs on entities that engage in the bulk of dealing activity in the market, while the de minimis threshold would allow persons who account for a small portion of dealing activity to avoid incurring these costs to obtain what would likely be comparatively modest benefits, given the small size of these dealers.¹³⁴⁴ We noted in that release that the de minimis threshold may mitigate some of the potential competitive burdens that could fall on entities engaged in a smaller amount of dealing activity without leaving an undue amount of dealing activity outside of the ambit of dealer regulation.¹³⁴⁵

In the cross-border context, the proposed de minimis exception¹³⁴⁶ could reduce the number of entities likely to exit the U.S. market because it would enable an established foreign entity to transact a de minimis amount of security-based swap dealing activity in the U.S. market before it determines whether to expand its U.S. business¹³⁴⁷ and become a registered security-

¹³⁴³ Barclay, Michael, William G. Christie, Jeffrey H. Harris, Eugene Kandel and Paul H. Schultz, "Effects of Market Reform on the Trading Costs and Depths of Nasdaq Stocks," *Journal of Finance*, Vol. 54, No. 1 (Feb. 1999) (measuring the impact of rules designed to enhance public competition with Nasdaq dealers, and observing evidence of lower quoted and effective spreads without adverse effects on market quality).

¹³⁴⁴ See Intermediary Definitions Adopting Release, 77 FR at 30741.

¹³⁴⁵ See id.

¹³⁴⁶ The proposed application of the de minimis exception would allow a U.S. and foreign dealing entity to conduct dealing activity in the U.S. security-based swap market without registering as a security-based swap dealer so long as their trailing 12-month notional volume of transactions with U.S. persons and transactions conducted within the United States in its dealing capacity is below the de minimis threshold. See proposed Rule 3a71-3(b) under the Exchange Act.

¹³⁴⁷ See proposed Rule 3a71-3(a)(6) under the Exchange Act.

based swap dealer. However, since the ability of smaller entities to access the U.S. security-based swap market without registration would be limited to conducting dealing activity below the de minimis threshold, these entities would have an incentive to curtail their security-based swap dealing activity with U.S. persons as they approach the de minimis threshold to avoid having to register as a dealer. To the extent that such entities choose to operate in the U.S. market at levels below the de minimis threshold, the net effect on competition of their decision to remain in the U.S. market is likely to be small and unlikely to deter the accumulation of market power by a relatively smaller number of large dealing entities than are currently active in the U.S. market.

On the other hand, Title VII regulatory requirements may allow registered dealers to credibly signal high quality, better risk management, and better counterparty protection relative to unregistered dealers that compete for the same order flow. End users in the U.S. market may be willing to pay higher prices for higher-quality services from registered entities.¹³⁴⁸ These regulatory benefits could mitigate the competitive burdens imposed by the proposed cross-border rules and substantive Title VII requirements applicable to registered security-based swap dealers by, for example reducing incentives for firms to exit the market.

¹³⁴⁸ Cf. Carl Shapiro, "Investment, Moral Hazard, and Occupational Licensing," *The Review of Economic Studies*, Vol. 53, No. 5 (1986) (using a theoretical model to show "that licensing and certification tend to benefit consumers who value quality highly at the expense of those who do not"). Oren Fuerst, "A Theoretical Analysis of the Investor Protection Regulations Argument for Global Listing of Stocks," Working Paper (1998) (using a theoretical model of the listing decision to show how managers of high quality firms signal their quality more effectively in a strict regulatory regime). Craig Doidge, G. Andrew Karolyi and Rene M. Stulz, "Why are Foreign Firms Listed in the U.S. Worth More?" *Journal of Financial Economics*, Vol. 71, Issue 2 (2004) (hypothesizing that firms cross-listed in the United States are better able to take advantage of growth opportunities, and finding that "expected sales growth is valued more highly for firms listed in the U.S. and that this effect is greater for firms from countries with poorer investor rights").

The proposed approach to application of Title VII requirements to dealing activities outside the United States may also have distinct competitive effects that interact with the effects just described. Because we are proposing to take a different approach to the application of Title VII to dealing activity outside the United States from the application of Title VII to dealing activity in the United States, certain dealing entities may have incentives to restructure their existing dealing business¹³⁴⁹ in order to prevent all or part of their security-based swap business from becoming subject to Title VII. For example, a foreign dealing entity conducting its U.S. Business¹³⁵⁰ in excess of the de minimis threshold may be motivated to separate its U.S. Business from its Foreign Business into two or more distinct entities.¹³⁵¹ Such a firm may conduct U.S. Business and Foreign Business through two separate entities and confine its U.S. Business in an entity registered as security-based swap dealer, potentially allowing the firm to insulate its Foreign Business from Title VII requirements. Alternatively, some foreign dealing entities may choose to exit the U.S. market entirely.

Similarly, application of the transaction-level requirements for public dissemination, mandatory clearing, and mandatory trade execution may generally be triggered, in part, by the choice of non-U.S. persons to conduct security-based swap transactions within the United States.¹³⁵² This may give foreign security-based swap dealers and other market participants an

¹³⁴⁹ See Section II.A.2, supra (describing the dealing structures used by dealing entities to conduct global security-based swap business).

¹³⁵⁰ See proposed Rule 3a71-3(a)(6) under the Exchange Act.

¹³⁵¹ See proposed Rule 3a71-3(a)(2) under the Exchange Act.

¹³⁵² This is in general the case, however, proposed Rules 3Ca-3(b) and 3Ch-1(b) would not apply the mandatory clearing and mandatory trade execution requirements to transactions between two non-U.S. persons who are not security-based swap dealers and whose performances under security-based swaps are not guaranteed by a U.S. person, even though such transactions are conducted in the United States.

incentive to restructure their operations or otherwise avoid using an agent in the United States to conduct security-based swap transactions in order to avoid the transaction-level requirements.¹³⁵³

For example, a foreign security-based swap dealer operating within the United States whose performance under security-based swaps are not guaranteed by a U.S. person (“foreign non-guaranteed security-based swap dealer”) would be required to comply with the mandatory clearing requirement with respect to a security-based swap with a non-U.S. person counterparty whose security-based swap transaction is not guaranteed by a U.S. person (“non-U.S. non-guaranteed counterparty”). However, the same security-based swap between a foreign non-guaranteed security-based swap dealer and a non-U.S. non-guaranteed counterparty would not be subject to mandatory clearing if the transaction were conducted outside the United States. Therefore, foreign non-guaranteed security-based swap dealers and non-U.S. non-guaranteed counterparties may be motivated to avoid using their U.S. operations, such as a sales and trading desk in the United States, to conduct security-based swaps with non-guaranteed non-U.S. counterparties in order to avoid application of the mandatory clearing, public dissemination, and trade execution requirements under Title VII. They may be further motivated to move part of their operations, such as the sales and trading desk in the United States that currently conducts security-based swaps with non-guaranteed non-U.S. counterparties to a location outside the United States.

¹³⁵³ This is especially the case with respect to the public dissemination requirement; however, with respect to mandatory clearing and mandatory trade execution requirements, this incentive would not exist with respect to a non-U.S. person who is not a security-based swap dealer and whose performance under security-based swaps is not guaranteed by a U.S. person, if such non-U.S. person transacts with another non-U.S. person that is not a security-based swap dealer and is not guaranteed by a U.S. person. See note 1352, supra.

These potential restructurings may impact competition in the U.S. market. On one hand, the ability to restructure one's business rather than exit the U.S. market entirely to avoid application of Title VII to an entity's non-U.S. operations may reduce the number of entities that exit the market, thus mitigating the negative effects on competition described above. On the other hand, U.S. end users may find that the only foreign security-based swap dealers that are willing to deal with them are those whose security-based swap business is sufficiently large to afford the costs of restructuring and of registration as well as the ensuing compliance costs associated with applicable Title VII requirements. To the extent that smaller dealers continue to have an incentive to exit the market, the overall level of competition in the market may decline.

Moreover, regardless of the response of dealers to our proposed approach, we cannot preclude the possibility that large end users in the United States who have the resources to restructure their business also may pursue restructuring and move part of their business offshore in order to transact with dealers outside the reach of Title VII. This may reduce liquidity within the U.S. market and provide additional incentives for U.S. persons and non-U.S. persons to shift a higher proportion of their security-based swap business off-shore, further reducing the level of competition within the United States. In this scenario, the competitive frictions caused by the application, in the cross-border context, of a de minimis threshold for dealing activity may affect the ability of small end users of security-based swaps to access the security-based swap market more than large ones, as smaller end users are less likely to have the resources that would enable or justify a restructuring of their business.

To reduce the likelihood of market fragmentation and increase U.S. persons' access to foreign markets, we are proposing not to require non-U.S. persons to count transactions with foreign branches of U.S. banks toward their de minimis threshold if the transactions are

conducted outside the United States.¹³⁵⁴ We preliminarily believe that this would reduce the incentives of non-U.S. person dealers to avoid engaging in security-based swap dealing activity with foreign branches of U.S. banks. In addition, we are proposing not to apply certain market-wide transaction-level requirements (i.e., mandatory clearing, public dissemination, and mandatory trade execution requirements) to foreign branches and non-U.S. persons whose performance under security-based swap transactions is guaranteed by a U.S. person, when foreign branches and guaranteed non-U.S. persons transact with non-U.S. persons whose performance under security-based swap transactions is not guaranteed by a U.S. person and who are not registered security-based swap dealers. This approach to transaction-level requirements reduces the likelihood of conflicting regulations for foreign branches of U.S. banks and guaranteed non-U.S. persons operating in foreign jurisdictions as these jurisdictions adopt regulatory requirements for security-based swap participants.

Finally, our proposed cross-border approach includes a substituted compliance policy framework that allows market participants to request substituted compliance. Substituted compliance, if granted, would allow certain security-based swap transactions or participants to satisfy their compliance obligations with respect to the applicable Title VII requirements by complying with the rules of a foreign jurisdiction. This should reduce market participants' compliance costs by reducing the effects of duplicative regulation. Substituted compliance could encourage foreign firms' participation in the U.S. market and U.S. firms' access to the global market. This might result in increased competition between both U.S. and foreign intermediaries without compromising the regulatory benefits intended by the applicable Title VII requirements.

¹³⁵⁴ See proposed Rule 3a71-3(b) under the Exchange Act.

Conflicting regulations may impose a legal barrier to entry that goes beyond firms' willingness to participate in U.S. markets as a result of duplicative compliance costs. In these cases, substituted compliance determinations may remove this legal barrier, even if offered conditionally, and allow market participants to more easily access U.S. markets. This may also facilitate U.S. participants' access to foreign liquidity. Access to more liquidity providers and infrastructure services, as well as the general benefits of increased market participation, should promote competition in the security-based swap market.

The overall effects of the proposed approach described in this release on competition among dealing entities in the U.S. security-based swap market will depend on the way market participants respond to these different elements of our proposal. For example, suppose the proposed application of the security-based swap dealer registration requirement increases concentration among security-based swap dealers providing services to U.S. end users. Application of market-wide transaction-level requirements that facilitate competition (as discussed further below) may offset any competitive effects caused by increased concentration. Fewer dealing entities may lead to decreased competition and wider spreads in the security-based swap market; however, implementation of the public dissemination and mandatory trade execution requirements would increase pre-trade and post-trade transparency, making it more difficult for dealing entities to post wider spreads.¹³⁵⁵

(b) Security-Based Swap Market Infrastructure Requirements

¹³⁵⁵ Michael A. Goldstein, Edith S. Hotchkiss, and Erik R. Sirri, "Transparency and Liquidity: A Controlled Experiment on Corporate Bonds," *Review of Financial Studies*, Vol. 20, No. 2 (2007) (using a controlled experiment in the BBB bond market to show how, in some cases, spreads on newly post-trade transparent bonds decline relative to bonds that remain opaque).

i. Registration of Clearing Agencies, SDRs and SB SEFs

The Commission has considered the effects of the proposed application in the cross-border context, of the registration requirements with respect to clearing agencies, SDRs, and SB SEFs on competition in the U.S. security-based swap market.

The proposed approach to applying the registration requirements with respect to security-based swap market infrastructures is based on whether a CCP, a data repository, or a security-based swap trading facility has performed the type of activity in the United States or with respect to U.S. persons that constitutes clearing services, data repository services, or trading facility services within the meaning of the Exchange Act that would trigger the registration requirement. One of the indicators of performing security-based swap infrastructure services in the United States is to provide such services to a U.S. person. In the case of clearing services, this would include accepting a U.S. person as a member of a CCP. Similar to our analysis of the effects of the proposed application of the security-based swap dealer registration requirement on competition in the cross-border context, we are mindful that the proposed approach would directly affect the total number of clearing agencies, SDRs, and SB SEFs that would be required to register with the Commission. Registration would trigger certain Title VII requirements, which would entail compliance costs. Certain CCPs, data repositories, or security-based swap trading facilities may choose to withdraw from the U.S. market to avoid registration.

However, the burden on competition imposed by the proposed approach to infrastructure registration requirements would likely be less acute than the security-based swap dealer registration requirement. Clearing, trade reporting, and execution on trading platforms are relatively recent services for the security-based swap market, and only a limited number of

CCPs, trade repositories, and execution facilities currently perform these services¹³⁵⁶ and may therefore be required to register under the Dodd-Frank Act. In addition, the proposed interpretation with respect to availability of an exemption from registration for foreign SB SEFs should reduce or eliminate the duplicative regulatory costs for foreign SB SEFs subject to comparable regulatory requirements and increase the likelihood that foreign SB SEFs will enter the United States, which, in turn, would increase competition.

Nonetheless, the proposed application of Title VII regulation in the cross-border context generates competitive frictions similar to those discussed above in the context of dealers. Broadly, providers of security-based swap infrastructure may seek to limit their exposure to the U.S. portion of the market in order to avoid Title VII regulation. For example, a foreign CCP that does not otherwise perform clearing services in the United States may refuse to accept U.S. persons as members to avoid registration and compliance costs, which would limit U.S. persons' access to foreign clearing services to correspondent arrangements. Similar arguments apply to U.S. persons' access to execution venues and data repositories.

The Commission also has considered the ways in which the structure of the market for infrastructure services may affect the benefits that flow from certain Title VII regulations. Providing incentives for entry of SDRs could result in fragmentation of regulatory data across multiple repositories, which would complicate oversight of the security-based swap market and require that regulators take additional steps to consolidate data sets.¹³⁵⁷ In this release, the

¹³⁵⁶ See Clearing Agency Standards Adopting Release, 77 FR at 66258 (estimating that between seven and 10 entities would be likely to register as CCPs); SDR Proposing Release, 75 FR at 77347 n.207 (estimating that 10 entities would be likely to register as SDRs); SB SEF Proposing Release, 76 FR at 11023 (estimating that up to 20 entities could seek to register as SB SEFs).

¹³⁵⁷ See Section VI.B, supra.

Commission has proposed the availability of conditional exemptive relief for non-U.S. persons performing SDR functions that potentially reduces the number of SDRs that would receive regulatory data.¹³⁵⁸ Further, the proposed indemnification exemption may discourage the establishment of SDRs on jurisdictional lines.¹³⁵⁹

Similarly, a single CCP serving the entire security-based swap market may result in more effective netting of offsetting positions among members, potentially reducing aggregate counterparty risk borne by the CCP and making risk management less costly.¹³⁶⁰ Indeed, high fixed costs and low variable costs associated with the provision of clearing services may contribute to a natural monopoly in this market. A second benefit of a single CCP is that it would preclude the possibility that risk management standards could erode as CCPs compete for clearing business. However, if the market evolves so that a single CCP emerges, it could require additional regulatory monitoring to address issues associated with natural monopolies.¹³⁶¹

These arguments are less clear in the case of SB SEFs. Evidence from equity markets seems to indicate benefits from both consolidation and fragmentation.¹³⁶² On the one hand, some

¹³⁵⁸ See Section XV.H.1(a)(ii), *infra*.

¹³⁵⁹ See Section XV.H.2, *infra*.

¹³⁶⁰ See Craig Pirrong, "The Economics of Central Clearing: Theory and Practice," ISDA Discussion Papers Series, No. 1 (2011). Concentration of risk in a CCP can itself also become a source of systemic risk. See Section II.A.6.(c), *supra*.

¹³⁶¹ See, e.g., Section 17A(b)(3)(D) of the Exchange Act, 15 U.S.C. 78q-1(b)(3)(D) (requiring that the rules of a "clearing agency provide for the equitable allocation of reasonable dues, fees, and other charges among its participants"). See also Kenneth Train, "Optimal Regulation: The Economic Theory of Natural Monopoly," Cambridge: The MIT Press (1991) (discussing price regulation of natural monopolies).

¹³⁶² See Haim Mendelson, "Consolidation, Fragmentation and Market Performance," *Journal of Financial and Quantitative Analysis*, Vol. 22, Issue 2 (1987) (using a theoretical model to examine the tradeoffs between consolidation and fragmentation). See also James L. Hamilton, "Marketplace Fragmentation, Competition, and the Efficiency of the Stock

research supports the conclusion that consolidation of order flow onto a small number of trading venues may facilitate efficient matching between supply and demand, reduce price volatility within the trading venue,¹³⁶³ and reduce spreads.¹³⁶⁴ On the other hand, other researchers have found that the competitive effects flowing from multiple trading venues can outweigh the effects of fragmentation, resulting in more efficient pricing and narrower spreads.¹³⁶⁵

The Commission has considered the above effects and proposed a cross-border approach that would require a CCP or execution facility to register if it performs clearing agency function in the United States or operates a facility for the trading or processing of security-based swaps in the United States or with respect to U.S. persons. Similarly, the Commission has proposed an approach that would require a trade repository to register if it performs SDR functions within the United States. The Commission preliminarily believes that this approach would promote transparency, improve systemic risk management, and allow better regulatory oversight, which in turn, would encourage broader market participation in the U.S. security-based swap market.

ii. Application of Mandatory Clearing, Public Dissemination, Regulatory Reporting, and Trade Execution Requirements in the Cross-Border Context

The proposed application of the market-wide transaction-level requirements to cross-border activities may have significant effects on competition in the U.S. security-based swap

Exchange,” *Journal of Finance*, Vol. 34, Issue 1 (1979) (examining data from the NYSE and showing that off-board trading that competes with specialists tends to reduce spreads more than the fragmentation of trade tends to increase them).

¹³⁶³ See Mendelson, note 1362, *supra*.

¹³⁶⁴ See Pankaj Jain, “Institutional Design and Liquidity at Stock Exchanges around the World,” Working Paper (2003). Using data on institutional features of stock exchanges around the world, the author observes that consolidated order flow is associated with lower spreads.

¹³⁶⁵ See Hamilton, note 1362, *supra*.

market. As noted above, the Commission is proposing an approach that would generally apply Title VII transaction-level requirements evenly to persons who conduct security-based swap activity with U.S. persons or within the United States.¹³⁶⁶ Because these requirements are generally applied evenly and expansively in the United States, a foreign person who wishes to avoid clearing, public dissemination, or pre-trade transparency requirements would have to avoid either transacting with U.S. persons or involving a U.S. person as agent in negotiating, soliciting, or executing security-based swap transactions on its behalf within the United States.¹³⁶⁷

Notwithstanding a possible reduction in competition, the Commission believes that these market-wide transaction-level requirements should be applied to such transactions because they reduce systemic risk, promote transparency, and improve regulatory oversight. All of these contribute to the integrity and efficiency of the U.S. security-based swap market and should increase competition among those who choose to participate under Title VII.

The proposed cross-border approach would generally not apply the market-wide transaction-level requirements to foreign branches and non-U.S. persons whose performance under security-based swap transactions is guaranteed by a U.S. person, when foreign branches and guaranteed non-U.S. persons transact with non-U.S. persons whose performance under security-based swap transactions is not guaranteed by a U.S. person and who are not registered security-based swap dealers. As stated in the competition analysis with respect to security-based

¹³⁶⁶ See the proposed definition of “transaction conducted within the United States” in proposed Rule 3a71-3(a)(5) under the Exchange Act and notes 1340 and 1341 above.

¹³⁶⁷ However, with respect to the mandatory clearing and mandatory trade execution requirements, transactions between two non-U.S. persons whose performance of obligations under security-based swaps is not guaranteed by U.S. persons and who are not security-based swap dealers would not be subject to mandatory clearing and mandatory trade execution even though these transactions are conducted within the United States. See proposed Rules 3Ca-3 and 3Ch-1 under the Exchange Act.

swap dealers,¹³⁶⁸ this proposed approach would facilitate U.S.-based dealing entities' access to foreign markets and help prevent market fragmentation. However, the guarantees provided by U.S. persons remain a conduit for systemic risk to be transmitted to the United States.

However, the Commission is mindful that, in the near term and until full implementation of transparency requirements in the other jurisdictions that are comparable to the U.S. market-wide transaction-level requirements, if any part of the global market is left opaque without either public dissemination or pre-trade transparency, there may be opportunities for market participants to restructure and move their transactions to the OTC part of the global market. The value of transparency in the U.S. market would be reduced to the extent that liquidity migrates to less-transparent jurisdictions.

3. Efficiency

As noted above, in proposing the rules and interpretations discussed in this release, we are required to consider whether these actions would promote efficiency. In significant part, the effects of our proposed cross-border approach on efficiency are linked to the effects on competition. Minimizing impediments to access to the security-based swaps not only promotes competition, but also encourages participants to express their true valuation for security-based swaps and, as a result, is expected to promote efficiency. Generally, rules and interpretations that delineate an appropriate scope of application of the Title VII requirements can be expected to promote the efficient allocation of risk, capital, and other resources by facilitating price discovery and reducing costs associated with dislocations in the market for security-based swaps.

The proposed application of Title VII rules to cross-border transactions potentially increases the volume of transactions that will take place on transparent venues. For example,

¹³⁶⁸ See Section XV.C.2(a), *supra*.

while the proposed rules allow exceptions to the mandatory trade execution requirement for certain transactions involving a foreign branch of a U.S. bank or a guaranteed non-U.S. person as one counterparty, these exceptions do not apply when a foreign security-based swap dealer is the other counterparty to the transactions, and such transactions would be exposed to pre-trade transparency on SB SEFs or exchanges. As stated above, the OTC security-based swap market is characterized by search frictions and asymmetric information.¹³⁶⁹ Currently, in order to trade, market participants must contact intermediaries on a bilateral basis to locate counterparties. Intermediaries may capture these search costs by behaving less competitively. Search-based inefficiencies in the bilateral OTC market manifest explicitly in the costs of matching with counterparties and are implicit in the somewhat wider spreads that dealers might quote as a strategic response to customer search costs.¹³⁷⁰ In addition, large intermediaries who observe vast volumes of order flows from the breadth of their customer base have an informational advantage over customers or small dealers who observe less order flow. This means that end users potentially face adverse selection in addition to search costs which may reduce their willingness to participate in the security-based swap market even when they might benefit from increased risk-sharing.

In markets with impartial access, such as those characterized by our proposed regime for SB SEFs, participants would face lower search costs when they decide to enter or exit a security-based swap position. Moreover, access to the security-based swap market would be available to

¹³⁶⁹ See SB SEF Proposing Release, 76 FR at 10949.

¹³⁷⁰ See Darrell Duffie, Nicolae Garleanu, and Lasse Heje Pedersen, "Over-the-Counter Markets," *Econometrica*, Vol. 73, Issue 6 (2005) (using a theoretical model of an over-the-counter market to show a reduction in spreads when investors have easier access to multiple counterparties).

more participants, increasing the likelihood of efficient reallocation of risks carried by security-based swap contracts.¹³⁷¹ At the same time, pre- and post-trade transparency requirements under Title VII reduce dealers' ability to benefit from private information that comes from observing order flow.¹³⁷² This change may increase the willingness of market participants to lay off risks they are relatively less-equipped to bear. Increased liquidity in a transparent security-based swap market should facilitate price discovery.¹³⁷³

Increased price efficiency in the security-based swap market, in turn, produces important externalities. Transparency in the security-based swap market could result in more accurate valuation of security-based swaps generally, as all market participants would have the benefit of knowing how counterparties to a security-based swap valued the security-based swap at a specific moment in time.¹³⁷⁴ Especially with complex instruments, investment decisions generally are predicated on a significant amount of due diligence to value the instrument

¹³⁷¹ See John Cochrane, *Asset Pricing*, Princeton University Press, Princeton, NJ (2001). Chapter 3 discusses the role of securities markets, new securities, and financial innovation in allowing individuals to share and diversify risks.

¹³⁷² We recognize that intermediaries' informational advantage may not be completely eliminated by the mandatory trade execution and public dissemination requirements. For example, intermediaries would have the advantage of seeing order flows or inquiries that are not ultimately executed and disseminated. In addition, the executing intermediary still has informational advantage from knowing the counterparty's identity, and intermediaries may know about an order or inquiry before anyone else in the market.

¹³⁷³ See Terrence Hendershott and Charles M. Jones, "Island Goes Dark: Transparency, Fragmentation, and Regulation," *Review of Financial Studies*, Vol. 18, No. 3 (2005) (showing that a decrease in limit order book transparency on Island was followed by substantial price discovery movement from the ETF market to the futures market). See also Bengt Holmstrom and Jean Tirole, "Market Liquidity and Performance Monitoring," *Journal of Political Economy*, Vol. 101, No. 4 (1993) (using a theoretical model to show how increased liquidity can increase the marginal value of information and the informativeness of stock prices).

¹³⁷⁴ See Regulation SBSR Proposing Release, 75 FR at 75281.

properly. A post-trade transparency system permits other market participants to derive at least some informational benefit from obtaining the views of the two counterparties who traded that instrument. Finally, central clearing of security-based swaps could make it easier for market participants who observe prices to disentangle the default risk of counterparties from the fundamental risks priced into the underlying contract. This has the benefit of enhancing the incremental price discovery already associated with the transparency requirements.

Better valuations could have a significant impact on efficiency and capital allocation. In particular, under the pre-trade and post-trade transparency regimes contemplated by Title VII, persons outside the security-based swap market could use information produced and aggregated by the security-based swap market as an input to both real investment decisions as well as financial investments in related markets for equity and debt.¹³⁷⁵ By helping asset valuations move closer to their fundamental values, transparency encourages efficient capital allocation.¹³⁷⁶

In the cross-border context, our proposed approach generally applies the full range of Title VII requirements (including mandatory clearing, regulatory reporting, public dissemination, and mandatory trade execution requirements) to transactions with U.S. persons and transactions conducted within the United States,¹³⁷⁷ with the objective of promoting transparency and

¹³⁷⁵ See Philip Bond, Alex Edmans, and Itay Goldstein, "The Real Effects of Financial Markets," *Annual Review of Financial Economics*, Vol. 4 (Oct. 2012) (reviewing the theoretical literature on the feedback between financial market price and the real economy). See also Sugato Chakravarty, Huseyin Gulen, and Stewart Mayhew, "Informed Trading in Stock and Option Markets," *Journal of Finance*, Vol. 59, No. 3 (2004) (estimating that the proportion of information about underlying stocks revealed first in option markets ranges from 10 to 20 percent).

¹³⁷⁶ See Regulation SBSR Proposing Release, 75 FR at 75281.

¹³⁷⁷ See note 1367, *supra*.

efficiency in the U.S. security-based swap market. For example, as noted above,¹³⁷⁸ the Commission is re-proposing certain provisions of Regulation SBSR to, among other things, extend the scope of security-based swaps that would be subject to regulatory reporting and public dissemination. As a result of the re-proposal, more transactions with a nexus to the United States would be reported to SDRs and thus would be made available to regulators.¹³⁷⁹ Furthermore, by possessing more comprehensive data on security-based swap transactions, regulators will be able to observe pockets of risk in the global marketplace that heretofore would not have been accessible to them. Early awareness of such risks provided by access to such data may enable regulators to respond by taking actions to mitigate the potential impact of such risks on the market, which could in turn prevent the deterioration of market conditions that could result if such risks remain hidden.

Besides impacts on price efficiency and the efficient allocation of capital, the Commission also has considered more generally the impact of the rules and interpretations in this release on the efficient use of resources. In our re-proposal of Regulation SBSR, the Commission is revising our approach to assigning the reporting duty to place less emphasis on the domicile of the counterparties, and to focus more on their status (*i.e.*, whether or not a counterparty is a security-based swap dealer or major security-based swap participant).¹³⁸⁰ We preliminarily believe that the revisions in the re-proposal reallocate the reporting burden to those entities that face a relatively lower cost of reporting, thus promoting efficiency. These revisions

¹³⁷⁸ See Section VIII, *supra*.

¹³⁷⁹ Due to corresponding impacts on the market not realized under Rule 908(a) as originally proposed, under the re-proposal, security-based swap transactions executed outside the United States by a non-U.S. person direct counterparty but performance of which is guaranteed by a U.S. person would now be subject to regulatory reporting.

¹³⁸⁰ See Section VIII, *supra* (describing the Regulation SBSR re-proposal).

are designed to assign the responsibility to report a security-based swap transaction to persons that the Commission preliminarily believes are more easily able to fulfill that responsibility, and in a manner consistent with the reporting hierarchy set forth in Section 13A(a)(3) of the Exchange Act.¹³⁸¹ In addition, the Commission expects any transaction reporting systems implemented by security-based swap dealers and major security-based swap participants to be automated.

However, we recognize that certain aspects of our proposal may reduce efficiency in the U.S. security-based swap market. Increasing market transparency, in some instances, may cause certain market participants to abstain from trading that would otherwise be efficient. For example, market participants might be less willing to trade on centralized, transparent markets if it means exposing their trading strategies to their competitors.¹³⁸²

Further, as we noted in our competition analysis, various jurisdictions are developing transparency rules at different paces. If stringent regulation under Title VII results in less access

¹³⁸¹ 15 U.S.C. 78m-1(a)(3). Section 13A(a)(3) of the Exchange Act assigns to specific kinds of counterparties the duty to report uncleared security-based swaps to an SDR or to the Commission. The Commission previously noted that it “understands that many reporting parties already have established linkages to entities that may register as [SDRs], which could significantly reduce the out-of-pocket costs associated with establishing the reporting function.” See Regulation SBSR Proposing Release, 75 FR at 75249 n.193. The Commission preliminarily believes that the additional cost for non-U.S. person security-based swap dealers and major security-based swap participants absorbing the costs of reporting these additional transactions should be *de minimis*, since these larger market participants have likely already taken significant steps to establish and maintain the systems, processes, and procedures, and have likely devoted staff resources to report security-based swaps currently to existing data repositories. See Section XV.H.3(a)(ii), *infra*.

¹³⁸² See, e.g., Ananth Madhavan, et al., “Should Securities Markets Be Transparent?” J. of Fin. Markets, Vol. 8 (2005) (finding that an increase in pre-trade price transparency leads to lower liquidity and higher execution costs, because limit-order traders are reluctant to submit orders given that their orders essentially represent free options to other traders).

for U.S. persons to foreign segments of the security-based swap market, opportunities for efficient risk-sharing may correspondingly decline. Furthermore, to the extent that we have implemented the transparency requirements and the other jurisdictions have not (or to the extent that the scope of the transparency requirement among various jurisdictions is not comparable), market participants may have an incentive to restructure their business in order to move transactions to opaque corners of the global security-based swap market.

If such restructuring results in a large and opaque market outside the reach of Title VII at the expense of liquidity in a transparent market regulated under Title VII, the efficiency benefits of Title VII would be undermined, in terms of price efficiency, efficient risk-sharing, and the efficient allocation of capital across real and financial assets. Moreover, insofar as the types of restructuring contemplated above purely constitute attempts at regulatory arbitrage, they represent a use of resources that could potentially be put to more productive uses. In addition, the effect of the proposed application of the Title VII requirements described in this release on efficiency also would be affected by the substantive rules we ultimately adopted to implement the relevant Title VII requirements.

In the cross-border context, we try to strike a balance between promoting efficiency in the U.S. security-based swap market and mitigating potential disruptions to other parts of the global market by including certain carve-outs in our proposed application of market-wide transaction-level requirements.¹³⁸³ These exceptions are designed to enable foreign branches and foreign affiliates whose performance under security-based swaps is guaranteed by a U.S. person to maintain access to other parts of the global security-based swap markets when they transact

¹³⁸³ See proposed Rule 3Ca-3(b), proposed Rule 3Ch-1(b), and re-proposed Rule 908(a)(2) under the Exchange Act.

with non-U.S. persons whose performance under security-based swaps is not guaranteed by a U.S. person. This should help ensure that U.S. banks operating through foreign branches and foreign affiliates of U.S. persons are able to continue to access global liquidity. However, as stated in our analysis of competition effects, the tradeoff is that the guarantees provided by U.S. persons represent a conduit for systemic risk to flow to the United States.

By seeking to minimize, where appropriate, interruption to existing relationships of U.S. banks and foreign affiliates of U.S. persons with foreign market participants, the Commission's proposed cross-border approach could help preserve existing conduits for global risk-sharing. We considered this benefit and the efficiency costs that may result because these transactions are not occurring in the transparent market envisioned under Title VII.

Finally, recognizing that the U.S. security-based swap market is an integral part of the global security-based swap market, the Commission has proposed exemptive relief from registration for foreign SB SEFs and SDRs in certain cases. The Commission's proposal to consider an exemption from SB SEF registration for foreign security-based swap markets may facilitate the consolidation of global order flow onto certain particular trading venues for security-based swap contracts written on certain reference entities. The Commission believes this may promote participation in the transparent market and, in turn, market efficiency, without sacrificing the benefits of requiring SB SEF registration.

The proposed exemptive relief for non-U.S. persons performing the functions of SDRs within the United States would allow non-U.S. persons to continue to receive data reported pursuant to the reporting requirements of a foreign jurisdiction without registering with the Commission as an SDR, subject to a condition that would help ensure that the confidentiality of the data and Commission access to data is maintained. The potential for exemptive relief from

SDR registration requirements might reduce the incentive for market participants to restructure their operations to avoid triggering registration requirements.¹³⁸⁴ Further, the potential for an Indemnification Exception, proposed in this release, could reduce the potential for SDRs to be established along purely jurisdictional lines.¹³⁸⁵

Similarly, the proposed cross-border approach permits substituted compliance in certain circumstances if the Commission determines that the applicable foreign regulatory requirements are comparable to the related Title VII requirements. By allowing certain security-based swap transactions or participants to satisfy their compliance obligations with respect to the applicable Title VII requirements by complying with the rules of a foreign jurisdiction, duplicative compliance costs could be reduced and compliance burdens minimized. This could allow security-based swap counterparties to operate more efficiently, as by allocating resources to other activities, such as improving operational efficiency or engaging in other investment activity. Therefore, the possibility of substituted compliance would encourage foreign firms' participation in the U.S. market and would help preserve U.S. firms' access to the other parts of the global market, while helping to ensure that substantially equivalent regulatory benefits are generated by meeting foreign regulatory standards comparable to Title VII.

4. Capital Formation

The Commission preliminarily believes that many aspects of the proposed cross-border approach are likely to promote capital formation. As mentioned above,¹³⁸⁶ a security-based swap market with pre-trade and post-trade price transparency, and enhanced regulatory oversight may

¹³⁸⁴ See Section XV.H.1(b)(i), *infra*.

¹³⁸⁵ See Section XV.H.2, *infra*.

¹³⁸⁶ See Section XV.C.3, *supra* (discussing the effects of our proposed cross-border approach on efficiency).

facilitate entry by a wide range of market participants seeking to engage in a broad range of hedging and trading activities. However, we recognize that, to the extent that Title VII imposes barriers to entry and access, or results in market fragmentation, it may impair capital formation and result in a redistribution of capital across jurisdictional boundaries.

As stated above, pre- and post-trade transparency should result in more accurate valuation, which should promote efficient allocation of capital.¹³⁸⁷ In general, market participants benefit from knowing how counterparties to a security-based swap transaction value the security-based swap at a specific moment in time; information revealed through pre- and post-trade transparency allows market participants to derive more-informed assessments with respect to asset valuations, leading to more efficient capital allocation. This should be true for the underlying assets as well. That is, information learned from security-based swap quoting and trading provides signals not only about security-based swap valuation, but also about the value of the reference assets underlying the swap. Similarly, we expect pre- and post-trade transparency to benefit the real economy as well. Transparent prices provide better signals about the quality of a business investment, promoting capital formation in the real economy by helping managers to make more-informed decisions and making it easier for firms to obtain financing for new business opportunities.¹³⁸⁸

Furthermore, as discussed above, our proposed cross-border approach strives to address the disruptions that implementation of Title VII may cause to the foreign branch of U.S. banks and foreign affiliates of U.S. persons by proposing certain exceptions to the application of the de

¹³⁸⁷ See id.

¹³⁸⁸ See Bond, et al. and Chakravarty, et al., note 1211, supra.

minimis exception to security-based swap dealer registration¹³⁸⁹ and the market-wide transaction-level requirements.¹³⁹⁰ We preliminarily believe that by doing so, our proposed cross-border approach to application of the Title VII requirements, as a whole, would address the disruptions to the global security-based swap market. Integrated markets provide more risk-sharing opportunities, which encourages efficient risk-sharing and capital allocation; the more integrated U.S. participants are into the global security-based swap market, the more access, liquidity, and participation we would expect to see in both the U.S. security-based swap market and the global security-based swap market as a whole.

Similarly, the proposed policy framework of substituted compliance should encourage foreign firms' participation in the U.S. security-based swap market and facilitate U.S. firms' access to the other parts of the global market while helping to ensure that the regulatory benefits of the applicable Title VII requirements are achieved by requiring the related foreign regulatory standards to be comparable to the requirements of Title VII. Substituted compliance is designed to accommodate the global nature of the security-based swap market and, therefore, should similarly help the security-based swap market continue to integrate various segments or subparts of the markets. As stated above, the integration of the U.S. market into the global market should encourage efficient global risk-sharing, which should, in turn, potentially free up more capital for investment in real assets.

¹³⁸⁹ See proposed Rule 3a71-3(b), proposed Rule 3Ca-3(b), proposed Rule 3Ch-1(b), and re-proposed Rule 908(a)(2) under the Exchange Act. See also Section XV.C.3, supra (discussing the effects of our proposed cross-border approach on efficiency).

¹³⁹⁰ See Sections VIII.C, IX.C, and X.B.3, supra.

Request for Comment

The Commission generally requests comment about our preliminary analysis of the effects of our proposal on efficiency, competition, and capital formation. In particular, the Commission requests comment on any effect the proposed rules, rule amendments, and interpretations may have on efficiency, competition, and capital formation, including the competitive or anticompetitive effects the proposed rule may have on market participants.

D. Economic Analysis of Proposed Rules Regarding “Security-Based Swap Dealers” and “Major Security-Based Swap Participants”

To promote the goals of reduced risk, increased transparency, and improved market integrity in the financial system, Title VII of the Dodd-Frank Act requires, among other things, registration and regulation of security-based swap dealers and major security-based swap participants. The Commission and the CFTC jointly adopted final rules in 2012 to further define “security-based swap dealer” and “major security-based swap participant.”¹³⁹¹ Of particular importance is the de minimis exception to dealing activity, which excepts a dealer in security-based swaps from the definition and designation of “security-based swap dealer” if the notional amount of its dealing activity in the trailing 12-month period is below a particular threshold. As discussed in the Intermediary Definitions Adopting Release, the costs and benefits of the dealer and participant definitions fall into two categories. First, there are costs and benefits associated with identifying a subset of current and future market participants as either security-based swap dealers or major security-based swap participants (i.e., the assessment costs). Second, there are costs and benefits associated with subjecting that subset to a complete, fully effective

¹³⁹¹ See Intermediary Definitions Adopting Release, 77 FR 30596.

complement of Title VII statutory and regulatory requirements (i.e., the programmatic costs and benefits).

In the Intermediary Definitions Adopting Release, the Commission estimated that, out of more than 1,000 entities engaged in CDS activity worldwide in 2011, 166 had worldwide CDS activity at a level high enough such that they would perform the dealer-trader analysis prescribed under the security-based swap dealer definition. Furthermore, based on an analysis of trading activity using DTCC-TIW data, the Commission estimated that, based on their global trading volumes, potentially 50 of these entities would exceed the de minimis threshold and thus ultimately have to register as security-based swap dealers. Similarly, based on position data from DTCC-TIW, the Commission estimated that, based on positions arising from their worldwide CDS activity, as many as 12 entities would perform substantial position and substantial counterparty exposure tests prescribed under the major security-based swap participant definition.

These estimates represent a baseline against which the Commission can analyze the costs and benefits of the proposed application of the intermediary definitions to cross-border activities. More specifically, because the proposed cross-border rules would allow non-U.S. persons to exclude from the de minimis and major participant thresholds certain transactions and positions with non-U.S. counterparties, the ultimate number of entities that would exceed the dealer de minimis or the major participant thresholds will likely be lower than estimated in the Intermediary Definitions Adopting Release, and this decline will have a corresponding impact on the programmatic costs and benefits associated with these definitions. On the other hand, the cross-border rules are likely to increase assessment costs, as certain non-U.S. persons may need

to determine which transactions and positions may be excluded from the thresholds. These costs and benefits are discussed more fully below.

1. Programmatic Costs and Benefits

(a) Registration of Security-based Swap Dealers and Major Security-Based Swap Participants

Title VII requires the registration of security-based swap dealers and major security-based swap participants in accordance with rules promulgated by the Commission.¹³⁹² The Commission proposed rules and forms to facilitate registration of security-based swap dealers and major security-based swap participants in the Registration Proposing Release.¹³⁹³ In that release, the Commission provided an economic analysis relating to the proposed registration requirements and forms.¹³⁹⁴ As discussed in more detail therein, the Commission expects that dealers engaging in security-based swap activity exceeding the de minimis amount will incur costs associated with registration.¹³⁹⁵ In addition, persons who are not security-based swap dealers but hold substantial security-based swap positions that create an especially high level of risk that could have systemic impact on the U.S. financial system will incur costs associated with registration as a major securities-based swap participant.¹³⁹⁶ Registration will provide the Commission with information regarding security-based swap dealers and major security-based

¹³⁹² See Section 15F(b)(5) of the Exchange Act, 15 U.S.C. 78o-10(b)(5).

¹³⁹³ See Registration Proposing Release, 76 FR 65784.

¹³⁹⁴ Id. at 65812-19.

¹³⁹⁵ In the Registration Proposing Release, the Commission described the costs we expect security-based swap dealers and major security-based swap participants to incur in connection with completing and filing forms, providing related certifications, addressing additional requirements in connection with associated persons, as well as certain additional costs. See Registration Proposing Release, 76 FR at 65812-19.

¹³⁹⁶ Id.

swap participants, which will enable the Commission to oversee these registered entities with respect to their security-based swap activity and oversee compliance with the substantive requirements applicable to them. The Commission believes that the revisions included in re-proposed Forms SBSE, SBSE-A, and SBSE-BD would not significantly impact our analysis of the costs and benefits of the rules and forms to facilitate registration of security-based swap dealers and major security-based swap participants.

(b) Security-Based Swap Dealers—De Minimis Exception

Title VII requires entities engaged in security-based swap dealing activity to register as security-based swap dealers unless such transactions constitute only “a de minimis quantity of security-based swap dealing” and the dealer, therefore, is sufficiently small not to warrant regulation as a security-based swap dealer.¹³⁹⁷ The statutory de minimis exception is silent on its application to the cross-border security-based swap dealing activity of U.S. persons and non-U.S. persons, and the Commission did not address this issue in the Intermediary Definitions Adopting Release. The Commission proposes Rule 3a71-3(b) under the Exchange Act in this release to address this issue.

Proposed Rule 3a71-3(b)(1) under the Exchange Act sets forth the application of the de minimis exception to the activities of U.S. persons and non-U.S. persons, describing which security-based swap transactions conducted in a dealing capacity should be counted for purposes of the de minimis exception. Because proposed Rule 3a71-3(b)(1) under the Exchange Act would exclude certain transactions from the de minimis calculation and thereby may allow certain entities to remain below the de minimis threshold, it affects the programmatic benefits

¹³⁹⁷ See Section III.C.3(b)(2), *supra*; see also Section 3(a)(71)(D) of the Exchange Act, 15 U.S.C. 78c(a)(71)(D), and 17 CFR § 240.3a71-2.

and costs of security-based swap dealer regulation under Title VII,¹³⁹⁸ as these programmatic costs depend on the number of persons that will ultimately be required to register as security-based swap dealers as well as the substantive requirements that are to be adopted in connection with the security-based swap dealer regime.

This does not mean, however, that there would be a one-to-one relationship between the exclusion of any particular person as a security-based swap dealer as a result of the de minimis exception and any change in the programmatic benefits and costs that would be associated with the non-regulation of that person. In other words, although Proposed Rule 3a71-3(b)(1) may allow certain entities to remain below the de minimis threshold, it does not follow that the programmatic costs and benefits will change by an amount proportional to the volume of those entities' dealing activity. As the Commission explained in the Intermediary Definitions Adopting Release, some of the costs and benefits of regulating an intermediary may be fixed, while other costs and benefits of regulation may be variable, depending on a particular person's security-based swap dealing activity.¹³⁹⁹ For example, the programmatic benefits associated with the registration and regulation of persons engaged in security-based swap dealing activity—in other words, the expected mitigation of risks to the stability and transparency of the U.S. financial system and to the protection of counterparties in the United States—will likely vary

¹³⁹⁸ See Intermediary Definitions Adopting Release, 77 FR at 30596.

¹³⁹⁹ See id. at 30724 (“Some of the costs of regulating a particular person as a dealer or major participants, such as costs of registration, may largely be fixed. At the same time, other costs associated with regulating that person as a dealer or major participant (e.g., costs associated with margin and capital requirements) may be variable, reflecting the level of the person's security-based swap activity. Similarly, the regulatory benefits that would arise from deeming that person to be a dealer or major participant (e.g., benefits associated with increased transparency and efficiency, and reduced risks faced by customers and counterparties), although not quantifiable, may be expected to be variable in a way that reflects the person's security-based swap activity.”).

depending on the type and nature of those persons' dealing activity. Estimating the de minimis exception's effects on the programmatic costs and benefits (through including or excluding any particular person within the intermediary definition) will be further complicated by the other proposed rules regarding application of the entity-level and transaction-level requirements, as discussed more fully below.

Given the same limitations on our ability to conduct a quantitative assessment of the programmatic costs and benefits associated with intermediary definitions as stated in the Intermediary Definitions Adopting Release,¹⁴⁰⁰ we believe the methodology used in the

¹⁴⁰⁰ The limitations stated in the Intermediary Definitions Adopting Release are those related to (i) the data available to us and (ii) the set of data we use to draw inferences from in order to estimate the number of dealers. See Section XV.B, supra.

With respect to the availability of data, we have taken into account data obtained from DTCC-TIW, especially data regarding the activity of participants in the single-name credit default swap market. See Intermediary Definitions Adopting Release, 77 FR at 30635. We also have considered more limited publicly available data regarding equity swaps. Id. at 30636 n.476, and 30637 n.485. The lack of market data is significant in the context of total return swaps on equity and debt. We do not have the same amount of information regarding those products as we have in connection with the present market for single name CDS. Id. at 30724 n.1456. We did not consider data regarding index CDS for purposes of the economic analysis of the security-based swap dealer definition because the data for index CDS encompasses both broad-based security indices and narrow-based security indices, and "security-based swap" in relevant part encompasses swaps based on single securities or on narrow-based security indices. See Section 3(a)(68)(A) of the Exchange Act, 15 U.S.C. 78c(a)(68)(A); see also Intermediary Definitions Adopting Release, 77 FR at 30635 n.472. We noted that the definition of security-based swaps is not limited to single-name CDS but we believed that the single-name CDS data are sufficiently representative of the market to help inform the analysis. See Section XV.B.2 and note 1278, supra, and accompanying text.

With respect to the dataset we use, we have based, in part, our economic analysis of the security-based swap dealer definition on certain data addressed by an analysis regarding the market for single-name CDS performed by the SEC's Division of Risk, Strategy, and Financial Innovation made available to the public. See "Information regarding activities and positions of participants in the single-name credit default swap market" (Mar. 15, 2012), available at: <http://www.sec.gov/comments/s7-39-10/s73910-154.pdf> ("CDS Data Analysis"). As stated in the Intermediary Definitions Adopting Release, we believe that

Intermediary Definitions Adopting Release is appropriate and potentially most illustrative in demonstrating our consideration of programmatic costs and benefits associated with proposed Rule 3a71-3(b) under the Exchange Act regarding application of the de minimis exception in the definition of security-based swap dealer.

In the Intermediary Definitions Adopting Release, we sought to identify a subset of entities that appear to be the types of entities for which the statutory requirements of Title VII were created based on the volume of their dealing activity. We then sought to adopt definitions that would capture these entities, as Title VII required us to do, without imposing the costs of Title VII on those entities for which regulation currently may not be justified in light of those purposes. In developing Rule 3a71-2, which establishes the de minimis threshold for security-based swap dealers, we took into account data regarding the security-based swap market and especially data regarding the activity—including activity that may be suggestive of dealing behavior—of participants in the single-name CDS market.¹⁴⁰¹ Based on the CDS Data

the data underlying the CDS Data Analysis provides reasonably comprehensive information regarding the CDS activities and positions of U.S. market participants, but we noted that the data does not encompass those CDS that both: (i) do not involve U.S. counterparties; and (ii) are based on non-U.S. reference entities. We also noted that the CDS Data Analysis contains transactions reflecting both dealing activity and non-dealing activity, including transactions by persons who may engage in no dealing activity whatsoever. Id. at 30635-36.

We also recognized in the Intermediary Definitions Adopting Release, and in our discussion of the limitations of this data above, that the CDS Data Analysis may be imperfect as a tool for identifying dealing activity, given that the presence or absence of dealing activity ultimately turns upon the relevant facts and circumstances of an entity's security-based swap transactions, as informed by the dealer-trader distinction. Nonetheless, various criteria used in the CDS Data Analysis appear to be useful for identifying apparent dealing activity in the absence of full analysis of the relevant facts and circumstances. Id. at 30636.

¹⁴⁰¹ See Intermediary Definitions Adopting Release, 77 FR at 30635.

Analysis,¹⁴⁰² we estimated in the economic analysis of the de minimis exception to the dealer definition in the Intermediary Definitions Adopting Release that 50 or fewer entities ultimately may have to register as security-based swap dealers.¹⁴⁰³

In developing proposed Rule 3a71-3(b), we have applied a methodology and analytical framework similar to that employed in the Intermediary Definitions Adopting Release to ensure that our proposed cross-border approach captures only those entities that we believe are likely, because activity relevant to the statutory dealer definition as interpreted in the Intermediary Definitions Adopting Release occurs with U.S. persons or otherwise within the United States, to raise the types of concerns with respect to the U.S. financial system that Title VII was intended to address, including stability, transparency, and counterparty protection. We continue to believe that entities engaged in such activity at levels above the de minimis threshold may be expected to raise these concerns and, therefore, warrant regulation under Title VII as security-based swap dealers. Conversely, we do not believe that entities engaged in dealing activity wholly outside

¹⁴⁰² See CDS Data Analysis.

¹⁴⁰³ See Intermediary Definitions Adopting Release, 77 FR at 30725 and n.1457. We stated that this estimate of 50 security-based swap dealers that would be required to register was a “conservative” estimate. See id. In establishing the de minimis threshold in that release, we analyzed the percentage of the market activity that would likely be attributable to registered security-based swap dealers under various thresholds and various screens designed to identify entities that are engaged in dealing activity. See Intermediary Definitions Adopting Release, 77 FR at 30636; CDS Data Analysis at 8-21. Our analysis placed particular weight on the screen that identified entities that engaged in security-based swap transactions with three or more counterparties that themselves were not identified as dealers by ISDA. See Intermediary Definitions Adopting Release, 77 FR at 30636. Twenty-eight firms and corporate groups satisfied this criterion, and 25 of these entities also engaged in trading activity over the \$3 billion threshold. See id. Based on this analysis, together with our expectation that some of the included corporate groups would register more than a single security-based swap dealer and that new entrants may be likely to enter the market, we estimated that as many as 50 entities would ultimately be required to register as a security-based swap dealer. See Intermediary Definitions Adopting Release, 77 FR at 30725 n.1457.

the United States directly raise these types of concerns with respect to the U.S. financial system, and our proposed approach would not require non-U.S. persons engaged in dealing activity wholly outside the United States to register as security-based swap dealers.

We recognize that security-based swap activity outside the United States, including the activity of foreign persons that engage in security-based swap dealing activity wholly outside the United States, may affect the U.S. financial system either because the foreign person's positions are guaranteed by a U.S. person or through risk spillover effects that may arise from, for example, counterparty defaults, asset fire sales, capital shortfalls, and asymmetric information about the positions of unregistered persons active in the global network of security-based swap market participants. However, to the extent that the risks presented by an entity engaged in security-based swap dealing activity to the U.S. financial system arise solely from such guarantees or from these spillover effects, rather than from the entity engaging in relevant activity within the United States, we preliminarily do not believe that Title VII dealer registration provides the appropriate mechanism for addressing these risks.

As we have already discussed, we believe that Title VII's dealer registration requirements are intended to apply to those entities that pose risks to the U.S. financial system or to counterparties in the United States or to the transparency of the U.S. financial market by virtue of their dealing activity within the United States. To the extent that an entity engaged in dealing activity wholly outside the United States poses risks to the U.S. financial system, we preliminarily believe that subjecting it to dealer registration and the related requirements would not generate the types of programmatic benefits that Title VII dealer regulation is intended to produce, as the dealing activity of such entity poses risks to counterparties outside the United States.

Our proposed Rule 3a71-3 identifies the types of transactions that U.S. persons and non-U.S. persons engaged in dealing activity within the United States, and that may therefore be expected to raise Title VII concerns, must count toward their de minimis threshold. As described above,¹⁴⁰⁴ because dealing activity engaged in by U.S. persons generally involves activity within the United States and results in risks being borne by a person within the United States, proposed Rule 3a71-3(b)(1)(i) would require U.S. persons to count toward their de minimis threshold all transactions that they enter into in a dealing capacity, regardless of the location or U.S.-person status of the counterparty, including any such transactions that the dealing entity conducts through a foreign branch. Similarly, as we discuss above, because security-based swap dealing activity conducted entirely outside the United States with non-U.S. persons will generally not give rise to the concerns addressed by security-based swap dealer regulation under Title VII within the United States, proposed Rule 3a71-3(b)(1)(ii) would require non-U.S. persons to include in their de minimis calculation only those transactions arising out of their dealing activity with U.S. persons or otherwise conducted within the United States.

As discussed above, our proposed rule allows non-U.S. persons to exclude transactions with foreign branches of U.S. banks from their de minimis threshold, if those transactions are conducted outside the United States.¹⁴⁰⁵ Although requiring non-U.S. persons to count these transactions toward the de minimis threshold would be consistent with the view that a foreign branch is part of a U.S. person, we are proposing not to require non-U.S. persons to count these transactions. As noted above, since U.S. banks are U.S. persons subject to certain exemptions, foreign branches that engage in security-based swap activity will generally be subject to

¹⁴⁰⁴ See Section III.B.3, supra.

¹⁴⁰⁵ See Section III.B.7, supra.

applicable provisions of Title VII (e.g., mandatory clearing, mandatory trade execution, public dissemination, and SDR reporting requirements) regardless of whether their non-U.S. person counterparty is a registered security-based swap dealer. If a foreign branch engages in security-based swap activity in a dealing capacity with non-U.S. persons outside the United States exceeding the de minimis level, the bank (including the foreign branch) will be required to register as a security-based swap dealer and the entire bank will be subject to the entity-level and transaction-level requirements discussed above.¹⁴⁰⁶

The security-based swap transactions excepted from the de minimis calculation of non-U.S. persons take place outside the United States. Requiring non-U.S. persons to count these transactions occurring in their foreign local markets could discourage non-U.S. persons from transacting with foreign branches, which could increase the likelihood of market disruption and fragmentation, including liquidity and order flow fragmentation, while decreasing the ability of U.S. banks to access foreign markets and foreign liquidity. Therefore, we preliminarily believe that the proposed approach to excepting non-U.S. persons' transactions with foreign branches outside the U.S. from the de minimis calculation would have the benefit of minimizing disruption to U.S. banks' access to foreign markets without significantly diminishing the benefits that flow from Title VII dealer regulation and the proposed application of the de minimis exception in the cross-border context.

As stated above, the most significant programmatic effects of the de minimis exception result from how it changes the number of entities that are required to register as security-based swap dealers. We preliminarily believe that under our proposed Rule 3a71-3(b) under the Exchange Act, the number of entities that may have to register with the Commission may be

¹⁴⁰⁶ See Sections III.C.3 and 4, supra.

somewhat smaller than the upper bound of 50 that we estimated in the Intermediary Definitions Adopting Release and in any case should not exceed that previous estimate of 50 or fewer entities.¹⁴⁰⁷ The entities that are not captured under our proposed approach would be those that engage in security-based swap dealing activity entirely (or almost entirely) with non-U.S. persons outside the United States.

¹⁴⁰⁷ See note 1218, *supra*. After further experience with the data used in the CDS Data Analysis, we have estimated the trading activity and number of counterparties of firms within a corporate group, which allows us to conduct a more granular analysis of the potential number of entities that will be required to register as security-based swap dealers. In the CDS Data Analysis, we estimated that 28 entities and corporate groups had three or more counterparties that are not ISDA dealers and that 25 of these entities had trailing notional transactions exceeding \$3 billion. See CDS Data Analysis at 14. Under our refined approach, which identifies the number of entities within a corporate group that may have to register, we estimate that 46 individual firms have three or more non-ISDA-dealer counterparties; of these, we estimate that 31 firms also engaged in a total of \$3 billion in worldwide security-based swap dealing activity during 2011. Of these firms, we estimate that 27 also engaged in at least \$3 billion of security-based swap activity during 2011 that these entities would be required to count toward their de minimis threshold under proposed Rule 3a71-3(b). We further estimate that the aggregation requirement for unregistered dealers may result in an additional two firms being required to register, for a total of 29 security-based swap dealers based on the current structure of the security-based swap market.

We continue to believe that an estimate of 50 or fewer entities that would be required to register with the Commission as security-based swap dealers is reasonable in light of this analysis. As explained in note 1403 above, our estimate of as many as 50 potential registrants was consistent with our analysis showing 25 entities that had both three or more non-ISDA-dealer counterparties and \$3 billion or more in trailing notional security-based swap transactions and our recognition of the potential for growth in the security-based swap market, for new entrants into the dealing space, and the possibility that some corporate groups may register more than one entity. Because our current estimate of 29 firms that may be required to register as security-based swap dealers includes individual entities within corporate groups (rather than treating corporate groups as a single entity), it accounts for the possibility that some corporate groups may register more than one security-based swap dealer. It also accounts for the likely results of our proposed aggregation requirement. Further allowing for the possibility of additional new entrants and growth in the security-based swap market, while also recognizing the possibility that our analysis overestimates the volume of dealing activity (and thus likely dealers), we think that our analysis in this release remains consistent with our earlier estimate of 50 or fewer entities.

We recognize that the U.S. market participants and transactions regulated under Title VII are a subset of the overall global security-based swap market and that there may be spillover risks arising from a foreign entity's dealing activity outside the United States. This spillover risk has the potential to affect the U.S. financial system either through that foreign entity's transactions with foreign entities, which, in turn, transact with U.S. persons (and may, as a result, be registered security-based swap dealers or major security-based swap participants) or through membership in a clearing agency which may be providing CCP services in the United States or have a U.S. person as a clearing member. We have considered these spillover risks in connection with discussing the effects of our proposed cross-border approach on efficiency, competition, and capital formation.¹⁴⁰⁸

(c) Major Security-Based Swap Participants—"Substantial Position" and "Substantial Counterparty Exposure" Thresholds

Title VII requires a person with a "substantial position" or "substantial counterparty exposure" in security-based swaps to register as a major security-based swap participant. As described in the Intermediary Definitions Adopting Release, the substantial position and substantial counterparty exposure tests prescribed by Rules 3a67-3 and 3a67-5 under the Exchange Act seek to capture persons whose security-based swap positions pose sufficient risk to counterparties and the markets generally, thus, warranting regulation as a major security-based swap participant.¹⁴⁰⁹ Furthermore, based on a review of notional positions maintained in 2011 by entities with single-name CDS positions, the Commission estimated that approximately 12

¹⁴⁰⁸ See Section XV.C.1, *supra*.

¹⁴⁰⁹ See Intermediary Definitions Adopting Release, 77 FR at 30727.

entities may reasonably find it necessary to engage in the requisite calculations, and that the number of major security-based swap participants likely will be fewer than five.¹⁴¹⁰

As proposed, Rule 3a67-10(c) under the Exchange Act provides that when determining whether a non-U.S. person falls within the major security-based swap participant definition, only transactions entered into with a U.S. person¹⁴¹¹ as the counterparty would be considered.¹⁴¹² Under this proposed rule, a non-U.S. person would calculate its security-based swap positions under the major security-based swap definition based solely on its security-based swap transactions with U.S. persons as counterparties (including foreign branches of U.S. banks), and all security-based swap transactions with non-U.S. persons would be excluded from the analysis. We recognize that there may be indirect spillover risks to the U.S. financial system resulting from the security-based swap positions entered into by non-U.S. persons with other non-U.S. person counterparties, but we preliminarily believe that such indirect risk may be more appropriately regulated by the foreign regulatory authorities with responsibilities for such non-U.S. persons. Similar to the de minimis exception to dealer designation and registration, the most significant programmatic effects of the application in the cross-border context of the major participant thresholds flow from the number of entities that will fall within the definition of major security-based swap participant given a particular threshold. Because non-U.S. persons must count only transactions with U.S. counterparties toward the substantial position and substantial counterparty exposure thresholds, the final number of registered major participants

¹⁴¹⁰ Id. at 30734.

¹⁴¹¹ The proposed rule uses the same definition of “U.S. person” as developed in the context of foreign security-based swap dealer registration. See Section III.B.5, supra.

¹⁴¹² Proposed Rule 3a67-10(c) under the Exchange Act.

may be lower than the preliminary upper bound of five estimated in the Intermediary Definitions Adopting Release.

We also are proposing interpretive guidance regarding the attribution of guaranteed positions for purposes of the major security-based swap participant calculation. In the Intermediary Definitions Adopting Release, we provided interpretive guidance that requires a person that guarantees or otherwise provides direct recourse to an affiliate or guaranteed entity's security-based swap counterparties to include those transactions in its own major participant calculations.¹⁴¹³ We are proposing further guidance in this release regarding the application of this interpretation in the cross-border context. As proposed, this guidance would require U.S. persons that guarantee the obligations of a non-U.S. person's security-based swap transactions to count those transactions in their major participant calculations. Our proposed guidance also would require a non-U.S. person to include in its calculations transactions of a U.S. person that it guarantees and transactions entered into by a non-U.S. person with U.S. persons that it guarantees. A non-U.S. person would not include in its calculation transactions it guarantees that are entered into by a non-U.S. person with another non-U.S. person.

We preliminarily believe that this guidance identifies the guaranteed security-based swap positions that are likely to pose risks to the U.S. financial system. Title VII envisions the establishment of a comprehensive regulatory regime that will identify, monitor, and mitigate risks to the U.S. financial system and protect counterparties in security-based swap transactions. Our proposed application of the major securities-based swap participant calculation in the cross-border context, and related guidance, is designed to include only those market participants whose

¹⁴¹³ See Intermediary Definitions Adopting Release, 77 FR at 30689.

security-based swap activity may directly affect the U.S. financial system in a manner relevant to the concerns of Title VII.

With respect to U.S. persons that provide a guarantee, our proposed interpretive guidance confirms that they must include in their major security-based swap participant calculations all security-based swap transactions that they guarantee, regardless of the U.S.-person status of the guaranteed person or the status of the counterparty to the transaction. Such interpretation is consistent with the rules and interpretations adopted in the Intermediary Definitions Adopting Release. We recognize that attributing security-based swap positions to the person guaranteeing another person's security-based swap transactions may increase the number of major participants and therefore affect the programmatic benefits discussed above. As stated in the Intermediary Definition Adopting Release, we do not currently possess data relating to the existence of guarantees of the security-based swap positions of other parties and thus cannot reasonably estimate the number of additional entities that may be brought within the ambit of major security-based swap participant regulation by virtue of the interpretation related to guarantees.¹⁴¹⁴ However, to the extent that a guarantee provided by a U.S. person of the security-based swap positions of another person, whether such other person is a U.S. person or a non-U.S. person, creates the level of exposure—and corresponding risk to the U.S. guarantor and the U.S. financial system—that warrants regulation under Title VII, it would appear inconsistent with the purposes of the statute not to attribute all of the security-based swap positions guaranteed by a U.S. person to such U.S. person and subject such U.S. person to major participant regulation.¹⁴¹⁵

¹⁴¹⁴ See Intermediary Definitions Adopting Release, 77 FR at 30730.

¹⁴¹⁵ Id.

Our proposed interpretive guidance regarding guarantees provided by non-U.S. persons also is likely to have no effect on the programmatic costs and benefits of major security-based swap participant regulation. The proposed guidance would allow non-U.S. persons to exclude security-based swap positions guaranteed by them from their major security-based swap participant calculations if the security-based swaps giving rise to the positions are entered into by a non-U.S. person with another non-U.S. person. By contract, non-U.S. persons would be required to include security-based swap positions guaranteed by them in their major security-based swap participant calculations if the security-based swaps are entered into by a non-U.S. person with a U.S. person. To the extent that any non-U.S. persons who guarantees security-based swap positions with U.S. persons that do not rise to the major security-based swap participant thresholds, they are unlikely to pose the types of risks addressed by the major security-based swap participant definition, and, as a result, not requiring them to register should not reduce the programmatic benefits that the major security-based swap participant definition was intended to achieve.

As stated above, we do not currently possess data relating to the existence of guarantees of the security-based swap positions of other parties and thus cannot reasonably estimate the number of additional entities that may be brought within the ambit of major security-based swap participant regulation by virtue of the interpretation related to guarantees. However, any non-U.S. person that is required to register under our proposed approach because of guarantees extended to U.S. persons or to non-U.S. persons that have positions arising from transactions with U.S. persons would have security-based swap exposures of the nature and size that would raise concerns that the major security-based swap participant requirements established by Title VII were intended to address. We therefore preliminarily believe that the registration of such

persons as major security-based swap participants would increase the programmatic benefits of our rule by ensuring that the risks presented by such entities to the U.S. financial system and U.S. counterparties to such transactions are regulated under the framework established by Title VII. Imposing Title VII on such entities would also increase programmatic costs, as such entities would be required to comply with the substantive requirements of Title VII.

Moreover, where a non-U.S. person's home country supervisor has adopted capital standards consistent in all respects with the Capital Accord of the Basel Committee on Banking Supervision (Basel Accord), to the extent that such non-U.S. person's security-based swap positions are guaranteed, we preliminarily believe that it is not necessary to attribute such guaranteed security-based swap positions to the guarantor, regardless of the guarantor's U.S.-person status. To the extent that this proposed interpretive guidance reduces the number of entities that would be required to register as major security-based swap participants as estimated in the Intermediary Definitions Adopting Release, we preliminarily believe that it would not significantly reduce the programmatic benefits expected under Title VII because the risk arising from the guaranteed security-based swap positions posed to the United States, and that Title VII was intended to address, would be addressed by the foreign regulation of the non-U.S. person's capital that is consistent with the Basel Accord. At the same time, excluding such entities from the definition of major security-based swap participant would further reduce the programmatic costs associated with the various requirements that apply to major security-based swap participants.

2. Assessment Costs

(a) Security-Based Swap Dealers—De Minimis Exception

Because proposed Rule 3a71-3(b) explains how the dealer de minimis exception adopted in Rule 3a71-2(a)(1)¹⁴¹⁶ should be applied to cross-border dealing activity, the analysis of the assessment costs relating to the proposed Rule 3a71-3(b) is closely related to the analysis of the assessment costs relating to the dealer determination described in the Intermediary Definitions Adopting Release.¹⁴¹⁷ Our proposed approach to the de minimis calculation in the cross-border context would require potential registrants that are non-U.S. persons, in assessing the applicability of Title VII's dealer registration and regulation requirements, to apply the new definitions of "U.S. person," "transactions conducted within the United States," and "transactions conducted through a foreign branch," which are used in Proposed Rule 3a71-3(b) of the Exchange Act to identify transactions that should be included in the de minimis calculation given the purposes of Title VII. Our proposed approach would also allow non-U.S. persons to exclude from this assessment and the de minimis calculation security-based swap transactions with a foreign branch of a U.S. bank, which would require them to make a separate determination that a particular counterparty satisfies the definition of "foreign branch."

As noted in the Intermediary Definitions Adopting Release, some market participants whose security-based swap activities exceed, or are not materially below, the de minimis threshold may be expected to incur assessment costs in connection with the dealer analysis.¹⁴¹⁸

¹⁴¹⁶ 17 CFR § 240.3a71-2(a)(1).

¹⁴¹⁷ See Intermediary Definitions Adopting Release, 77 FR at 30731-32.

¹⁴¹⁸ Id. at 30731. These assessment costs include costs associated with analyzing an entity's security-based swap activities to determine whether those activities constitute dealing

In the Intermediary Definitions Adopting Release, we estimated that 123 entities out of over 1,000 entities (U.S. and non-U.S.) that engaged in single-name CDS transactions in 2011 had more than \$3 billion in single-name CDS transactions over the previous 12 months.¹⁴¹⁹ We also assumed that the 43 entities that engaged in security-based swap activity during the trailing 12-month period totaling between \$2 and \$3 billion notional may opt to engage in the dealer analysis out of an abundance of caution or to meet internal compliance requirements, leading to a total of 166 entities.¹⁴²⁰ We concluded that this estimate of 166 entities represented a potential upper bound for the total assessment costs arising from security-based swap dealer determinations.¹⁴²¹ To the extent that all of these entities retain outside counsel to analyze their status under the security-based swap dealer definition, including the de minimis exception, we estimated that the assessment costs may approach \$4.2 million.¹⁴²²

In considering the assessment costs associated with the proposed Rule 3a71-3(b), we hold the same expectation as we noted in the Intermediary Definitions Adopting Release that market participants generally would be aware of the notional amount of their activity involving security-based swaps as a matter of good business practice. However, as discussed below, proposed Rule 3a71-3(b) introduces a few variables that may result in higher overall assessment costs associated with the dealer registration analysis for certain non-U.S. persons that may result in

activity and the costs of monitoring the volume of dealing activity against the de minimis threshold.

¹⁴¹⁹ Intermediary Definitions Adopting Release, 77 FR at 30731-32.

¹⁴²⁰ Id.

¹⁴²¹ Id.

¹⁴²² Id. We estimated that the per-entity cost of the dealer analysis would be approximately \$25,000. Our estimate of aggregate industry-wide costs of \$4.2 million reflects the costs that may be incurred by all 166 entities. See id.

different aggregate assessment costs for all entities performing this dealer analysis from the figure that we estimated in the Intermediary Definitions Adopting Release.

Because non-U.S. persons would be required to count toward the dealer de minimis threshold only those transactions they enter into, in a dealing capacity, with U.S. persons (other than foreign branches of U.S. banks) or otherwise conducted within the United States, we believe that such persons would likely implement systems to identify transactions that involve U.S. persons or that are conducted within the United States¹⁴²³ and monitor the notional amount of dealing activity reflected in such transactions.¹⁴²⁴ We preliminarily believe that the costs of establishing a system capable of identifying the volume of transactions with U.S. persons or within the United States should be similar to the costs estimated in the Intermediary Definitions Adopting Release for a system to monitor positions for purposes of the major security-based swap participant thresholds because such a system would involve monitoring the total volume of an entity's dealing transactions in a system capable of flagging those transactions that involve U.S. persons or otherwise occur within the United States. We preliminarily believe that this system would have similar functionality and requirements to the system that potential major

¹⁴²³ See proposed Rule 3a71-3(a)(5) under the Exchange Act. "Transactions conducted within the United States" refers to security-based swap transactions that are solicited, negotiated, or executed within the United States.

¹⁴²⁴ Given the ability of non-U.S. persons under our proposed rule to exclude certain transactions from their de minimis calculation, we expect that potentially all 166 of the entities identified in our Intermediary Definitions Adopting Release as likely to perform the dealer analysis may engage in analysis to determine whether they are U.S. persons. Because our proposed definition of U.S. person is relatively straightforward to apply, we believe that any market participant should be able readily to identify its U.S.-person status by referring to its residence status, its principal place of business, or its organizational documents. To the extent that an entity seeks the assistance of outside counsel, we expect that the cost of this analysis will be encompassed in the \$25,000 in assessment costs that we have estimated in the Intermediary Definitions Adopting Release. See Intermediary Definitions Adopting Release, 77 FR at 30732.

security-based swap participants would be likely to adopt in order to track their exposures for purposes of the major security-based swap participant thresholds. In the Intermediary Definitions Adopting Release, we noted that entities establishing such a system would likely incur one-time programming costs of \$15,287 and ongoing annual systems costs of \$17,040.¹⁴²⁵

The Commission preliminarily believes that market participants would also incur costs arising from the need to identify and maintain records concerning the U.S.-person status of their counterparties and the location of their transactions. We anticipate that potential dealers are likely to request representations from their transaction counterparties to determine the

¹⁴²⁵ In the Intermediary Definitions Adopting Release, we estimated that the one-time programming costs of \$13,692 per entity and annual ongoing assessment costs of \$15,268. See Intermediary Definitions Adopting Release, 77 FR at 30734-35 and accompanying text (providing an explanation of the methodology used to estimate these costs). The hourly cost figures in the Intermediary Definitions Adopting Release for the positions of Compliance Attorney, Compliance Manager, Programmer Analyst, and Senior Internal Auditor were based on data from SIFMA's Management & Professional Earnings in the Securities Industry 2010. For purposes of the cost estimates in this release, we have updated these figures with more recent data as follows: the figure for a Compliance Attorney is \$310/hour, the figure for a Compliance Manager is \$269/hour, the figure for a Programmer Analyst is \$234/hour, and the figure for a Senior Internal Auditor is \$217/hour, each from SIFMA's Management & Professional Earnings in the Securities Industry 2011, modified by SEC staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead. We also have updated the Intermediary Definitions Adopting Release's \$464/hour figure for a Chief Financial Officer, which was based on 2011 data. Using the consumer price index to make an inflation adjustment to this figure, we have multiplied the 2011 estimate by 1.02 and arrived at a figure of \$473/hour for a Chief Financial Officer in 2012. Incorporating these new cost figures, the updated one-time programming costs based upon our assumptions regarding the number of hours required in the Intermediary Definitions Adopting Release would be \$15,287 per entity, *i.e.*, (Compliance Attorney at \$310 per hour for 2 hours) + (Compliance Manager at \$269 per hour for 8 hours) + (Programmer Analyst at \$234 per hour for 40 hours) + (Senior Internal Auditor at \$217 per hour for 8 hours) + (Chief Financial Officer at \$473 per hour for 3 hours) = \$15,287, and the annual ongoing costs would be \$17,040 per entity, *i.e.*, ((Senior Internal Auditor at \$217 per hour for 16 hours) + Compliance Attorney at \$310 per hour for 4 hours) + (Compliance Manager at \$269 per hour for 4 hours) + (Chief Financial Officer at \$473 per hour for 4 hours) + (Programmer Analyst at \$234 per hour for 40 hours) = \$17,040.

counterparties' U.S.-person status and whether the transaction was conducted within the United States. Therefore, the Commission preliminarily believes that the assessment costs associated with determining the status of counterparties and the location of transactions should be primarily one-time costs of establishing a practice or compliance procedure of requesting and collecting representations from trading counterparties and maintaining the representations collected as part of the recordkeeping procedures and limited ongoing costs associated with requesting and collecting representations. The Commission preliminarily believes that such one-time costs would be approximately \$15,160.¹⁴²⁶ The Commission preliminarily believes that requesting and collecting representations would be part of the standardized transaction process reflected in the policies and procedures described above regarding security-based swap sales and trading practices and should not result in separate assessment costs.¹⁴²⁷

The Commission also considers it likely that market participants will implement modifications to the system described above to monitor counterparty status for purposes of future trading of security-based swaps. The Commission preliminarily believes that there would be one-time programming costs associated with the system implementation by market participants

¹⁴²⁶ This estimate is based on estimated 40 hours of in-house legal or compliance staff's time to establish a procedure of requesting and collecting representations from trading counterparties, taking into account that such representation may be built into form of standardized trading documentation. Based upon data from SIFMA's Management & Professional Earnings in the Securities Industry 2012 (modified by the Commission staff to account for an 1800-hour-work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead), the staff estimates that the average national hourly rate for an in-house attorney is \$379.

¹⁴²⁷ There will be ongoing costs associated with processing representations received from counterparties, including additional due diligence and verification to the extent that a counterparty's representation is contrary to or inconsistent with the knowledge of the collecting party. The Commission believes that these would be compliance costs encompassed within programmatic costs associated with the security-based swap dealer definition.

to maintain a record of counterparty status for purposes of performing the dealer de minimis calculation and estimates such programming costs to be \$12,870.¹⁴²⁸

Based on the foregoing discussion, the Commission estimates the total one-time per-entity costs for non-U.S. persons engaged in dealing activity within the United States associated with the de minimis calculation would be \$43,317.¹⁴²⁹ Estimated annual ongoing costs would be \$17,040. Based on available data provided by the DTCC-TIW, we preliminarily believe that as many as 70 of the firms with over \$2 billion in total worldwide notional trading activity in single-name CDS during 2011 may be non-U.S. persons under our proposed rule and thus will likely incur these costs. Assuming that each of these 70 entities perceived the need to monitor the status of its counterparties and the location of its transactions to perform the dealer de minimis calculation, we preliminarily believe that the total annual one-time industry-wide costs associated with establishing such systems would amount to \$3,032,190. Total annual ongoing costs would amount to \$1,192,800.

¹⁴²⁸ This is based on an estimate of the time required for a programmer analyst to modify the software to track the U.S. person status of a counterparty and to record and classify whether a transaction is a transaction conducted within the United States, including consultation with internal personnel, and an estimate of the time such personnel would require to ensure that these modifications conformed to proposed definitions of U.S. person and transaction conducted within the United States. Using the estimated hourly costs described above, we estimate the costs as follows: (Compliance Attorney at \$310 per hour for 2 hours) + (Compliance Manager at \$269 per hour for 4 hours) + (Programmer Analyst at \$234 per hour for 40 hours) + (Senior Internal Auditor at \$217 per hour for 4 hours) + (Chief Financial Officer at \$473 per hour for 2 hours) = \$12,870. See note 1425, *supra* (for source of the estimated per hour costs).

¹⁴²⁹ The estimated one-time costs of \$43,317 represent the costs for programming a system to monitor the dealing activity of a non-U.S. person (\$15,287), the costs for programming a system to monitor the U.S.-person status of its counterparties and the location of its dealing activity (\$12,870), and the costs for establishing a practice or compliance procedure of requesting and collecting representations from trading counterparties and maintaining the representations collected as part of the recordkeeping procedures (\$15,160).

In addition to assessment costs discussed above associated with determining the volume of U.S.-facing transactions, market participants would also incur assessment costs relating to performing the analysis as to whether certain security-based swaps involve dealing activity. At the same time, some non-U.S. persons that establish such systems may be expected to forgo the costs of performing the dealing activity analysis. As noted above, we assumed in the Intermediary Definitions Adopting Release that only entities with more than \$2 billion in security-based swap transactions over the previous 12 months would be likely to engage in the full dealer analysis. We believe that it similarly is unlikely that non-U.S. persons with less than \$2 billion in U.S.-facing security-based swap transactions over the previous 12 months would engage in the dealer analysis. Available data from the Trade Information Warehouse shows that 39 of these 70 non-U.S. persons had total U.S.-facing security-based swap transactions under \$2 billion in 2011. We preliminarily believe that, under our proposed rule, these entities would not engage in the full dealer analysis and thus would not be likely to incur the \$25,000 in assessment costs described in the Intermediary Definitions Adopting Release, reducing the estimated assessment costs in that release by approximately \$975,000. The combined effect of our proposed rule on non-U.S. persons, therefore, should result in a net increase in assessment costs over those estimated in the Intermediary Definitions Adopting Release of approximately \$2,057,190.¹⁴³⁰

¹⁴³⁰ As noted above, in the Intermediary Definitions Adopting Release, we estimated total annual one-time industry-wide costs associated with the dealer analysis to be \$4.2 million. See note 1422, *supra*. According to the analysis above, non-U.S. persons are likely to incur additional annual one-time industry-wide costs of \$3,032,190 associated with new systems to monitor the volume of dealing activity, while annual one-time industry-wide costs associated with the dealing activity analysis may decline by \$975,000. We therefore estimate the annual one-time industry-wide costs associated with the dealer analysis for both U.S. persons and non-U.S. persons to be \$6,257,190

(b) Major Security-Based Swap Participants—“Substantial Position” and “Substantial Counterparty Exposure” Thresholds

Proposed Rule 3a67-10(c) and the proposed interpretive guidance regarding the attribution of guaranteed positions, which is discussed below, together identify the security-based swap positions that entities would be required to include in determining whether they exceed the major security-based swap participant thresholds that were established in the Intermediary Definitions Adopting Release. We preliminarily believe that entities that perceive the need to perform the threshold calculations associated with the major security-based swap definition will incur only relatively minor incremental costs to those described in the Intermediary Definitions Adopting Release as a result of our proposed rule and interpretive guidance applying these thresholds in the cross-border context.

In the Intermediary Definitions Adopting Release, we estimated that certain market participants could be expected to incur costs in connection with the determination of whether they have a “substantial position” in security-based swaps or pose “substantial counterparty exposure” in connection with security-based swaps in connection with their determination as to whether or not they are a major security-based swap participant.¹⁴³¹

(\$4,200,000 + \$3,032,190 - \$975,000 = \$6,257,190), or \$2,057,190 more than our initial estimate of \$4.2 million.

We have not separately estimated the assessment costs that market participants may incur associated with identifying the special entity status of their counterparties. The Intermediary Definitions Adopting Release noted that the de minimis threshold for dealing activity involving special entities would cause market participants to incur costs independent of those associated with the general de minimis threshold based on the CDS Data Analysis, which showed that all entities engaged in security-based swap transactions with special entities appeared to also engage in more than \$8 billion in security-based swap transactions in 2011. See CDS Data Analysis at 21 n.8 and Intermediary Definitions Adopting Release, 77 FR at 30732 n.1510.

¹⁴³¹

See Intermediary Definitions Adopting Release, 77 FR at 30734-36.

Based on the data available at that time, we estimated that as many as 12 entities might perceive the need to perform these calculations, given the size of their security-based swap positions.¹⁴³² We further estimated that each of these entities would likely incur annual one-time costs of \$15,287 and ongoing annual costs of \$17,040 in monitoring these positions and performing the necessary calculations.¹⁴³³

Our proposal would require non-U.S. persons to include in these calculations only transactions they enter into directly with, or that they guarantee, that involve U.S.-person counterparties. As noted above, Proposed Rule 3a67-10(c) would require a non-U.S. person that performs the major security-based swap participant calculation to identify the U.S.-person status of its counterparties. Our proposed interpretive guidance would further clarify that a non-U.S. person must include in its calculation all transactions of other entities that it guarantees where a U.S. person has direct recourse to the non-U.S. person performing the major security-based swap participant calculation.¹⁴³⁴ A non-U.S. person performing this calculation would therefore be required to identify the U.S.-person status of its counterparties, and the counterparties of transactions it guarantees, and monitor the positions arising from transactions involving U.S. person as counterparties.

The Commission preliminarily believes that market participants would request representations from their transaction counterparties to determine the U.S. person status of their

¹⁴³² See Intermediary Definitions Adopting Release, 77 FR at 30734.

¹⁴³³ See note 1425, supra.

¹⁴³⁴ Our proposed interpretive guidance also would clarify that U.S. persons performing the major security-based swap participant calculation must include all positions entered into by other parties where it guarantees the transaction. Because this interpretive guidance would not change the scope of the transactions that a U.S. person must consider in performing this calculation, we do not expect it to have any effect on the assessment costs incurred by such persons.

counterparties. Therefore, the Commission preliminarily believes that the one-time assessment costs associated with the counterparty status should be limited to the costs of establishing a practice or compliance procedure or requesting and collecting representations from trading counterparties and maintaining the representations collected as part of the recordkeeping procedures. The Commission preliminarily believes that such assessment costs would be approximately \$15,160.¹⁴³⁵

The Commission also considers it likely that market participants will implement systems to keep track of counterparty status for purposes of future trading of security-based swaps. The Commission preliminarily believes that there would be one-time programming costs associated with the system implementation by market participants to maintain a record of counterparty status for purposes of assessing the major security-based swap participant status and estimates

¹⁴³⁵ This estimate is based on estimated 40 hours of in-house legal or compliance staff's time to establish a procedure of requesting and collecting representations from trading counterparties, taking into account that such representation may be built into form of standardized trading documentation. Based upon data from SIFMA's Management & Professional Earnings in the Securities Industry 2012 (modified by the SEC staff to account for an 1800-hour-work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead), the staff estimates that the average national hourly rate for an in-house attorney is \$379.

Similar to our analysis of the assessment costs associated with the de minimis exception relating to the definition of the security-based swap dealer, we preliminarily believe that requesting and collecting representations would be part of the standardized transaction process reflected in the policies and procedures described above regarding security-based swap sales and trading practices. There would be ongoing costs associated with processing representations received from counterparties, including additional due diligence and verification to the extent that a counterparty's representation is contrary to or inconsistent with the knowledge of the collecting party. The Commission believes that these costs would be compliance costs encompassed within programmatic costs associated with the major security-based swap participant definition.

such programming costs to be \$12,870.¹⁴³⁶ Therefore, the Commission estimates the total one-time costs per entity associated with the proposed Rule 3a67-10(c) and the interpretive guidance regarding guarantee could be \$28,030.¹⁴³⁷ This is in addition to the estimate of ongoing annual costs of \$17,040 associated with performing the major security-based swap participant threshold calculations and the one-time programming costs of \$15,287 related to establishing an automated system or modifying the existing automated system to perform the major participant threshold calculations as described in the Intermediary Definitions Adopting Release.¹⁴³⁸

Request for Comment

The Commission generally requests comment about our preliminary estimates of the number and composition of dealing entities and major participants that may be required to register as security-based swap dealers as a result of the proposed application of the de minimis exception in the cross-border context. The Commission also requests comments about our estimates of the effect of our proposed approach on programmatic costs and benefits and

¹⁴³⁶ This is based on an estimate of the time required for a programmer analyst to modify the software to track the U.S. person status of a counterparty and to record and classify whether a transaction is a transaction conducted within the United States, including consultation with internal personnel, and an estimate of the time such personnel would require to ensure that these modifications conformed to proposed definitions of U.S. person and transaction conducted within the United States. Using the estimated hourly costs described above, we estimate the costs as follows: (Compliance Attorney at \$310 per hour for 2 hours) + (Compliance Manager at \$269 per hour for 4 hours) + (Programmer Analyst at \$234 per hour for 40 hours) + (Senior Internal Auditor at \$217 per hour for 4 hours) + (Chief Financial Officer at \$473 per hour for 2 hours) = \$12,870. For the source of the estimated per hour costs. See note 1263, supra.

¹⁴³⁷ The \$28,030 per entity cost is derived from \$15,160 cost of establishing a written compliance policy and procedures regarding obtaining counterparty representations and plus \$12,870 one-time programming cost relating to system implementation to maintain counterparties representations and track the U.S. person status of each counterparty in the system.

¹⁴³⁸ See note 1433, supra.

assessment costs. The Commission requests that commenters provide data and sources of data to support any comments.

- Are the Commission's estimates regarding the number of U.S.-person and non-U.S. persons active as dealers in security-based swaps, both in the United States and worldwide, and the number of these that engage in security-based swap dealing transactions above the de minimis threshold reasonable in light of the proposed rule?
- Are the Commission's estimates of assessment costs associated with the dealer registration analysis, including the costs associated with the determination of the status of counterparties as U.S. persons, non-U.S. persons, foreign branches and the costs associated with the determination of transactions conducted within the United States reasonable?
- Are the Commission's estimates of the number of U.S. persons and non-U.S. persons whose security-based swap positions may rise to the major security-based swap participant level reasonable, both in the United States and worldwide?
- Are the Commission's estimates of the number of U.S. persons and non-U.S. persons whose security-based swap positions may be attributed to other persons because of guarantees and whether such attribution may result in such persons becoming major security-based swap participants reasonable?
- Is the Commission's estimate that the revisions included in re-proposed Form SBSE and re-proposed Form SBSE-A would not significantly impact the costs and benefits associated with the rules and forms to facilitate registration accurate?
- Has the Commission accurately explained the relationship between the proposed application of the dealer de minimis threshold (including the definition of U.S.

person) and the programmatic effects and the programmatic costs and benefits of our dealer definition?

- Has the Commission appropriately accounted for the programmatic benefits and costs of subjecting (or not subjecting) certain entities to the security-based swap dealer or major security-based swap participant requirements under the proposed approach?
- Does the Commission's analysis of the proposed treatment of non-U.S. persons who are guaranteed by U.S. persons adequately reflect the expected programmatic costs and benefits associated with this treatment?
- Has the Commission properly analyzed the programmatic costs and benefits associated with requiring U.S. persons to include dealing activity conducted through a foreign branch in their dealer de minimis calculations?
- Has the Commission properly analyzed the programmatic costs and benefits associated with permitting non-U.S. persons not to count dealing transactions with a foreign branch toward their de minimis threshold?
- Is the Commission's estimate of the assessment costs associated with determining whether one falls within the security-based swap dealer or major security-based swap participant definitions accurate? Do the Commission's estimates reflect reasonable assumptions about the types of systems that would be necessary to perform the required analyses?
- Does the Commission's estimate of assessment costs appropriately reflect the cost to an entity of determining its U.S.-person status? Does it appropriately reflect the cost of determining whether its counterparty is a U.S. person or is engaging in a transaction conducted within the United States?

- Has the Commission accurately estimated the costs associated with identifying and maintaining records concerning the U.S.-person status of counterparties and the location of transactions?

3. Alternatives Considered

(a) De Minimis Exception

As stated above, market participants, foreign regulators and other interested parties have provided views on the application of Title VII requirements in the cross-border context through written comment letters (on other proposed rulemakings by the Commission and on the cross-border interpretive guidance proposed by the CFTC) and meetings with the Commission and our staff.¹⁴³⁹ In particular, commenters have provided their views on how the term “U.S. person” should be defined and how the de minimis exception in the security-based swap dealer definition should be applied in the cross border context.¹⁴⁴⁰ These comments have been informative in the Commission’s development of our proposed approach to the application of the de minimis exception in the cross-border context, and our understanding of the economic consequences of the proposed U.S. person definition and the proposed de minimis exception. In this section, we briefly describe our analysis of the economic impact of these alternative approaches suggested by the commenters.

i. Alternatives to the Proposed Definition of U.S. Person

The proposed definition of U.S. person plays a central role in the application of Title VII in the cross-border context. It directly affects the number of entities that will have to register as security-based swap dealers: a potential security-based swap dealer performing its de minimis

¹⁴³⁹ See Section I, *supra*.

¹⁴⁴⁰ See, e.g., Cleary Letter IV at 2, 6-9; Davis Polk Letter I at 6 n.6.

calculation must first determine its own U.S.-person status and then, if it is a non-U.S. person, identify the U.S.-person status of its counterparties in transactions arising out of its dealing activity.¹⁴⁴¹ We also propose to use the U.S. person definition in determining the applicability of certain transaction-level requirements under Title VII.¹⁴⁴² As a result, the U.S. person definition in the proposed rule directly affects the scope of the application of Title VII requirements to the cross-border security-based swap market and, in particular, the number of entities that will be required to register as security-based swap dealers.¹⁴⁴³

As explained above, our proposed definition of U.S. person is designed to identify those market participants whose security-based swap activity may be particularly likely to affect the U.S. market in a manner relevant to the concerns of Title VII or that may warrant the protections of Title VII. In our view, the security-based swap activity of a person that has its place of residence, incorporation, or its principal place of business within the United States may be particularly likely to warrant the application of Title VII because its security-based swap activity is likely to result in risks being borne by the person within the United States or because its activity raises other concerns that Title VII is intended to address, such as the stability or transparency of the U.S. financial system or the protection of counterparties. Consistent with

¹⁴⁴¹ See proposed Rule 3a71-3(b) under the Exchange Act, as discussed in Section III.B.3, supra.

¹⁴⁴² See Sections VIII - X, supra (discussing the application of the reporting and public dissemination of security-based swap information, mandatory clearing, and mandatory trade execution requirements). As further discussed in these sections, the U.S. person definition plays a significant role in determining whether a particular transaction is subject to transaction-level requirements.

¹⁴⁴³ See Section XV.C.1, supra (discussing economic analysis of the proposed de minimis exception).

this view, we have proposed a definition of U.S. person that looks to the location of the person's residence, incorporation, or principal place of business.

In developing our proposed definition of U.S. person, we have considered two alternative definitions: One suggested by commenters, and one proposed by the CFTC in its own cross-border guidance proposal.¹⁴⁴⁴ In the discussion that follows, we briefly describe these alternatives and the related benefits and costs. A more in-depth analysis of the programmatic costs and benefits of these alternatives will continue in the following sections, in which we analyze the role that these definitions play in the specific application of our proposed approach to the de minimis calculations to different types of entities.

Several commenters suggested that we consider the definition of U.S. person found in Regulation S of the Securities Act, noting that at least some market participants would find the definition familiar and easy to apply.¹⁴⁴⁵ As explained above, we declined to take this approach because we believe that the U.S. person definition in Regulation S addresses specific concerns associated with the offshore offering of unregistered securities that are different from the concerns of Title VII.¹⁴⁴⁶ Regulation S, among other things, provides safe harbors for offshore offerings of unregistered securities, and a central concern of Regulation S is ensuring that

¹⁴⁴⁴ See, e.g., Cleary Letter IV at 2; SIFMA Letter at 5; see also CFTC Cross-Border Proposal, 77 FR at 41218) (discussing the definition of U.S. person proposed by the CFTC).

¹⁴⁴⁵ See SIFMA Letter at 5. Regulation S provides, among other things, certain safe harbors regarding registration requirements as they relate to the offshore offering of securities. See Offshore Offers and Sales, Final Rules, 55 FR 18306 (May 2, 1990). Under Regulation S, an entity's U.S.-person status is a relevant factor in determining whether certain of the safe harbors are available to a specific offering or sale of securities. See 17 CFR § 230.902(o) (defining "U.S. person").

¹⁴⁴⁶ See Section III.B.4, supra.

unregistered securities offered abroad do not come to rest within the United States.¹⁴⁴⁷ Given this concern, the definition of U.S. person used in the Regulation S safe harbors appropriately focuses on the location of the person making the decision to purchase unregistered securities.¹⁴⁴⁸

On the other hand, as already noted, Title VII addresses the potential impact of swap and security-based swap transactions on the stability of the U.S. financial system, market transparency, and counterparty protection.¹⁴⁴⁹ In this context and in light of the nature of the risk arising from such transactions, the location of the person making the decision to enter into a security-based swap appears to us to be less relevant than the location of the person bearing the risk of the transaction. For example, as discussed further below, if the definition of U.S. person in Regulation S were used to determine whether a potential security-based swap dealer should be registered or whether a security-based swap should be subject to Title VII transaction-level requirements, a dealer may not be required to register as a security-based swap dealer based on its dealing activity conducted through its foreign branch, despite the fact that such transactions generally create the same risks for the dealing entity as any other security-based swap activity that it conducts directly from its headquarters. Excluding foreign branches from the definition of U.S. person could result in U.S. banks engaging in significant levels of security-based swap dealing activity, and bearing the risk of such activity, entirely outside the requirements of Title VII, including the registration requirements. This result would reduce the programmatic benefits that the Title VII security-based swap dealer definition or the security-based swap dealer

¹⁴⁴⁷ See Regulation S Adopting Release, 55 FR at 18308. Whether securities come to rest in the United States or abroad is relevant to whether the interests served by the registration requirement are affected by the securities offering.

¹⁴⁴⁸ See 17 CFR § 230.902(o).

¹⁴⁴⁹ See note 4, supra.

registration requirement is intended to achieve, which are to subject to regulation those dealing entities that we believe are likely, by virtue of engaging in dealing activity within the United States, to pose risk to the U.S. financial system that Title VII was intended to regulate.¹⁴⁵⁰ Therefore, the definition of U.S. person in Regulation S, with its focus on the location of the person making the investment decision and not on the person bearing the risk of the transaction, is ill-suited to address these types of concerns.

We also considered the interpretation of U.S. person proposed by the CFTC in its cross-border interpretive guidance.¹⁴⁵¹ The CFTC definition resembles our proposed definition in many respects, as it also focuses on the location of the person bearing the risk of the transaction. However, we have declined to include in our proposed definition certain categories of entities (or their equivalent in the security-based swap market) that the CFTC has defined as U.S. persons. Most significant of these are (i) entities “in which the direct or indirect owners thereof are responsible for the liabilities of such entity and one or more of such owners is a U.S. person”; (ii) certain investment vehicles, wherever organized or incorporated, “of which a majority ownership is held, directly or indirectly, by a U.S. person;” and (iii) certain investment vehicles “the operator of which would be required to register as a commodity pool operator with the CFTC.”¹⁴⁵² The Commission has preliminarily determined not to include within the definition of “U.S. person” any entity that is not resident, organized, or incorporated within the United States

¹⁴⁵⁰ Similarly, under the definition of U.S. person in Regulation S, certain dealers may not be required to register as a security-based swap dealer based on their dealing activity with an investment manager located outside the United States who manages a discretionary account on behalf of a U.S. person, even though the resulting transactions are with that U.S. person and that U.S. person bears the risk arising out of that transaction.

¹⁴⁵¹ See CFTC Cross-Border Proposal, 77 FR at 41218.

¹⁴⁵² Id.

or does not have its principal place of business in the United States, regardless of any ownership interest by a U.S. person.

We are proposing this approach because we preliminarily believe that Title VII is primarily concerned about security-based swap activity that raises the types of concerns—including the stability of the U.S. financial system, swap market transparency, and counterparty protection—within the United States that Title VII was intended to address.¹⁴⁵³ If U.S. residents or U.S.-based entities suffer losses from their investments in investment vehicles or their investments in entities organized, incorporated, or having the principal place of business located outside the United States, such losses are generally limited to their investments in the form of equity or debt securities. Such investment risks are not related to security-based swaps, and the protection of U.S. investors with respect to investments in equity, debt securities, or investment vehicles, as well as investment management or investment advisory activity, is addressed by other provisions of U.S. securities law pertaining to issuances and offerings of equity or debt securities.

Therefore, the Commission does not believe that it would advance the programmatic benefits of Title VII to include foreign entities or foreign investment vehicles in the U.S. person definition because U.S.-based entities or U.S. residents own them or because a U.S.-based entity is responsible for the foreign entities' liabilities (as proposed by the CFTC). Furthermore, given our focus on reducing risk to, and promoting transparency in, the U.S. security-based swap market, we do not think the U.S.-person status of a commodity pool operator or fund adviser (as

¹⁴⁵³ See Section III.B.3, *supra*. As noted above, we do not believe that Title VII's security-based swap dealer registration requirements are the appropriate mechanism for addressing the potential for spillover effects caused by non-U.S. persons that engage in security-based swap dealing activity or other security-based swap activity wholly outside the United States.

opposed to the fund actually entering into the transaction) is in itself relevant in determining whether security-based swap activity occurs within the United States and should therefore be subject to the full range of Title VII requirements because those entities do not bear the risk of the transactions.¹⁴⁵⁴

Finally, the Commission preliminarily believes that the alternative definition of U.S. person in Regulation S and the definition of U.S. person proposed by the CFTC would likely cause potential security-based swap dealers and end users to incur higher assessment costs. For example, Regulation S classifies accounts differently depending on whether they are discretionary or non-discretionary,¹⁴⁵⁵ while our proposed definition would focus on the status of the counterparty to a security-based swap transaction.¹⁴⁵⁶ The Regulation S definition specifies the U.S. person status of more types of entities than does our proposed definition and would introduce a level of complexity into the definition that is not relevant to the purposes of Title VII. Similarly, the CFTC's proposed interpretation likely would increase assessment costs compared to our proposed definition by, for example, requiring investment funds or their counterparties to

¹⁴⁵⁴ We also note that, to the extent that the commodity pool operator or fund advisor enters into a security-based swap transaction that is conducted within the United States, Title VII would generally apply to that transaction. See proposed Rule 3a71-3(a)(5) under the Exchange Act (defining "transaction conducted within the United States"), as discussed in Section III.B.5, *supra*. However, proposed Rules 3Ca-3(b)(2) and 3Ch-1(b)(2) would not apply the mandatory clearing and mandatory trade execution requirements to transactions between two non-U.S. persons who are not security-based swap dealers and whose performances under security-based swaps are not guaranteed by a U.S. person, even though such transactions are conducted in the United States.

¹⁴⁵⁵ Cf. 17 CFR §§ 230.902(o)(1)(vi), (vii) (defining certain types of accounts to be U.S. persons) with 17 CFR § 230.902(o)(2) (defining certain types of accounts not to be U.S. persons).

¹⁴⁵⁶ Proposed Rule 3a71-3(a)(7)(iii) under the Exchange Act (defining an account as a U.S. person by looking at the status of the account holder or owner), as discussed in Section III.B.4, *supra*.

determine the U.S.-person status of the direct and indirect owners of such funds. It may be operationally costly and otherwise impracticable to identify the indirect ownership of an investment vehicle given the legal structure of the investment vehicle and the beneficial ownership in book-entry form, and it is unnecessary as those entities bear risks only to the amount of their investment (as opposed to the open-ended risks that can be associated with security-based swap positions). We expect that this complexity could significantly raise assessment costs for market participants.

Based on the above, we preliminarily believe that our proposed definition appropriately focuses on the types of entities that are likely to be actively engaged in the security-based swap market and on the specific categories of such entities whose security-based swap activity has the potential to impact the U.S. financial system. We do not believe that following either the Regulation S approach or the CFTC's proposed interpretation would achieve the benefits of Title VII. We also believe that either approach would result in higher assessment costs.¹⁴⁵⁷

ii. Alternatives to the Proposed Rule Regarding Application of the De Minimis Exception

As described above, our proposal also includes a proposed rule regarding the application of the de minimis exception in the cross-border context.¹⁴⁵⁸ This rule prescribes how a person's transactions arising out of its dealing activity must be included in its de minimis calculation, depending on whether it is a U.S. person or non-U.S. person. The definition of U.S. person, described above, is central to this rule, as it is used to identify both the status of the person

¹⁴⁵⁷ We will discuss the relative costs and benefits of these alternatives in more detail in the context of our analysis of alternatives to proposed rules that use the U.S. person definition in the following sections.

¹⁴⁵⁸ See Proposed Rule 3a71-3(b) under the Exchange Act, as discussed in Section III.B.3, *supra*. See also 17 CFR § 240.3a71-2.

engaged in security-based swap dealing activity and, with respect to a non-U.S. person engaged in dealing activity, the status of its counterparties in transactions connected to dealing activity.

In this section, we will describe certain alternatives to our proposed application of the de minimis exception and explain how these alternatives would have affected the programmatic costs and benefits of Title VII. Some of these alternatives have been considered in our discussions of the U.S. person definition.

a. Calculation of U.S. Persons' Transactions for De Minimis Exception

Our proposed approach would require a U.S. person to count toward the de minimis threshold all transactions it enters into in a dealing capacity, including those it conducts through a foreign branch, regardless of the location of the counterparty to the transaction.¹⁴⁵⁹ Some commenters suggested that the Commission lacks the authority to subject the dealing activity of a foreign branch of a U.S. bank to Title VII, including our registration requirements, to the extent that it does business only with counterparties that are not U.S. persons outside the United States.¹⁴⁶⁰ As noted above, commenters generally took the view that the Commission should consider using the Regulation S definition of U.S. person for purposes of applying the de minimis exception in the cross border context, as Regulation S specifically excludes from its definition of U.S. person foreign branches of U.S. banks.¹⁴⁶¹ Presumably, under the approach suggested by some commenters, the headquarters of a U.S. bank would be designated a U.S. person, whereas each of its foreign branches would be classified as a separate non-U.S. person for purposes of Title VII.

¹⁴⁵⁹ See proposed Rule 3a71-3(b)(1)(i) under the Exchange Act, as discussed in Section III.B.3, supra.

¹⁴⁶⁰ See, e.g., Sullivan & Cromwell Letter at 2.

¹⁴⁶¹ See notes 218 and 219, supra.

For the reasons already noted above,¹⁴⁶² we are not proposing to follow this approach. Because of the nature of the risks posed by security-based swaps, which are borne by the entire legal entity even if the transaction is entered into by a foreign branch of such entity, consistent with the Commission's approach to the meaning of "person" in the security-based swap dealer definition, as discussed above,¹⁴⁶³ we are proposing to define the term "U.S. person" to include the entire entity, including its foreign branches. In addition, such separation is inconsistent with the focus in Title VII on the effect of a person's dealing activity on the U.S. financial system, including the risks such person bears as a result of its dealing activity. Although we recognize that certain U.S.-based banks have chosen to conduct some or all of their foreign security-based swap business through foreign branches,¹⁴⁶⁴ we preliminarily believe that, given Title VII's goal of addressing potential dealing risk to the U.S. financial system caused by security-based swap dealing activity, the de minimis exception should apply to all security-based swap dealing activity of a person that has its principal place of business within, or is incorporated or organized within, the United States, regardless of which part of such person carries out such dealing activity wherever its counterparties are located, even if elements of that activity occur outside the United States.

We preliminarily believe that the alternative approach suggested by commenters could reduce the programmatic benefits of security-based swap dealer registration under Title VII and the ensuing substantive requirements applicable to registered security-based swap dealers if the de minimis calculation for U.S. persons engaged in dealing activity does not include the entire

¹⁴⁶² See Section III.B.3, supra

¹⁴⁶³ See Section III.B.4, supra.

¹⁴⁶⁴ See Sections II.A.2 and III.B.6, supra (discussing the dealing structures used by U.S.-based entities).

volume of such persons' dealing activity. Drawing a distinction between the branches, desks, or offices of a U.S. person and the entity as a whole would be inconsistent with the fact that the U.S. person as a whole bears the risk of all security-based swap transactions that it enters into, including those transactions conducted through a foreign branch or office with non-U.S. person counterparties located outside the United States.¹⁴⁶⁵

Even if the headquarters of a U.S. bank were already registered by virtue of its own security-based swap dealing activity in the United States, the commenters' suggested approach would presumably allow the same bank, through its foreign branches, to engage in unlimited dealing activity with non-U.S. persons outside the United States without registering those branches.¹⁴⁶⁶ We do not view such disparate regulatory treatment of two parts of the same legal entity to be consistent with the purposes of Title VII, particularly given that this approach would appear to place entirely outside the scope of regulation under Title VII transactions that pose risks to a U.S. bank that are indistinguishable from those arising from transactions done directly from the home office of that bank.¹⁴⁶⁷ We believe that excluding transactions conducted through foreign branches from the de minimis calculations would not achieve the programmatic benefits intended by the Title VII requirements because it would leave unaddressed risks associated with security-based swap dealing activity that occurs within the United States and therefore raises the

¹⁴⁶⁵ See Section II.A.3, supra (discussing the example of AIG FP).

¹⁴⁶⁶ For example, treating the branch differently may remove the branch entirely from Title VII's rules. This could prevent regulation of capital adequacy and other risk mitigating requirements, even though all of the risk from the transaction is residing within the entity as a whole, creating risk for the U.S. financial system.

¹⁴⁶⁷ Security-based swap activity conducted through a foreign branch poses risks to the entire entity to which the branch belongs that are generally indistinguishable from those posed by security-based swap activity conducted through an office. The experience of AIG FP demonstrates that the security-based swap activity of a foreign office can lead to the default of the entire entity. See Section II.A.3, supra.

types of concerns with respect to the U.S. market that Title VII's dealer requirements were intended to address.

b. Calculation of Non-U.S. Persons' Transactions for De Minimis Exception (including transactions conducted within the United States)

Our proposed application of the de minimis exception to non-U.S. persons engaged in security-based swap dealing activity would require them to include in their de minimis calculations any transactions with U.S. persons or any transactions otherwise conducted within the United States, to the extent they are entered into in a dealing capacity. Given the focus on Title VII on the stability and transparency of the U.S. financial system and the protection of counterparties,¹⁴⁶⁸ we preliminarily believe that it is appropriate to require non-U.S. persons that engage in dealing activity within the United States and therefore are likely to raise these types of concerns to count such dealing activity toward their de minimis thresholds. To the extent that the aggregate notional amount of transactions arising from a non-U.S. person's dealing activity involving U.S. persons or otherwise conducted within the United States exceeds the de minimis threshold in the trailing 12-month period, we would require a non-U.S. person to register as a security-based swap dealer.

In developing our proposed application of the de minimis threshold to non-U.S. persons, we have considered alternatives suggested by commenters or proposed by the CFTC. We declined to incorporate these alternatives into our approach.

Some commenters suggested that a non-U.S. person that engages in dealing activity with U.S.-person counterparties through an affiliated U.S. intermediary should be permitted to register

¹⁴⁶⁸ Pub.L. No. 111-203 Preamble. See Section I and note 4, supra.

in a limited capacity or should not be required to register as a security-based swap dealer.¹⁴⁶⁹ Specifically, some commenters suggested that the Commission adopt an approach that is modeled on the Commissions' existing regimes, permitting non-U.S. security-based swap dealers to transact with U.S. persons without registering in the United States if those transactions are intermediated by a U.S.-registered security-based swap dealer.¹⁴⁷⁰

We preliminarily believe that the above alternative suggested by commenters would potentially reduce the programmatic benefits intended by Title VII. To the extent that a non-U.S. person engages in security-based swap dealing entirely with U.S. persons or within the United States, that person's security-based swap activity raises the concerns that security-based swap dealer regulation under Title VII intends to address: First, the entity's dealing activity raises customer protection concerns, which the external business conduct standards and segregation requirements of Title VII are intended to address; second, the entity's dealing activity raises financial responsibility concerns, which Title VII's entity-level requirements applicable to registered security-based swap dealers are intended to address; finally, the entity's dealing activity raises transparency, regulatory oversight, counterparty risk and systemic risk concerns, which Title VII intends to address through its regulatory reporting, public reporting, mandatory

¹⁴⁶⁹ See, e.g., Société Générale Letter II; Cleary Letter IV.

¹⁴⁷⁰ See, e.g., Davis Polk Letter I at 11 n.17 ("This model is similar to the mode of operation permitted by Rule 15a-6 under the Securities Exchange Act of 1934, pursuant to which foreign broker-dealers interface with U.S. customers under arrangements with affiliated or non-affiliated broker-dealers without themselves registering as broker-dealers in the U.S."); Cleary Letter IV at 22 ("Accordingly, as one alternative, we suggest that the Commissions adopt an approach that is modeled on the Commissions' existing regimes, permitting non-U.S. swap dealers to transact with U.S. persons without registering in the U.S. if those transactions are intermediated by a U.S.-registered swap dealer. This would be consistent with the approach adopted by the SEC under Rule 15a-6 and prior interpretative precedents with respect to non-U.S. securities dealers.").

clearing, and mandatory trade execution requirements. Although the Commission recognizes that some of these concerns might be addressed by regulating the intermediary, as in the broker-dealer context, we preliminarily believe that only if the non-U.S. person dealer itself is subject to Title VII would it be possible to address the entire range of concerns that Title VII dealer regulation is intended to address.¹⁴⁷¹

The CFTC has proposed that non-U.S. persons that are guaranteed by U.S. persons be required to include in their de minimis calculation all transactions carried out in a dealing capacity with any counterparty, wherever that counterparty is located, just as a U.S. person acting in a dealing capacity would be required to do.¹⁴⁷² As discussed above, the Commission recognizes that such guarantees of the security-based swap transactions of non-U.S. persons may pose risk to the U.S. financial system; however, the Commission does not believe that the security-based swap dealer regulation in Title VII is the appropriate vehicle for regulating the dealing activity of non-U.S. persons occurring outside the United States with other non-U.S. persons.¹⁴⁷³ As discussed above, the Commission preliminarily believes that the risk posed to the U.S. markets by the dealing activity of non-U.S. persons outside the United States whose performance under security-based swaps is guaranteed by a U.S. person does not necessarily raise the full range of concerns that Title VII dealer regulation is intended to address. Such activity may give rise to security-based swap positions that raise concerns within the United States that are relevant to the purposes of Title VII if those positions are large enough to affect the stability of the institution providing the guarantee and potentially the stability of the U.S.

¹⁴⁷¹ See Section III.B.4, supra.

¹⁴⁷² See CFTC Cross-Border Proposal, 77 FR at 41221.

¹⁴⁷³ See Section III.B.7, supra.

financial system more generally. This risk, however, arises from attribution of security-based swap positions to the guarantor due to the guarantee rather than the dealing activity per se. In these circumstances, we preliminarily believe that the risks relating to these positions warrant registration only to the extent that the positions exceed the thresholds established for major security-based swap participant registration.¹⁴⁷⁴

In light of the foregoing, we do not believe that requiring a non-U.S. person that is guaranteed by a U.S. person to count every transaction entered into in a dealing capacity toward its de minimis threshold and to register as a security-based swap dealer even if it engaged in no dealing activity with U.S. persons or otherwise within the United States would materially increase the programmatic benefits of the dealer registration requirements. Although it is likely that such an approach would cause more entities to register as dealers than does our proposed approach, to the extent that these entities were required to register as security-based swap dealers even though they engaged in dealing activity only with non-U.S. persons outside the United States, we preliminarily believe that this alternative would impose programmatic costs on these entities without a corresponding increase of the programmatic benefits to the U.S. security-based swap markets that are intended by the security-based swap dealer requirements in Title VII, as we do not believe that the dealing activity of such persons (to the extent that it involves only non-U.S. counterparties outside the United States) raises the types of concerns within the United States that Title VII dealer registration was intended to address.

Another alternative to our proposed approach would be not to require non-U.S. persons that engage in dealing activity with other non-U.S. persons through transactions conducted

¹⁴⁷⁴ Id.

within the United States to include such transactions in their de minimis calculations.¹⁴⁷⁵ As noted above, Title VII is intended to promote accountability and transparency in the U.S. financial system,¹⁴⁷⁶ and to do so, it is necessary to ensure that security-based swap dealing activity that occurs within the United States is subjected to the requirements of Title VII,¹⁴⁷⁷ including those related to external business conduct protections and other transaction-level requirements. Even if a non-U.S. person located outside the United States is engaging in dealing activity with non-U.S. persons located in the United States, it is, among other things, providing liquidity in the U.S. security-based swap market and thus engaging in dealing activity within the United States. Excluding such dealing activity from Title VII would reduce the programmatic benefits of security-based swap dealer regulation because it would reduce the transparency of the U.S. market and deprive counterparties within the United States of the protections of Title VII. We recognize that the ultimate programmatic benefits discussed here associated with the application of the security-based swap dealer regulation in the cross-border context would be affected by the substantive rules adopted by the Commission. The Commission is reopening the comment periods for our outstanding rulemaking releases that concern security-based swaps and security-based swap market participants and were proposed pursuant to certain provisions of the Exchange Act, as amended by Title VII of the Dodd-Frank Act.

¹⁴⁷⁵ The CFTC's proposed guidance does not trigger application of Title VII requirements based on the location of the security-based swap activity.

¹⁴⁷⁶ See Section II, supra.

¹⁴⁷⁷ See proposed Rule 3a71-3(a)(5) under the Exchange Act (defining "transaction conducted within the United States"), as discussed in Section III.B.5, supra.

iii. Aggregation of affiliate dealing activity

Our proposed rule regarding the application of the de minimis exception in the cross-border context also requires a U.S. person who enters into security-based swap transactions in a dealing capacity, or non-U.S. person who enters into security-based swap transactions with U.S. persons or transactions conducted within the United States in a dealing capacity, to count toward such person's de minimis threshold certain transactions of its affiliates. Specifically, such persons would be required to include in the de minimis calculation the notional amount of (1) the transactions entered into in a dealing capacity by all of their commonly controlled affiliates who are U.S. persons and (2) the transactions with U.S. persons or transactions conducted within the United States entered into in a dealing capacity by all of its commonly controlled affiliates who are non-U.S. persons. However, such calculation would exclude any affiliate that is a registered security-based swap dealer if such person who relies on the de minimis exception maintains separate operations independent of any affiliate who is a registered security-based swap dealer and does not involve, or act in concert with, any affiliate that is a registered security-based swap dealer in any stage of a security-based swap transaction that arises out of its dealing activity.¹⁴⁷⁸

In developing this rule, we considered the approach proposed by the CFTC, which we understand to permit non-U.S. persons to aggregate only the transactions carried out in a dealing capacity by their commonly controlled affiliates that are also non-U.S. persons, rather than including all such transactions by all commonly controlled affiliates, wherever located. As noted

¹⁴⁷⁸ See proposed Rule 3a71 under the Exchange Act. This approach is consistent with the aggregation requirement described in the Intermediary Definitions Release. See Intermediary Definitions Release, 77 FR at 30631 (requiring aggregation of dealing activity by commonly controlled affiliates for purposes of de minimis calculation).

above,¹⁴⁷⁹ we declined to follow the CFTC's proposal in part out of concern that doing so could confer competitive advantages on affiliated corporate groups that engage in security-based swap dealing activity through both U.S. and foreign affiliates by allowing them to operate with an effective de minimis threshold twice higher than the threshold applicable to security-based swap dealers operating solely within the United States or solely in one or more foreign-based affiliates.

We recognize that our approach may require some persons to register that might not be required to register under the CFTC's approach and thus would impose programmatic costs on those entities that they might not otherwise incur. It may also require more firms to engage in assessment, as even those with activity levels far below the threshold will probably perform these calculations, if they are part of a larger corporate family with a number of security-based swap dealers. However, we believe that those corporate groups operating a centralized booking model or centralized risk management should be able to have the central booking entity or central risk management location perform the de minimis aggregation calculation for the entire corporate group. For purposes of this analysis, we have assumed that corporate groups are likely to perform such assessments centrally.¹⁴⁸⁰

We preliminarily conclude that our proposed application of the aggregation requirement to the de minimis calculation in the cross-border context is appropriate in light of the purposes of Title VII and of dealer regulation in particular. The aggregation requirement is designed to

¹⁴⁷⁹ See Section III.B.4.(c), *supra*.

¹⁴⁸⁰ We understand, based on comment letters and our staff's discussion with market participants, that many market participants keep a global swap book and operate a central booking model. See, e.g., Cleary Letter I at 9. If this is not the case with respect to a particular market participant, then the number of entities that need to perform the de minimis calculation would increase. The Commission currently does not have available information with respect to the number of market participants active in the security-based swap market that utilize a central booking model.

discourage evasion of the dealer registration requirement by a corporate group by engaging in large volumes of dealing activity through multiple affiliates, none of which engages in activity exceeding the de minimis threshold.¹⁴⁸¹ Therefore, we have preliminarily determined that a corporate group's dealing activity should be considered as a whole.

Similarly, to be entitled to rely on the de minimis exception, an unregistered affiliate within a corporate group must have an independent operation separate from any affiliate who is a registered security-based swap dealer and must not act in concert with the registered affiliate in any stage of a security-based swap transaction. The Commission preliminarily believes that this requirement would have the benefit of preventing evasion.

(b) Major Security-based Swap Participants

Several commenters suggested that foreign government-related entities, such as sovereign wealth funds and multilateral development institutions, should be excluded from the major security-based swap participant definition.¹⁴⁸² By potentially capturing fewer major security-based swap participants, this alternative approach would correspondingly decrease the programmatic costs and benefits associated with Title VII regulation of major security-based swap participants. We preliminarily believe that security-based swap transactions entered into by these types of foreign government-related entities with U.S. persons pose the same risks to the U.S. security-based swap markets as transactions entered into by entities that are not foreign-government related. Moreover, as noted above,¹⁴⁸³ based upon our conversations with market participants we understand that foreign government-related entities rarely enter into security-

¹⁴⁸¹ See Intermediary Definitions Release, 77 FR at 30631.

¹⁴⁸² See note 382, supra.

¹⁴⁸³ See Section IV.C.3, supra.

based swap transactions (as opposed to other types of swap transactions) in amounts that would trigger the obligation to register as a major security-based swap participant. Therefore, we preliminarily believe that the proposed approach considering only security-based swap transactions entered into with a U.S. person as counterparty in determining a non-U.S. person's status as a major security-based swap participant, regardless of whether such non-U.S. person is a foreign government-related entity, is more appropriately tailored to the objectives of Title VII.

Request for Comment

The Commission requests comments on all aspects of the economic analysis of the alternatives to the proposed definition of U.S. person, the proposed application of the de minimis exception and the proposed application of the major security-based swap participant definition in the cross-border context. The Commission requests that commenters provide data and sources of data to support any comments. In addition, the Commission requests commenters' views on the following:

- Has the Commission appropriately considered the costs and benefits associated with adopting the definition of U.S. person found in Regulation S? If not, please explain why and provide information on how such costs and benefits should be assessed.
- Has the Commission appropriately considered the costs and benefits associated with adopting the same definition of U.S. person as proposed by the CFTC? If not, please explain why and provide information on how such costs and benefits should be assessed.
- Has the Commission appropriately considered the costs and benefits associated with adopting a rule to permit foreign branches of U.S. banks to exclude transactions conducted through a foreign branch from their de minimis calculations? If not, please

explain why and provide information on how such costs and benefits should be assessed.

- Has the Commission appropriately considered the costs and benefits associated with not requiring a non-U.S. person to count its transactions conducted within the United States with non-U.S. persons towards its de minimis threshold? If not, please explain why and provide information on how such costs and benefits should be assessed.
- Has the Commission appropriately considered the costs and benefits associated with requiring a non-U.S. person whose performance under security-based swaps is guaranteed by a U.S. person to count all transactions connected to its security-based swap dealing activity toward its de minimis threshold, even though such non-U.S. person only conducts dealing activity with non-U.S. persons outside the United States? If not, please explain why and provide information on how such costs and benefits should be assessed.
- Has the Commission appropriately considered the costs and benefits associated with the proposed rule regarding aggregation of security-based swap transactions entered into in a dealing capacity by a person and its affiliates under common control and requiring that such aggregated notional amount be included in such person's de minimis calculation? If not, please explain why and provide information on how such costs and benefits should be assessed. Should the Commission require operational independence, from the cost and benefit point of view, as a condition to excluding transactions of an affiliate that is a registered security-based swap dealer from a person's de minimis calculation?

- Has the Commission appropriately considered the costs and benefits associated with excluding foreign government-related entities, such as sovereign wealth funds and multilateral development institutions, from the definition of major security-based swap participant? If not, please explain why and provide information on how such costs and benefits should be assessed.
- Should the Commission take into account the potential impact of the Push-Out Rule and the Volcker Rule in considering the approach to application of the Title VII requirements to foreign branches of the U.S. banks? For example, what would the costs and benefits be with respect to requiring foreign branches of U.S. banks to include transaction conducted through a foreign branch in its de minimis calculation, or requiring a non-U.S. person to include its transactions with foreign branches in its major security-based swap participant calculation, after taking into account the effects of the Push-Out Rule and the Volcker Rule on U.S. banks? Please explain how such costs and benefits should be assessed.

E. Economic Analysis of the Proposed Application of the Entity-Level and Transaction-Level Requirements to Security-Based Swap Dealers and Major Security-Based Swap Participants

As stated above, persons who fall within the statutory definitions of security-based swap dealer and major security-based swap participant, as further defined by the rules adopted in the Intermediary Definition Adopting Release, will be required to register with the Commission and comply with a host of ensuing substantive requirements.¹⁴⁸⁴ These requirements include entity-

¹⁴⁸⁴ See Section XV.D.1, supra.

level requirements¹⁴⁸⁵ and transaction-level requirements¹⁴⁸⁶ set forth in Sections 15F and 3E of the Exchange Act and rules and regulations thereunder.¹⁴⁸⁷

1. Entity-Level Requirements

Section 764(a) of the Dodd Frank Act adds a new Section 15F(e) to the Exchange Act, which imposes capital and margin requirements on security-based swap dealers and major security-based swap participants.¹⁴⁸⁸ These requirements are designed to reduce the probability of these institutions' failure, mitigate the consequences of these institutions failures, protect customer assets, and contribute to the stability of the security-based swap market in particular and the U.S. financial system more generally.¹⁴⁸⁹ The benefits of the capital and margin requirements for security-based swap dealers are expected to include enhancing protection of customer assets and mitigation of the consequences of a firm failure, while allowing security-based swap dealers appropriate flexibility in how they conduct their security-based swaps business.¹⁴⁹⁰ Similarly, the benefits of the capital and margin requirements for major security-based swap participants are expected to include neutralization of the credit risk between a major security-based swap participant and a counterparty, which would lessen the impact on the counterparty if the major security-based swap participant failed.¹⁴⁹¹ We believe the capital and margin requirements strengthen the financial system by reducing the potential for defaults by

¹⁴⁸⁵ See Section III.C.3(a), *supra*.

¹⁴⁸⁶ See Section III.C.3(b), *supra*.

¹⁴⁸⁷ See Section 15F of the Exchange Act, 15 U.S.C. 78o-8, and Section 3E of the Exchange Act, 15 U.S.C. 78c-4.

¹⁴⁸⁸ See Section 15F(e) of the Exchange Act, 15 U.S.C. 78o-10(e).

¹⁴⁸⁹ See Capital, Margin, and Segregation Proposing Release, 77 FR at 70218 and 70303.

¹⁴⁹⁰ See *id.* at 70218.

¹⁴⁹¹ *Id.*

entities engaging in security-based swap activity and mitigating the impact of such defaults, including the adverse spillover or contagion effect of a default by security-based swap dealers and major security-based swap participants.¹⁴⁹²

In addition, registered security-based swap dealers and major security-based swap participants are required to establish robust risk management systems adequate for managing their day-to-day business,¹⁴⁹³ keep books and records and maintain daily trading records of the security-based swaps they enter into,¹⁴⁹⁴ establish internal systems and controls,¹⁴⁹⁵ diligently

¹⁴⁹² These spillover effects could create instability for the financial markets more generally, such as by limiting the willingness of market participants to extend credit to each other, and thus substantially reduce liquidity and valuations for particular types of financial instruments. See, e.g., Markus K. Brunnermeier and Lasse Heje Pedersen, "Market Liquidity and Funding Liquidity," *Review of Financial Studies* (2009); Denis Gromb and Dimitri Vayanos, "A Model of Financial Market Liquidity," *Journal of the European Economic Association* (2010).

¹⁴⁹³ See Section 15F(j)(2) of the Exchange Act, 15 U.S.C. 78o-10(j)(2); see also Section III.C.3(b)(3), *supra*.

¹⁴⁹⁴ See Sections 15F(f) and (g) of the Exchange Act, 15 U.S.C. 78o-10(f) and (g); see also Section III.C.3(b)(4), *supra*.

¹⁴⁹⁵ See Sections 15F(j)(3) and (4) of the Exchange Act, 15 U.S.C. 78o-10(j)(3) and (4); Section III.C.3(b)(5), *supra*. See also proposed Rule 15Fh-3(i)(2)(iv) under the Exchange Act.

supervise the security-based swap business,¹⁴⁹⁶ designate a chief compliance officer,¹⁴⁹⁷ and keep books and records open to inspection and examination by the Commission.¹⁴⁹⁸

The programmatic costs and benefits associated with the entity-level requirements applicable to security-based dealers and major security-based swap participants under Title VII are (or will be) addressed in more detail in connection with the applicable rulemakings implementing Title VII.¹⁴⁹⁹

With respect to the application of the entity-level requirements in the cross-border context, as stated above, the Commission preliminarily believes that it would be consistent with the objective of Title VII to ensure the safety and soundness of registered security-based swap dealers¹⁵⁰⁰ to require foreign security-based swap dealers to comply with the entity-level requirements.¹⁵⁰¹ Similarly, the Commission preliminarily does not believe that foreign major security-based swap participants should be excluded from the application of any entity-level

¹⁴⁹⁶ See Section 15F(h)(1)(B) of the Exchange Act, 15 U.S.C. 78o-10(h)(1)(B). The Commission has proposed a rule that would establish supervisory obligations that incorporates principles from Section 15(b) of the Exchange Act and existing SRO rules. Proposed Rule 15fh-3(i) under the Exchange Act, as discussed in the External Business Conduct Standards Proposing Release, 76 FR at 42419-21. See also Section III.C.3(b)(6), supra.

¹⁴⁹⁷ See Section 15F(k) of the Exchange Act, 15 U.S.C. 78o-10(k); see also Section III.C.3(b)(7), supra.

¹⁴⁹⁸ See Section 15F(l)(C) of the Exchange Act, 15 U.S.C. 78o-10(l)(C); see also Section III.C.3(b)(8), supra.

¹⁴⁹⁹ See, e.g., Capital, Margin, and Segregation Proposing Release, 77 FR 70214.

¹⁵⁰⁰ See Section 15F(e)(3)(A) of the Exchange Act, 15 U.S.C. 78o-8(e)(3)(A) (“To offset the greater risk to the security-based swap dealer...and the financial system arising from the use of security-based swaps that are not cleared, the requirements imposed under paragraph (2) shall – (i) help ensure the safety and soundness of the security-based swap dealer....”).

¹⁵⁰¹ See Section III.C.5, supra.

requirements.¹⁵⁰² However, the Commission recognizes the concerns raised by commenters regarding the possibility that foreign security-based swap dealers may be subject to conflicting or duplicative regulatory requirements and proposes to mitigate the costs associated with the potential duplicative compliance obligations through the Commission's proposed approach to substituted compliance.¹⁵⁰³ We have considered the effect of the proposed rules regarding substituted compliance on its effect on efficiency, competition and capital formation above¹⁵⁰⁴ and will discuss the economic considerations of the proposed rules regarding substituted compliance more fully below.¹⁵⁰⁵

Alternative

The CFTC proposed to treat Title VII margin requirements with respect to non-cleared swaps as transaction-level requirements and would not apply the margin requirements to foreign non-bank swap dealers (including foreign affiliates of U.S. persons regardless of whether such foreign affiliates' performance obligations under swaps are guaranteed by U.S. persons) when they transact swaps with non-U.S. person counterparties whose performance obligations under the swaps are not guaranteed by U.S. persons.¹⁵⁰⁶ The prudential regulators' margin proposal does not apply Title VII margin requirements to a foreign covered swap entity¹⁵⁰⁷ with respect to

¹⁵⁰² Id.

¹⁵⁰³ See Section XI, supra (discussing the Commission's overall proposed approach to substituted compliance in the context of Title VII).

¹⁵⁰⁴ See Section XV.C, supra.

¹⁵⁰⁵ See Section XV.I, infra.

¹⁵⁰⁶ See CFTC Cross-Border Proposal, 77 FR at 41226, 41228, and 41237.

¹⁵⁰⁷ A "foreign covered swap entity" is defined as any entity prudentially regulated by the prudential regulators and required to register as a swap dealer, major swap participant, security-based swap dealer or major security-based swap participant under section 4s of the Commodity Exchange Act or section 15F of the Exchange Act that (i) is not a

foreign non-cleared swaps or foreign non-cleared security-based swaps.¹⁵⁰⁸ In practice, the Commission's proposed treatment of the margin requirements as an entity-level requirement differs from the CFTC's and the Prudential regulators' proposals in that non-bank foreign security-based swap dealers (regardless of whether their performance of obligations under security-based swaps are guaranteed by U.S. persons) would be subject to the margin requirements with respect to their transactions with non-U.S. person counterparties whose performance obligations under the security-based swaps are not guaranteed by U.S. persons.

The Commission could have taken the CFTC's approach to treat margin requirements as transaction-level requirements by proposing not to apply margin to non-bank foreign security-based swap dealers with respect to their transactions with non-U.S. person counterparties whose performance obligations under the security-based swaps are not guaranteed by U.S. persons. We also could have taken the prudential regulators' approach by proposing not to apply margin to foreign non-bank security-based swap dealers that are not controlled by a U.S. person with respect to their transactions with non-U.S. person counterparties whose performance obligations

company organized under the laws of the United States or any State; (ii) is not a branch or office of a company organized under the laws of the United States or any State; (iii) is not a U.S. branch, agency or subsidiary of a foreign bank; and (iv) is not controlled, directly or indirectly, by a company that is organized under the laws of the United States or any State. See Prudential Regulator Margin and Capital Proposal, 76 FR at 27581.

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A "foreign non-cleared swap or foreign non-cleared security-based swap" is defined as a non-cleared swap or non-cleared security-based swap with respect to which: (i) The counterparty to the foreign covered swap entity is not a company organized under the laws of the United States or any State, not a branch or office of a company organized under the laws of the United States or any State, and not a person resident in the United States; and (ii) performance of the counterparty's obligations to the foreign covered swap entity under the swap or security-based swap has not been guaranteed by an affiliate of the counterparty that is a company organized under the laws of the United States or any State, a branch of a company organized under the laws of the United States or any State, or a person resident in the United States. See Prudential Regulator Margin and Capital Proposal, 76 FR at 27581.

under the security-based swaps are not guaranteed by U.S. persons. Either approach would not treat margin as an entity-wide requirement.

The Dodd-Frank Act seeks to address the counterparty credit risk exposures arising from OTC derivatives by, among other things, imposing mandatory clearing and margin requirements for non-cleared security-based swaps.¹⁵⁰⁹ The margin requirements established by the Commission with respect to non-cleared security-based swaps will operate in tandem with mandatory clearing provisions in the Dodd-Frank Act.¹⁵¹⁰ Registered clearing agencies that operate as CCPs manage credit and other risks through a range of controls and methods, including prescribed margin rules for their participants.¹⁵¹¹ Thus, the mandatory clearing requirements in effect will establish margin requirements for cleared security-based swaps and, thereby, complement the margin requirements for non-cleared security-based swaps established by the Commission and the prudential regulators.¹⁵¹²

In addition, margin requirements, along with the capital standards and segregation requirements, are an integral part of the proposed financial responsibility requirements for

¹⁵⁰⁹ See Capital, Margin, and Segregation Proposing Release, 77 FR at 70258; see also Section 3C(a)(1) and Section 15F(e)(1) of the Exchange Act, 15 U.S.C. 78c-3(a)(1) and 78o-10(e)(1).

¹⁵¹⁰ See Section 3C(a)(1) of the Exchange Act, 15 U.S.C. 78c-3(a)(1) (requiring that security-based swaps must be cleared through a registered clearing agency unless an exception to mandatory clearing exists).

¹⁵¹¹ See Clearing Agency Standards Adopting Release, 77 FR at 66230-32.

¹⁵¹² See Capital, Margin, and Segregation Proposing Release, 77 FR at 70259; see also Prudential Regulator Margin and Capital Proposal, 76 FR at 27567 (“In the derivatives clearing process, central counterparties (CCPs) manage the credit risk through a range of controls and methods, including a margining regime that imposes both initial margin and variation margin requirements on parties to cleared transactions. Thus, the mandatory clearing requirement established by the Dodd-Frank Act for swaps and security-based swaps will effectively require any party to any transaction subject to the clearing mandate to post initial and variation margin to the CCP in connection with that transaction.”).

security-based swap dealers that are intended to enhance the financial integrity of these entities.¹⁵¹³ The margin requirements proposed by the Commission are intended to work in tandem with the capital requirements to strengthen the financial system by reducing the potential for default to an acceptable level and limiting the amount of leverage that can be employed by security-based swap dealers and other market participants.¹⁵¹⁴ For example, with respect to cleared security-based swaps, for which margin requirements will not be established by the Commission, the Commission proposed a capital charge that would apply if a nonbank security-based swap dealer collects margin collateral from a counterparty in an amount that is less than the deduction that would apply to the security-based swap if it was a proprietary position of the non-bank security-based swap dealer.¹⁵¹⁵ In addition, the Commission proposed capital charges to address exceptions from the margin collection requirements with respect to non-cleared security-based swaps, as an alternative to margin collateral by requiring a non-bank security-based swap dealer to hold sufficient net capital to enable it to withstand losses if a counterparty defaults.¹⁵¹⁶

In the context of the statutory framework and the Commission's proposed financial responsibility program for non-bank security-based swap dealers, if the Commission were to treat margin as a transaction-level requirement and apply margin to certain non-cleared transactions but not others, any credit risk of such other transactions that are not collateralized by mutually agreed contractual arrangement between a security-based swap dealer and its

¹⁵¹³ See Capital, Margin, and Segregation Proposing Release, 77 FR at 70303 and 70259.

¹⁵¹⁴ See id. at 70304.

¹⁵¹⁵ See id. at 70245-46.

¹⁵¹⁶ See id. at 70246.

counterparty would need to be addressed by imposing capital charges, which would increase the amount of net capital a non-bank security-based swap dealer is required to set aside. While the increased liquid capital would provide an additional buffer for a non-bank security-based swap dealer to withstand losses resulting from a default of its counterparties, it also would increase business costs. Depending on the size of a foreign security-based swap dealers' foreign business that is not collateralized, the size of the increased amount of the capital charge may be very large. As discussed in the Capital, Margin, and Segregation Proposing Release, if security-based swap dealers are required to maintain an excessive amount of capital, that amount may result in certain costs for the markets and the financial system, including the potential for the reduced availability of security-based swaps for market participants who would otherwise use such transactions to hedge the risks of their business, or engage in other activities that would promote capital formation.¹⁵¹⁷ End users also may incur increased transaction costs in connection with the increased capital charges as security-based swap dealers are likely to pass on the financial burden of any increased capital requirements to customers.¹⁵¹⁸ If the transaction costs are too high, end users may seek other cheaper alternatives, such as cleared security-based swaps or voluntary collateral posting to reduce transaction pricing, or they may decide not to transact security-based swaps at all.

In the cross-border context, the Commission is proposing not to apply the mandatory clearing requirement to transactions between a foreign security-based swap dealer and non-U.S. person counterparties whose performance obligations under security-based swaps are not guaranteed by U.S. persons. Therefore, a foreign security-based swap dealer's exposure to

¹⁵¹⁷ See id. at 70306.

¹⁵¹⁸ Id.

counterparty credit risk arising from its transactions with these non-U.S. person counterparties would not be addressed by the Title VII mandatory clearing requirement. If margin requirements do not apply to these transactions, the counterparty credit risk arising from such transactions may be left uncollateralized. In the event that non-U.S. counterparties experience financial difficulties, and the foreign security-based swap dealer's uncollateralized exposures to such counterparties have grown exponentially due to severe market movement, the uncollateralized foreign credit exposures may jeopardize the safety and soundness of the foreign security-based swap dealer, whose failure would have negative impact on the U.S. security-based swap market and present risk to the U.S. financial system. Such uncollateralized credit risk could be addressed by imposing capital charges under the Commission's proposed capital rule, but taking this approach would result in increased costs and higher barrier for new foreign entrants into the U.S. security-based swap market. To mitigate the cost of increased capital charges, a foreign security-based swap dealer may choose to enter into credit support arrangements and request some or all counterparties to post collateral. This would be particularly the case when a foreign security-based swap dealer is transacting in a foreign market where collateral posting is a common market practice to manage counterparty credit risk or in a foreign jurisdiction that imposes margin requirements because the foreign security-based swap dealer would encounter less resistance to posting margin from foreign counterparties. To the extent that the costs of capital charges drive foreign security-based swap dealers to voluntarily collateralize their exposures to counterparty credit risks, the differences in the economic consequences between treating margin as an entity-level requirement as opposed to a transaction-level requirement would narrow.

By contrast, under the proposed approach, the counterparty credit exposures arising from a foreign non-bank security-based swap dealers transactions with non-U.S. persons whose performance of obligations under non-cleared security-based swaps are not guaranteed by U.S. persons would be collateralized but the collateral would not be segregated.¹⁵¹⁹ The collateral received would protect the foreign security-based swap dealer against the default risk of the foreign counterparty and reduce the probability of the failure of the foreign security-based swap dealer and the spillover and contagion risk of a foreign counterparty's default that may impact the U.S. financial system. In addition, such collateral could finance the business needs of the foreign security-based swap dealer and increase its liquidity. The Commission preliminarily believes that the proposed treatment of margin as an entity-level requirement would generate the benefit of offsetting the greater risk to the foreign security-based swap dealer and the U.S. financial system arising from the use of non-cleared security-based swaps and help ensure the safety and soundness of the security-based swap dealers¹⁵²⁰ without imposing excessive capital charges at the same time, which may raise the barrier for foreign dealers to enter the U.S. security-based swap market. The proposed treatment of margin also may increase funds available to finance a foreign security-based swap dealers' business activity, which would decrease the borrowing needs and lower the costs of business.

¹⁵¹⁹ A foreign security-based swap dealer that is not a registered broker-dealer would not be required to segregate assets held as collateral received from a non-U.S. person counterparty with respect to non-cleared security-based swap transactions. A foreign security-based swap dealer that is a registered broker-dealer would be required to segregate margin collateral received from all counterparties. See proposed Rule 18a-4(e)(1) under the Exchange Act and discussion in Section III.C.4(b).ii, supra.

¹⁵²⁰ See Section 15F(e)(3)(A) of the Exchange Act, 15 U.S.C. 78o-10(e)(3)(A).

Commenters raised concerns about the potential costs and burdens of applying duplicative margin collection requirements to foreign transactions.¹⁵²¹ The Commission preliminarily believes that the costs of complying with duplicative margin requirements can be addressed by the proposed substituted compliance framework. As stated in our cost and benefit analysis with respect to substituted compliance below, the Commission preliminarily believes that substituted compliance would not substantially change the programmatic benefits intended by the entity-level requirements in Section 15F of the Exchange Act, including margin requirements; however, to the extent that substituted compliance eliminates duplicative compliance costs, registered foreign security-based swap dealers that are eligible for a substituted compliance determination may incur lower programmatic costs associated with implementation or compliance with the specified Title VII requirements (including margin requirements).¹⁵²²

Request for Comment

The Commission requests comments on all aspects of the economic analysis of the alternatives to the proposed definition of U.S. person, the proposed application of the de minimis exception and the proposed application of the major security-based swap participant definition in the cross-border context. The Commission requests that commenters provide data and sources of data to support any comments. In addition, the Commission requests commenters' views on particular issues below. Responses that are supported by empirical data and analysis provide great assistance to the Commission in considering the economic consequences of the proposed

¹⁵²¹ See Cleary Letter IV at 18 (“If non-U.S. margin requirements are essentially the same, or are merely different, but not significantly different, it is not obvious how the Agencies could justify their proposal or ex ante cost-benefit analysis.”)

¹⁵²² See Section XV.I, infra.

treatment of certain requirements as entity-level and other requirements as transaction-level requirements.

- Has the Commission appropriately considered the costs and benefits associated with an approach that would treat all the requirements set forth in Section 15F of the Exchange Act, and rules and regulations thereunder, as entity-level requirements and apply them on an entity-wide basis, except for the external business conduct standards and segregation requirements? Has the Commission appropriately estimated the costs and benefits associated with requiring a foreign security-based swap dealer to conform its capital and risk management practices to the rules proposed by the Commission? If not, please explain why and provide information on how such costs and benefits should be assessed.
- Are there any requirements that are treated as entity-level in the Commission's cross-border proposal that should be treated as transaction-level requirements from the cost and benefit point of view? If so, please explain how such treatment would affect the costs and benefits of the proposed approach.
- Has the Commission appropriately considered the costs and benefits associated with treating margin as an entity-level requirement, taking into account the interplay between the minimum capital requirement and margin requirement? If not, please explain why and provide information on how such costs and benefits should be assessed. What would be the economic impact of treating margin as an entity-level requirement? Should the Commission adopt the CFTC's approach by treating margin as a transaction-level requirement, given the costs and benefits of this alternative? Should the Commission adopt the prudential regulators' approach to exclude certain

foreign security-based swaps from application of the margin requirement, given the costs and benefits of this alternative?

2. Transaction-Level Requirements

With respect to the application of these transaction-level requirements to security-based swap dealers active in the cross-border context, the Commission proposes Rule 3a71-3(c) under the Exchange Act regarding application of customer protection requirements to security-based swap dealers,¹⁵²³ Rule 18a-4(e) regarding application of segregation requirements to foreign security-based swap dealers,¹⁵²⁴ Rule 3a67-10(b) regarding application of customer protection requirements to foreign major security-based swap participants,¹⁵²⁵ and Rule 18a-4(f) regarding application of segregation requirements to foreign major security-based swap participants.¹⁵²⁶ In the following sections, we discuss the economic considerations of these proposed rules regarding application of transaction-level requirements to security-based swap dealers or major security-based swap participants in the cross-border context.

(a) Proposed Rule 3a71-3(c) – Application of Customer Protection Requirements

Title VII imposes certain external business conduct requirements on registered security-based swap dealers that govern their interactions with counterparties to security-based swap transactions.¹⁵²⁷ These provisions are intended to protect the counterparties of registered dealers

¹⁵²³ See proposed Rule 3a71-3(c) under the Exchange Act, as discussed in Section III.C.4(b).i, supra.

¹⁵²⁴ See proposed Rule 18a-4(e) under the Exchange Act, as discussed in Section III.C.4(b).ii, supra.

¹⁵²⁵ See proposed Rule 3a67-10(b) under the Exchange Act, as discussed in Section IV.D.1(b), supra.

¹⁵²⁶ Id.

¹⁵²⁷ See Sections 15F(h) and 15F(j)(5) of the Exchange Act.

in such transactions by ensuring that security-based swap dealers, among other things, provide adequate disclosures to their counterparties about the risks of the transaction.¹⁵²⁸

Proposed Rule 3a71-3(c) provides that registered security-based swap dealers, with respect to their Foreign Business, shall not be subject to the requirements relating to business conduct standards described in Section 15F(h) of the Exchange Act, and the rules and regulations thereunder, other than Section 15F(h)(1)(B) of the Exchange Act, and the rules and regulations thereunder. We are proposing to define “Foreign Business” as security-based swap transactions entered into, or offered to be entered into, by or on behalf of a foreign security-based swap dealer or a U.S. security-based swap dealer in a dealing capacity that are not its “U.S. Business.”¹⁵²⁹

“U.S. Business” would be defined separately for foreign security-based swap dealers and U.S. security-based swap dealers. With respect to a foreign security-based swap dealer, “U.S. Business” would include any transaction entered into, or offered to be entered into, by or on behalf of such foreign security-based swap dealer, with a U.S. person (other than a foreign branch), or any transaction conducted within the United States.¹⁵³⁰ With respect to a U.S. security-based swap dealer, “U.S. Business” would include any transaction by or on behalf of the U.S. security-based swap dealer, wherever entered into or offered to be entered into, other than a transaction conducted through a foreign branch with a non-U.S. person or another foreign branch.¹⁵³¹ With the exception of the exclusion of transactions conducted through a foreign

¹⁵²⁸ See Section III.C.3(a)i, supra.

¹⁵²⁹ Proposed Rule 3a71-3(a)(2) under the Exchange Act, as discussed in Section III.C.4.(a), supra.

¹⁵³⁰ Proposed Rule 3a71-3(a)(6)(i) under the Exchange Act, as discussed in Section III.C.4.(a), supra.

¹⁵³¹ Proposed Rule 3a71-3(a)(6)(ii) under the Exchange Act, as discussed in Section III.C.4.(a), supra.

branch from the definition of a U.S. security-based swap dealer's U.S. Business, these definitions closely track the application of the de minimis exception to the transactions of U.S. persons and non-U.S. persons under proposed Rule 3a71-3(b) under the Exchange Act. Moreover, whether a transaction occurs within the United States or with a U.S. person, which are key elements of the Foreign Business and U.S. Business definitions, would turn on the same factors that are used to determine whether the de minimis exception applies to the security-based swap activity of a non-U.S. person engaged in dealing activity.¹⁵³²

In the External Business Conduct Standards Proposing Release, we have considered the expected benefits and costs of the proposed rules regarding external business conduct standards as they apply to dealers generally, and we expect to discuss the benefits and costs associated with the final rules in our adopting release. In the proposing release, we noted that these rules may be expected to benefit security-based swap dealers and other market participants in a number of ways. For example, the requirement for security-based swap dealers to provide a daily mark should enable counterparties to have a clearer picture of their relationship with security-based swap dealers, including by providing a meaningful reference point for calculating variation margin.¹⁵³³ Similarly, our proposed rules regarding security-based swap dealers' obligations to know their counterparties may be expected to help ensure that security-based swap dealers recommend only transactions that are appropriate to the needs and resources of their

¹⁵³² See proposed Rule 3a71-3(b)(1)(i) under the Exchange Act (identifying transactions that U.S. persons and non-U.S. persons must include in their de minimis calculations); proposed Rule 3a71-3(a)(2) under the Exchange Act (defining "Foreign Business"); proposed Rule 3a71-3(a)(6) under the Exchange Act (defining "U.S. Business").

¹⁵³³ External Business Conduct Standards Proposing Release, 76 FR at 42449.

counterparties.¹⁵³⁴ Proposed rules regarding the standards of conduct in transactions involving special entities should likewise help ensure that such business is awarded on the merits of the transaction.¹⁵³⁵

We also noted that the proposed external business conduct rules would be likely to impose certain costs on security-based swap dealers and other market participants. For example, they would require security-based swap dealers to make various disclosures and establish systems for monitoring compliance with these requirements.¹⁵³⁶

Because this proposing release does not change the substantive external business conduct requirements but only potentially reduces the number of registered security-based swap dealers and the number of transactions involving registered security-based swap dealers that would be subject to the external business conduct requirements, our discussion below focuses on how proposed Rule 3a71-3(c) affects the scope of application of these rules. This change in scope will directly affect the resulting programmatic benefits and costs. We also discuss the assessment costs associated with distinguishing Foreign Business from U.S. Business.

i. Programmatic Benefits and Costs

Our proposed rules may affect the programmatic costs and benefits associated with requirements regarding external business conduct standards in two ways. First, we are proposing rules regarding application of the de minimis exception in the cross-border context that may be expected to reduce the number of non-U.S. persons that would otherwise be required to register

¹⁵³⁴ See id. at 42450.

¹⁵³⁵ See id. at 42450.

¹⁵³⁶ See id. at 42443-448.

as security-based swap dealers.¹⁵³⁷ Because the business conduct and conflict-of-interest rules apply only to registered dealers, reducing the number of registered dealers would reduce the number of entities required to comply with these dealer-specific rules. Second, we are proposing not to require foreign or U.S. security-based swap dealers to comply with requirements relating to external business conduct standards with respect to their Foreign Business, which would reduce the proportion of registered dealers' transactions that are required to comply with these rules. We preliminarily believe that these proposed rules will not significantly affect the programmatic benefits of the rules but should reduce programmatic costs that they impose on market participants.

As already noted, Title VII is concerned directly with risk to the U.S. financial system, transparency, and the protection of investors,¹⁵³⁸ and we preliminarily believe that our proposed approach to applying requirements related to external business conduct standards is consistent with these goals. As noted above in our discussion of the programmatic costs and benefits associated with our application of the de minimis exception in the cross-border context, we believe that our proposed approach to the de minimis calculation appropriately identifies those entities whose dealing activity poses the type of stability, transparency, and counterparty-protection concerns that Title VII is intended to address.¹⁵³⁹ To the extent that the number of entities required to comply with these requirements relating to external business conduct standards decline because the number of registered foreign security-based swap dealers declines, we do not believe that there will be a significant change in programmatic benefits, as foreign

¹⁵³⁷ See proposed Rule 3a71-3(b) under the Exchange Act, as discussed in Section III.B.3, supra.

¹⁵³⁸ See note 4, supra.

¹⁵³⁹ See Section III.B.4, supra.

security-based swap dealers whose transactions with U.S. persons and transaction conducted within the United States falls below the de minimis threshold raise concerns no different from those posed by U.S. security-based swap dealers whose security-based swap activity falls below the threshold. We see no reason, therefore, for treating these two types of entities differently.

We also preliminarily believe that our proposal not to require compliance with these requirements with respect to Foreign Business, even if a security-based swap dealer is registered, will have an insignificant effect, if any, on programmatic benefits and should reduce programmatic costs. We recognize that our proposed rule would not require foreign and U.S. security-based swap dealers to comply with these rules with respect to a significant proportion of their transactions. However, because Title VII is directed to the promoting the stability of the U.S. financial system and protecting counterparties, we do not believe that this proposed approach would reduce the programmatic benefits of our regulatory framework, given that such transactions, including any customer-facing activity, occur entirely or in significant part outside the United States where the parties typically do not expect U.S. customer-protection requirements to apply. At the same time, our definition of U.S. Business should ensure that registered dealers are required to comply with these requirements in their transactions with those counterparties that are entitled to protection in light of the purposes of Title VII or that reasonably expect to be protected in their dealings with registered security-based swap dealers.

We preliminarily believe that our proposed approach will reduce programmatic costs for registered security-based swap dealers generally in proportion to their relative volume of Foreign Business, although certain of the costs associated with policies and procedures established to comply with these requirements are likely to remain fairly constant to the extent that a security-based swap dealer has any U.S. Business. Permitting security-based swap dealers to enter into

transactions arising out of their Foreign Business without complying with these requirements should reduce the costs of compliance with Title VII for such registered security-based swap dealers and reduce the competitive effects of the Title VII dealer requirements by reducing unnecessary disparities between registered and unregistered security-based swap dealers in their foreign business.

ii. Assessment Costs

The assessment costs associated with the proposed rules regarding these requirements would primarily flow from the determination of whether a given transaction is part of a registered security-based swap dealer's U.S. Business or its Foreign Business. Both for U.S. and foreign security-based swap dealers, "U.S. Business" is defined to capture largely the same transactions that these entities are required to calculate in determining whether they are required to register as security-based swap dealers.¹⁵⁴⁰ Because of this overlap with the information needed to perform the de minimis calculation, the incremental costs of these determinations for registered security-based swap dealers should be minimal. We preliminarily believe that a registered foreign security-based swap dealer would not incur additional assessment costs above those already incurred in establishing and maintaining a system to identify and monitor the status of its counterparties and transactions for purposes of the de minimis calculation, as described above.¹⁵⁴¹

¹⁵⁴⁰ The sole exception is that, for U.S. security-based swap dealers, transactions conducted through a foreign branch, which would be counted toward the U.S. person's de minimis threshold, would not be treated as U.S. Business for purposes of applying the external business conduct requirements.

¹⁵⁴¹ See Section XV.D.2, supra.

U.S. security-based swap dealers would likely not have incurred these types of systems costs in performing the de minimis calculation because our proposed approach would require U.S. persons to count all of their dealing transactions toward their de minimis threshold. However, U.S. security-based swap dealers who conduct some or all of their security-based swap business through foreign branches and seek to rely on the Foreign Business exception to the external business conduct requirement would likely establish a similar system to identify such transactions. We believe that the costs of such a system would closely track the costs associated with the systems that non-U.S. persons are likely to establish to perform the dealer de minimis calculation and to determine whether a foreign security-based swap dealer must comply with Title VII external business conduct requirements, as described above, as U.S. security-based swap dealers conducting business through a foreign branch will also need to classify their counterparties and transactions in order to determine whether external business conduct requirements apply.¹⁵⁴² Based on a review of DTCC-TIW data relating to single-name credit default swap activity in 2011, there were no more than five U.S. security-based swap dealers that conducted dealing activity through foreign branches. Assuming that all such entities elected to establish a system to identify their Foreign Business, the total assessment costs associated with our proposed rule would be approximately \$85,200 in one-time annual programming costs and \$76,435 in ongoing annual costs.¹⁵⁴³

¹⁵⁴² See Section XV.D.2(a), supra.

¹⁵⁴³ As noted above in connection with the calculation of the de minimis threshold by foreign security-based swap dealers, we estimate the per-entity one-time annual programming costs to total approximately \$17,040 and the per-entity ongoing annual costs to total \$15,287. See note 1425, supra.

iii. Alternatives

The Commission's proposed approach to the application of the requirements relating to external business conduct standards is similar to the CFTC's proposed approach in certain aspects but differs from the CFTC's proposed approach in other aspects. With respect to U.S. security-based swap dealers, both the Commission's and the CFTC's proposed approaches would not apply the requirements relating to external business conduct standards to such U.S. security-based swap dealers' transactions conducted through a foreign branch outside the United States with non-U.S. person counterparties.¹⁵⁴⁴ On the other hand, with respect to foreign security-based swap dealers, the Commission's proposed approach would apply the requirements relating to external business conduct standards to such foreign security-based swap dealers' transactions conducted within the United States with all counterparties and transactions conducted outside the United States with foreign branches while the CFTC's proposed approach would not apply external business conduct standards to non-U.S. swap dealers' swap transactions with non-U.S. person counterparties even though such transactions are conducted within the United States.¹⁵⁴⁵

The Commission could have proposed an approach to the application of the external business conduct standards that is the same as the CFTC's but instead, is proposing a territorial approach with a focus on counterparty protection in the United States. The Commission preliminarily believes that imposing external business conduct standards on U.S. security-based swap dealers with respect to their transactions conducted outside the United States through

¹⁵⁴⁴ See CFTC Cross-Border Proposal, 77 FR at 41230 and the text accompanying note 116. However, the CFTC's cross-border proposal did not address whether external business conduct standards would apply to transactions conducted through a foreign branch or agency of a U.S. security-based swap dealer within the United States where the counterparty is a non-U.S. person.

¹⁵⁴⁵ See CFTC Cross-Border Proposal, 77 FR at 41229 and 41237.

foreign branches would cause U.S. security-based swap dealers to incur compliance costs with respect to their foreign business¹⁵⁴⁶ conducted through foreign branches, which would not be incurred by foreign security-based swap dealers when foreign security-based swap dealers conduct security-based swap transactions outside the United States in foreign markets.

The Commission recognizes that non-bank U.S. security-based swap dealers who do not conduct transactions through foreign branches would be subject to the external business conduct standards with respect to all transactions, including transactions with non-U.S. persons. The Commission preliminarily believes that, unlike U.S. security-based swap dealers who are banks and conduct foreign business through their foreign branches, a non-bank U.S. security-based swap dealer may conduct dealing activity with non-U.S. persons directly from its U.S. location or from its foreign offices that may not have separate operations that are subject to substantive local financial regulation and may not operate for valid business reasons. Therefore, transactions conducted by a non-bank U.S. security-based swap dealer with non-U.S. persons are an inseparable part of such non-bank dealer's security-based swap business. Consistent with our traditional entity approach to the regulation of broker-dealers, the Commission preliminarily believes that it is appropriate to apply the external business conduct standards to a non-bank U.S. security-based swap dealer with respect to all transactions. To the extent that non-bank U.S. security-based swap dealers conduct dealing activity with non-U.S. persons through foreign affiliates, the proposed approach to application of the external business conduct standards would not impose burdens on non-bank U.S. security-based swap dealers' activity in the foreign security-based swap markets and would achieve the benefits of protecting investors from abusive financial services practices in the United States. The Commission requests comments on the

¹⁵⁴⁶ See proposed Rule 3a71-3(a)(2) and the discussion in Section III.C.4(a), *supra*.

costs and benefits associated with the proposed application of external business conduct standards to U.S. security-based swap dealers and whether the proposed approach would burden bank and non-bank U.S. security-based swap dealers' foreign dealing business.

With respect to foreign security-based swap dealers, the Commission proposes to apply the external business conduct standards to their transactions with non-U.S. persons if such transactions are conducted within the United States. As stated above, the proposed approach to application of the external business conduct standards to transactions conducted within the United States would generate the benefit of protecting investors from abusive financial services practices. To permit registered foreign security-based swap dealers not to comply with the external business conduct standards when they conduct transactions in the United States with non-U.S. person may not adequately prevent abusive financial services practices in the U.S. security-based swap market and would permit double standards in security-based swap dealings in the United States. Therefore, the Commission preliminarily believes that the proposed territorial approach with a focus on counterparty protection in the United States is appropriate.

Request for Comment

- The Commission requests data to assess the costs and benefits of the proposed rule regarding application of external business conduct standards described above. Specifically, the Commission requests comment on (1) whether the proposed rule not to require a registered U.S. bank security-based swap dealer and foreign security-based swap dealer to comply with the external business conduct standards with respect to its foreign business would compromise counterparty protection from abusive financial services practices in the United States; (2) whether the proposed rule to require a registered non-bank U.S. security-based swap dealer to comply with

the external business conduct standards with respect to all transactions regardless of whether the counterparties are U.S. persons or non-U.S. persons would affect its foreign dealing business; and (3) the Commission's estimate of the assessment costs with respect to the proposed rule. Commenters should provide an assessment of these costs and benefits, as well as any costs and benefits not already defined, that may result from the adoption of the proposed rule. Commenters should provide analysis and empirical data to support their views on the costs and benefits associated with the proposals.

(b) Proposed Rule 18a-4(e) – Application of Segregation Requirements

i. Programmatic Benefits and Costs

a. Pre-Dodd Frank Segregation Practice

Segregation is intended to protect customer assets by ensuring that cash and securities that a registered security-based swap dealer holds for security-based swap customers are isolated from the proprietary assets of the security-based swap dealer and identified as property of such customers.¹⁵⁴⁷ Customer assets related to OTC derivatives are currently not consistently segregated from dealer proprietary assets in today's OTC derivatives markets.¹⁵⁴⁸ With respect to non-cleared derivatives, available information suggests that there is no uniform segregation practice but that collateral for most accounts is not segregated.¹⁵⁴⁹ In the absence of a

¹⁵⁴⁷ See Section III.C.4.(b)(2), *supra*. See also Capital, Margin, and Segregation Proposing Release 77 FR at 70274.

¹⁵⁴⁸ See ISDA Margin Survey 2012. See also Capital, Margin, and Segregation Proposing Release, 77 FR at 70325.

¹⁵⁴⁹ See generally ISDA Margin Survey 2012. According to this survey, where an independent amount (initial margin) is collected, ISDA members reported that most (approximately 72.2%) was commingled with variation margin and not segregated, and

segregation requirement, the likelihood that security-based swap customers would suffer losses upon a security-based swap dealer's default may be substantially higher than may be expected if security-based swap dealers are subject to such a requirement.¹⁵⁵⁰

b. Benefits of the Segregation Requirements

Segregation requirements would limit the potential losses for security-based swap customers if a registered security-based swap dealer fails.¹⁵⁵¹ The extent to which assets are in fact protected by proposed Rule 18a-4(a)-(d) would depend on how effective they are in practice in allowing assets to be readily returned to customers.¹⁵⁵² In the cross-border context, the effectiveness of the segregation requirement with respect to foreign security-based swap dealers in practice may depend on many factors, including the type and objective of the insolvency or liquidation proceeding and how the U.S. Bankruptcy Code, SIPA, banking regulations, and applicable foreign insolvency laws are interpreted by the U.S. bankruptcy court, SIPC, Federal Deposit Insurance Corporation, and relevant foreign authorities. In the Capital, Margin, and Segregation Proposing Release, we stated that it would be difficult to measure the benefits of the segregation requirements proposed by the Commission under Section 3E of the Exchange

only 4.8% of the amount received was segregated with a third party custodian. The survey also notes that while the holding of the independent amounts and variation margin together continues to be the industry standard both contractually and operationally, it is interesting to note that the ability to segregate has been made increasingly available to counterparties over the past three years on a voluntary basis, and has led to 26% of independent amount received and 27.8% of independent amount delivered being segregated in some respects. See ISDA Margin Survey 2012 at 10. See also Capital, Margin, and Segregation Proposing Release, 77 FR at 70325.

¹⁵⁵⁰ See Capital, Margin, and Segregation Proposing Release, 77 FR at 70325.

¹⁵⁵¹ Id.; see also CFTC and Commission, Statement on MF Global about the deficiencies in customer futures segregated accounts held at the firm (Oct. 31, 2011).

¹⁵⁵² See Capital, Margin, and Segregation Proposing Release, 77 FR at 70325.

Act,¹⁵⁵³ however, we believe that Rule 15c3-3, the existing segregation rule for broker-dealers, would provide a reasonable template for crafting the segregation requirements for security-based swap dealers.¹⁵⁵⁴ The ensuing increased confidence of market participants when transacting in security-based swaps, as compared to the OTC derivatives market as it exists today, should increase the desire to trade security-based swaps and generally benefit market participants.¹⁵⁵⁵

c. Costs of the Segregation Requirements

Segregation requirements also will impose certain costs on registered security-based swap dealers as well as other market participants. The costs associated with individual account segregation include fees charged by custodians to monitor individual account assets and to account for potential legal risks and liabilities of custodians to account beneficiaries or dealers, as well as operational costs to account for collateral on an individual customer basis.¹⁵⁵⁶ The costs associated with omnibus segregation would include operational costs and increase in costs of funds to dealers due to inability to use customer funds,¹⁵⁵⁷ compared to the baseline today that

¹⁵⁵³ Id.

¹⁵⁵⁴ Id.

¹⁵⁵⁵ Id. at 70326.

¹⁵⁵⁶ In the Capital, Margin, and Segregation Proposing Release, we stated that a commenter to the CFTC raised concerns with the length of time and the costs to comply with an individual segregation mandate. Specifically, the commenter raised concerns regarding the number of collateral arrangements that would be required. The commenter estimated, based on discussion with its members, that "a rough estimate of the time it would take to establish the necessary collateral arrangements is 1 year and eleven months, with an associated cost of \$141.8 million, per covered swap entity." See Capital, Margin, and Segregation Proposing Release 77 FR at 70326.

¹⁵⁵⁷ See Capital, Margin, and Segregation Proposing Release 77 FR at 70326, citing SIFMA/ISDA Comment Letter to the Prudential Regulators ("First, because the collateral cannot be rehypothecated, and because the collateral amounts will be very large, CSEs will be limited to investing very large amounts of eligible collateral in assets that generate low returns.").

dealers in general do not segregate customer collateral for security-based swaps, and to the extent collateral is segregated, it is not done so on the terms that would be required by the segregation rules proposed by the Commission in the Capital, Margin, and Segregation Proposing Release.¹⁵⁵⁸ The operational costs include costs to establish qualifying bank accounts and to perform the calculations required to determine the amount that is required at any one time to be maintained in the reserve account.¹⁵⁵⁹ The increase in costs of funds to the extent that collateral a dealer holds that could otherwise be rehypothecated to finance business activity would no longer be permitted for that purpose could equal the borrowing costs of the dealer. The extent of the increase of cost of funds to dealers would depend on how much collateral associated with security-based swaps and held by dealers today consists of initial margin that they can rehypothecate, *i.e.*, that is not now segregated as would be required under the new Rules 18a-4(a) - (d) proposed by the Commission in the Capital, Margin and Segregation Proposing Release.¹⁵⁶⁰ The Commission currently does not have sufficient information to quantify the increase of costs of funds to dealers as a result of the proposed segregation requirement and

¹⁵⁵⁸ See proposed Rules 18a-4(a)-(d) under the Exchange Act and Capital, Margin, and Segregation Proposing Release 77 FR at 70274-78.

¹⁵⁵⁹ See section V.C. of the Capital, Margin, and Segregation Proposing Release for a discussion of implementation costs. In cases where an SBSB is jointly registered as a broker-dealer, the costs of adapting existing systems to account for security-based swap transactions may not be material in light of the similarities between the systems and procedures required by Rule 15c3-3 and those that would be required by proposed Rules 18a-4(a)-(d).

¹⁵⁶⁰ See Capital, Margin, and Segregation Proposing Release, 77 FR at 70326. See also Manmohan Singh, "Velocity of Pledged Collateral: Analysis and Implications," IMF Working Paper (Nov. 2011), available at: [http://nowandfutures.com/large/VelocityOfPledgedCollateral-wp11256\(imf\).pdf](http://nowandfutures.com/large/VelocityOfPledgedCollateral-wp11256(imf).pdf); Manmohan Singh and James Aitken, "The (sizable) Role of Rehypothecation in the Shadow Banking System," IMF Working Paper (July 2010), available at: <http://www.imf.org/external/pubs/ft/wp/2010/wp10172.pdf>

seeks comment on the impact of the proposed application of segregation requirements on the increase of costs of funds.¹⁵⁶¹

d. Costs and Benefits of Proposed Rules 18a-4(e)(1) and (2) Regarding Application of Segregation Requirements to Foreign Security-Based Swap Dealers

Proposed Rules 18a-4(e)(1) and (2) would not apply segregation requirements to a foreign security-based swap dealer in certain circumstances. Specifically, with respect to non-cleared security-based swap transactions, a foreign security-based swap dealer that is not a broker-dealer would not be subject to the segregation requirements set forth in Section 3E of the Exchange Act and paragraphs (a)-(d) of the proposed Rule 18a-4 with respect to margin received from non-U.S. person counterparties.¹⁵⁶² Therefore, under the proposed Rule 18a-4(e)(1)(ii), non-U.S. person counterparties to non-cleared security-based swaps with a registered foreign security-based swap dealer that is not a registered broker-dealer would not be “customers” of such registered foreign security-based swap dealer and would not be given the preferred priority status with respect to the segregated assets in the omnibus account maintained by such foreign security-based swap dealer in a stockbroker liquidation proceeding under the U.S. Bankruptcy Code.¹⁵⁶³ With respect to a registered foreign security-based swap dealer that is not a foreign bank with a branch or agency in the United States and is not a registered broker-dealer, the proposed Rule 18a-4(e)(2)(ii) would subject such foreign security-based swap dealer to the

¹⁵⁶¹ The amount of initial margin collateral associated with security-based swaps posted to and held by dealers today that they can rehypothecate is unknown to the Commission.

¹⁵⁶² See proposed Rule 18a-4(e)(1)(ii) under the Exchange Act. A foreign security-based swap dealer that is a broker-dealer shall be subject to the segregation requirements set forth in Section 3E of the Exchange Act and paragraphs (a) - (d) of the proposed Rule 18a-4 with respect to margin received from any counterparties. See proposed Rule 18a-4(e)(1)(i) under the Exchange Act.

¹⁵⁶³ See Section III.C.4.(b)(2), *supra*.

segregation requirements with respect to any assets posted by a non-U.S. person counterparty to secure a cleared security-based swap transaction only if such foreign security-based swap dealer accepts any assets from, for, or on behalf of a U.S. person counterparty to secure a security-based swap.¹⁵⁶⁴ The proposed Rule 18a-4(e)(2)(iii) would not subject a registered foreign security-based swap dealer that is a foreign bank with a branch or agency in the United States to the segregation requirements with respect to any assets posted by a non-U.S. person counterparty to a security-based swap transaction.¹⁵⁶⁵

As stated above, the proposed Rules 18a-4(e)(1) and (2) regarding application of the segregation requirements to foreign security-based swap dealers would focus on applying the segregation requirements to provide customer protection to U.S. person counterparties and would not extend the same customer protection to non-U.S. person counterparties unless not doing so would result in losses to U.S. person counterparties.¹⁵⁶⁶ To the extent that a foreign security-based swap dealer would not be subject to the segregation requirements, the programmatic benefits described above, such as prompt return of customer assets and limiting the potential losses for security-based swap customers in the event of a failure of a registered security-based swap dealer, would not be extended to non-U.S. person counterparties. In addition, the benefits of potential increased confidence of market participants when transacting in security-based

¹⁵⁶⁴ See proposed Rule 18a-4(e)(2)(ii) under the Exchange Act. A registered foreign security-based swap dealer that is a registered broker-dealer shall be subject to the segregation requirements set forth in Section 3E of the Exchange Act and paragraphs (a)-(d) of the proposed Rule 18a-4 under the Exchange Act with respect to margin received from any counterparties. See proposed Rule 18a-4(e)(2)(i) under the Exchange Act.

¹⁵⁶⁵ See proposed Rule 18a-4(e)(2)(iii) under the Exchange Act.

¹⁵⁶⁶ See Section III.C.4.(b)(2), *supra*.

swaps, as brought about by the segregation requirements, would not occur in the markets where such foreign security-based swap dealer transacts with non-U.S. person counterparties.

There also would be corresponding decrease in costs as a result of the proposed Rule 18a-4(e)(1)(ii) not requiring a foreign security-based swap dealer that is not a registered broker-dealer to segregate assets collected from non-U.S. person counterparties as collateral to secure non-cleared security-based swaps. A foreign security-based swap dealer would not need to provide notice required pursuant to Section 3E(f)(1)(A) of the Exchange Act to a non-U.S. person counterparty with respect to the right to elect individual account segregation.¹⁵⁶⁷ This would save operational costs to account for collateral on an individual customer basis and save fees charged by custodians as described above.¹⁵⁶⁸ A foreign security-based swap dealer that is not a registered broker-dealer also would have cost-savings associated with omnibus segregation, including less operational cost (such as the cost to perform the calculations required to determine the amount that is required at any one time to be maintained in the reserve account) as described above, and may be able to rehypothecate non-U.S. person counterparty's assets to finance its business activity, which would result in borrowing cost savings. The extent of these cost savings would depend on how much collateral posted by non-U.S. person counterparties and held by

¹⁵⁶⁷ See Section 3E(f)(1)(A) of the Exchange Act, 15 U.S.C. 78c-5(f), and proposed Rule 18a-4(d)(1) under the Exchange Act.

¹⁵⁶⁸ Although the segregation requirements with respect to non-cleared security-based swaps described in Section 3E(f) and the proposed Rule 18a-4(a)-(d) would not apply to a foreign security-based swap dealer when such foreign security-based swap dealer transacts with a non-U.S. person counterparty, proposed Rule 18a-4(e)(1) does not prevent parties from making segregation arrangements by contractual agreement under applicable local law. If parties were to make segregation arrangements, certain benefits and costs would arise; however, these benefits and costs would be outside the Title VII regulatory regime and would not be attributable to the Title VII regulatory regime.

dealers today to secure security-based swaps consisting of margin that is available for dealers to use (i.e., that is not now segregated).

The Commission preliminarily believes that the above decreases in benefits and costs as a result of the proposed Rule 18a-4(e)(1) and (2) are not those programmatic benefits and costs intended by the segregation requirements set forth in Section 3E of the Exchange Act, and the rules and regulations thereunder. Such decreases reflect the exclusion of foreign security-based swap dealers (that are not registered broker-dealers) from the segregation requirements when they transact with non-U.S. persons in the foreign markets, which we believe is consistent with the objective of the Dodd-Frank Act to protect the U.S. markets and participants in those markets.¹⁵⁶⁹

e. Costs and Benefits of Proposed Rule 18a-4(e)(3) Regarding Disclosures

There would be new costs and benefits associated with compliance with the segregation requirements for foreign security-based swap dealers due to the disclosures requirements in the proposed Rule 18a-4(e)(3). Specifically, proposed Rule 18a-4(e)(3) would require a registered foreign security-based swap dealer to disclose to its counterparty that is a U.S. person the potential treatment of the assets segregated by such registered foreign security-based swap dealer pursuant to Section 3E of the Exchange Act, and the rules and regulations thereunder, in insolvency proceedings under U.S. bankruptcy law and any applicable foreign insolvency laws. Such disclosure shall include whether the foreign security-based swap dealer is subject to the segregation requirement set forth in Section 3E of the Exchange Act, and the rules and regulations thereunder, with respect to the assets collected from the U.S. person counterparty who will receive the disclosure, whether the foreign security-based swap dealer could be subject

¹⁵⁶⁹ See Section III.C.4.(b)(2), *supra*.

to the stockbroker liquidation provisions in the U.S. Bankruptcy Code, whether the segregated assets could be afforded customer property treatment under the U.S. bankruptcy law, and any other relevant considerations that may affect the treatment of the assets segregated under Section 3E of the Exchange Act in insolvency proceedings of the foreign security-based swap dealer. The Commission preliminarily believes that such disclosure would greatly benefit U.S. person counterparties and assist them in evaluating the legal risk in respect of posting collateral to a foreign security-based swap dealer and the likely treatment of their assets held as collateral in the event of insolvency or liquidation of the foreign security-based swap dealer whom they transact with and post collateral to.

With respect to costs, the Commission preliminarily believes that a foreign security-based swap dealer should be able to include such disclosure in the credit support agreement pursuant to which assets would be posted to margin, guarantee, or secure a security-based swap transaction. The costs associated with such disclosure may include legal costs related to consulting bankruptcy counsels, both U.S. counsel and relevant foreign counsel, in respect of the potential treatment of the segregated assets under U.S. bankruptcy law and applicable foreign insolvency laws, the costs of drafting such disclosure, and the costs of updating such disclosure whenever there is a material change of U.S. bankruptcy law or applicable foreign laws that may render the prior disclosure inaccurate or misleading. The Commission preliminarily estimates that the average costs associated with such disclosure would be less than \$2,000,000 and a narrow range could be between \$760,000 and \$920,000.¹⁵⁷⁰

¹⁵⁷⁰ This estimate is based on staff experience in undertaking legal analysis of U.S. bankruptcy law treatment of customer assets held by broker-dealers and assumes that foreign security-based swap dealers would seek outside legal counsel to prepare the disclosures described in proposed Rule 18a-4(e)(3) and that the legal analysis of the

ii. Assessment Costs

The assessment cost associated with proposed Rule 18a-4(e)(1) and (2) should primarily be related to inquiries about a counterparty's U.S. person status, whether a security-based swap is a cleared or non-cleared transaction, whether the foreign security-based swap dealer is a registered broker-dealer, whether the foreign security-based swap dealer, whether the foreign security-based swap dealer has a branch or agency in the United States, and whether the foreign security-based swap dealer accepts any assets from, or on behalf of, a U.S. person counterparty to security a security-based swap, in order to determine whether a transaction would be subject to the segregation requirements. A security-based swap dealer should know whether it is a registered broker-dealer and whether a particular transaction is submitted for clearing and should not incur any assessment costs relating to determining whether a transaction is cleared or non-cleared security-based swap. A foreign security-based swap dealer may need to make an internal

treatment of customer property under a complex foreign insolvency law regime may cost \$50,000 per entity and the same legal analysis under a less complex foreign insolvency law regime or the U.S. bankruptcy law regime may cost \$30,000 per entity. We recognize that the complexity of the insolvency laws relating to liquidation of a foreign security-based swap dealer may vary greatly, and that we do not have insight into various insolvency law regimes such that we could reasonably determine what insolvency law regime may be considered more or less complex for these purposes. Thus, based on our understanding of the U.S. bankruptcy law analysis relating to liquidation of a broker-dealer, taking into account the potential application of various foreign insolvency laws, we believe that an average of the costs associated with more complex and less complex insolvency law regimes equaling \$40,000 per entity could reasonably approximate the average costs for a foreign security-based swap dealer to prepare the disclosures required in proposed Rule 18a-4(e)(3). We have estimated that the total number of dealers that may be required to register under the proposed *de minimis* rule is 50 or fewer entities, and if the criterion of three or more non-ISDA dealer counterparties is applied to the analysis, we estimated that the total number of dealers that may be required to register is between 27 and 31. See Section XV.D.1(b), *supra*. Out of these dealers, we estimated that the number of non-U.S. domiciled dealers is between 19 and 23. Therefore, the aggregate costs of the disclosure requirement could be \$2,000,000 (\$40,000 * 50) or less with a narrow range from \$760,000 (\$40,000 * 19) to \$920,000 (\$40,000 * 23).

inquiry as to whether it has a branch or agency in the United States and whether it accepts collateral from, or on behalf of, a U.S. person counterparty. Such inquiry should be a factual inquiry involving consulting the corporate secretary, in-house attorney or compliance manager without the need for further research and, therefore, the cost of such inquiry should be minimal. The Commission preliminarily believes that the costs associated with inquiring about a counterparty's U.S. person status should be subsumed in the assessment costs of the de minimis rule and the requirements relating to the external business conduct standards since a security-based swap dealer only needs to inquire about a counterparty's U.S. person status and implement systems to record and track the counterparty status once in order to assess and comply with all the Title VII requirements that depend on such factual inquiry. Therefore, the Commission preliminarily believes that the assessment costs associated with proposed Rules 18a-4(e)(1) and (2) alone should be minimal.

The assessment cost associated with the disclosures in proposed Rule 18a-4(e)(3) would be related to inquiries about a counterparty's U.S. person status, which also would be subsumed in the assessment costs associated with proposed Rules relating to the de minimis exception and the requirements relating to the external business conduct standards.

Request for Comment

- Is it appropriate, from the cost and benefit point of view, not to require foreign security-based swap dealers to comply with the segregation requirements when they transact with non-U.S. person counterparties? Are there other costs and benefits not mentioned above? Specifically, the Commission requests comment on (1) whether the proposed approach to application of the segregation requirements to foreign security-based swap dealers based on their status as a broker-dealer, foreign security-

based swap dealer that is a bank with a branch or agency in the United States, or foreign security-based swap dealer that is not a broker-dealer and is not a bank with a branch or agency in the United States would generate the benefit of effectively administering the segregation requirement in practice and protecting U.S. counterparties, (2) the costs of custodian fees, the operation costs and the costs associated with increased costs of funds due to inability to use customer asserts as a result of a foreign security-based swap dealer being required to comply with the segregation requirements, (3) the costs of preparing the disclosures required in proposed Rule 18a-4(e)(3) and (4) the assessment costs associated with the proposed Rule 18a-4(e).

- Is it appropriate, from the cost and benefit point of view, to require a foreign security-based swap dealer to disclose potential treatment of the assets segregated by such foreign security-based swap dealer in insolvency proceedings under U.S. bankruptcy law and any applicable foreign insolvency laws? Are there other costs and benefits not mentioned above?
- Is it appropriate, from the cost and benefit point of view, to require a foreign security-based swap dealer to disclose to its non-U.S. person counterparty that it is not subject to the segregation requirements and that funds or property provided by such non-U.S. person counterparty would not be treated as “customer property” as that term is defined in 11 U.S.C. 741?

F. Economic Analysis of Application of Rules Governing Security-Based Swap Clearing in Cross-Border Context

The Dodd-Frank Act amends the Exchange Act to require central clearing of security-based swaps that the Commission determines should be cleared,¹⁵⁷¹ and it directs entities that perform clearing agency functions for security-based swaps to register with the Commission.¹⁵⁷² In this section, we first discuss the costs and benefits resulting from clearing agency registration and then consider the costs and benefits associated with the proposed rule regarding application of the clearing agency registration requirement to foreign clearing agencies. Following this, we discuss the costs and benefits that result from requiring security-based swap market participants to centrally clear transactions and then examine the trade-offs associated with the proposed rule implementing the mandatory clearing requirement in the cross-border context.

1. Programmatic Benefits and Costs Associated with the Clearing Agency Registration

(a) Proposed Interpretive Guidance Regarding Clearing Agency Registration

(i) Current State of Clearing Agency Registration

At present, voluntary clearing of security-based swaps in the United States is limited to CDS products.¹⁵⁷³ It began in December of 2008, when the Commission acted to facilitate the clearing of OTC security-based swaps by permitting five clearing agencies, including three foreign clearing agencies,¹⁵⁷⁴ to clear CDS on a temporary, conditional basis.¹⁵⁷⁵ In each instance, these clearing agencies wanted to perform clearing functions with respect to CDS in the

¹⁵⁷¹ See Section 3C(a)(1) of the Exchange Act, 15 U.S.C. 78c-3(a)(1).

¹⁵⁷² See Section 17A(g) of the Exchange Act, 15 U.S.C. 78q-1(g).

¹⁵⁷³ See Section XV.B.2(e), *supra*.

¹⁵⁷⁴ These three foreign clearing agencies are ICE Clear Europe Limited, Eurex Clearing AG, and LIFFE A&M and LCH Clearnet Ltd. See note 74, *supra*.

¹⁵⁷⁵ See note 74, *supra*.

United States by providing CCP services directly to U.S. persons.¹⁵⁷⁶ The temporary exemptive orders granted to four of these clearing agencies (including two foreign clearing agencies) were extended until July 16, 2011.¹⁵⁷⁷ Title VII of the Dodd-Frank Act provides that (1) a depository institution that cleared swaps as a multilateral clearing organization prior to the date of enactment of the Dodd-Frank Act or (2) a derivatives clearing organization registered with the CFTC that cleared swaps pursuant to an exemption from registration as a clearing agency prior to the date of enactment of the Dodd-Frank Act is deemed registered as a clearing agency for the purposes of clearing security-based swaps (“Deemed Registered Provision”).¹⁵⁷⁸ The Deemed Registered Provision, along with other general provisions under Title VII of the Dodd-Frank Act, became effective on July 16, 2011.¹⁵⁷⁹ As a result, three clearing agencies, *i.e.*, ICE Clear

¹⁵⁷⁶ Id.

¹⁵⁷⁷ See Exchange Act Release Nos. 63389 (Nov. 29, 2010), 75 FR 75520 (Dec. 3, 2010) (order extending temporary conditional exemptions in connection with request on behalf of ICE Clear Europe, Limited), 63390 (Nov. 29, 2010), 75 FR 75518 (Dec. 3, 2010), (order extending temporary conditional exemptions in connection with request on behalf of Eurex Clearing AG), 63388 (Nov. 29, 2010), 75 FR 75522 (Dec. 3, 2010) (order extending temporary conditional exemptions in connection with request on behalf of Chicago Mercantile Exchange, Inc.), and 63387 (Nov. 29, 2010) 75 FR 75502 (Dec. 3, 2010) (order extending and modifying temporary exemptions in connection with request of ICE Trust US LLC); LIFFE A&M and LCH.Clearnet Ltd. allowed their order to lapse without seeking renewal.

¹⁵⁷⁸ See 15 U.S.C. 78q-1(l). Under this Deemed Registered Provision, a clearing agency will be required to comply with all requirements of the Exchange Act, and the rules thereunder, applicable to registered clearing agencies to the extent it clears security-based swaps after the effective date of the Deemed Registered Provision, including, for example, the obligation to file proposed rule changes under Section 19(b) of the Exchange Act.

¹⁵⁷⁹ See Section 774 of the Dodd-Frank Act (stating, “[u]nless otherwise provided, the provisions of this subtitle shall take effect on the later of 360 days after the date of the enactment of this subtitle or, to the extent a provision of this subtitle requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of this subtitle.”).

Europe, Limited, ICE Clear Credit LLC (formerly ICE Trust US LLC), and Chicago Mercantile Exchange Inc., which were performing CCP functions with respect to CDS in the United States, were deemed registered with the Commission on July 16, 2011.¹⁵⁸⁰

(ii) Programmatic Effect of the Proposed Interpretive Guidance

As stated above,¹⁵⁸¹ the Commission is proposing interpretive guidance that a clearing agency performing the functions of a CCP for security-based swaps within the United States would be required to register pursuant to Section 17A(g) of the Exchange Act.¹⁵⁸² Under this proposed interpretive guidance, a registration requirement pursuant to Section 17A(g) of the Exchange Act would apply only to clearing agencies that provide CCP services directly to a U.S. person with respect to security-based swaps, since these entities would be performing the functions of a CCP within the United States. Three clearing agencies currently provide CCP services directly to U.S. persons with respect to swaps and security-based swaps.¹⁵⁸³ All of these three clearing agencies are registered with the Commission under the Deemed Registered Provision. Therefore, the proposed interpretation would not increase the number of domestic or foreign clearing agencies required to register with the Commission until new clearing agencies

¹⁵⁸⁰ Eurex Clearing AG did not meet the criteria in the Deemed Registered Provision and is not currently providing CCP services in the United States with respect to security-based swaps. See, e.g., Order Granting Temporary Exemptions Under the Securities Exchange Act of 1934 in Connection with the Pending Revision of the Definition of "Security" to Encompass Security-Based Swaps, and Request for Comment, Exchange Act Release No. 64795 (July 1, 2011) at n. 76.

¹⁵⁸¹ See Section V, supra.

¹⁵⁸² 15 U.S.C. 78q-1(g).

¹⁵⁸³ See Clearing Agency Standards Adopting Release, 77 FR at 66265. These three clearing agencies are ICE Clear Europe, Limited, ICE Clear Credit LLC, and Chicago Mercantile Exchange, Inc.

desire to enter the U.S. market to provide CCP services directly to U.S. persons with respect to security-based swaps.

(iii) Costs and Benefits of the Proposed Interpretive Guidance

The Commission has considered the costs and benefits associated with the clearing agency registration requirement in Section 17A(g) of the Exchange Act¹⁵⁸⁴ in the cross-border context through the lens of a key Title VII goal: systemic risk mitigation. We discuss below the costs and benefits of the proposed interpretive guidance by looking at the role of the clearing agency in the security-based swap market and how clearing agencies transfer financial risks.

The proposed interpretive guidance regarding clearing agency registration would generate significant programmatic benefits. These benefits are tied to mandatory clearing. As explained below, clearing agency registration promotes sound management of the counterparty risk concentrated in CCPs, the importance of which is magnified by the application of a mandatory clearing requirement. Registration would provide standards for CCPs' management of financial risks, including counterparty credit risk, legal risk and liquidity risk. Mandatory clearing of security-based swaps is one means by which Title VII of the Dodd-Frank Act seeks to reduce systemic risk in the U.S. financial system. Under Title VII, security-based swaps, "whenever possible and appropriate,"¹⁵⁸⁵ shall be centrally cleared through a clearing agency that

¹⁵⁸⁴ 15 U.S.C. 78q-1(g).

¹⁵⁸⁵ See, e.g., S. Comm. on Banking, Hous., & Urban Affairs, *The Restoring American Financial Stability Act of 2010*, S. Rep. No. 111-176, at 32 ("As a key element of reducing systemic risk and protecting taxpayers in the future, protections must include comprehensive regulation and rules for how the OTC derivatives market operates. Increasing the use of central clearinghouses, exchanges, appropriate margining, capital requirements, and reporting will provide safeguards for American taxpayers and the financial system as a whole."); *id.* at 34 ("Some parts of the OTC market may not be suitable for clearing and exchange trading due to individual business needs of certain users. Those users should retain the ability to engage in customized, uncleared contracts

is registered or exempt from registration under the Exchange Act.¹⁵⁸⁶ In a world of bilateral transactions in which each counterparty bears the other counterparty's credit risk, a large counterparty who transacts with many other counterparties and cumulates significant security-based swap positions may pose systemic risk when its failure would generate sequential counterparty defaults.¹⁵⁸⁷

Central clearing through a CCP generally reduces counterparty risk by interposing a CCP as counterparty to all cleared transactions.¹⁵⁸⁸ Where security-based swaps are subject to a mandatory clearing requirement the role of the CCP becomes even more critical, as the volume of positions in which the CCP is interposed and becomes the central counterparty will likely increase.¹⁵⁸⁹

While central clearing may make sequential counterparty defaults less likely, it does not eliminate systemic risk. CCPs concentrate counterparty risk.¹⁵⁹⁰ CCPs manage and reduce such

while bringing in as much of the OTC market under the centrally cleared and exchange-traded framework as possible.”).

¹⁵⁸⁶ See 15 U.S.C. 78c-3(a)(1).

¹⁵⁸⁷ See Craig Pirrong, “The Economics of Central Clearing: Theory and Practice,” ISDA Discussion Papers Series, No. 1 (2011), at 6 (“Widespread defaults on derivatives contracts may harm more than the counterparties on the defaulted contracts. The losses suffered by the victims of the original defaults may be so severe as to force those victims into financial distress, which harms those who have entered into financial contracts with them—including their creditors, and the counterparties to derivatives on which they owe money. Such a cascade of defaults can result in a systemic financial crisis.”).

¹⁵⁸⁸ See Clearing Agency Standards Adopting Release, 77 FR at 66264 (“Central clearing facilitates the management of counterparty credit risk among dealers and other institutions by shifting that risk from individual counterparties to CCPs, thereby helping protect counterparties from each other’s potential failures and preventing the buildup of risk in such entities, which could be systemically important.”).

¹⁵⁸⁹ See Clearing Procedures Adopting Release, 77 FR at 41638.

¹⁵⁹⁰ See Clearing Agency Standards Adopting Release, 77 FR at 66264-65 (stating that “a CCP also concentrates risks and responsibility for risk management in the CCP.”).

concentrated risk by applying mark-to-market pricing and margin requirements to cleared transactions in a consistent manner¹⁵⁹¹ and through netting (*i.e.*, by reducing the amounts of funds or other assets that must be exchanged at settlement).¹⁵⁹² In the event of a clearing member's default in which the losses exceed the collateral posted to the CCP and other available funds, residual losses will be mutualized among the other non-defaulting members.¹⁵⁹³ By placing members under financial strain, mutualization may strain the entire financial system and create systemic impact.¹⁵⁹⁴ Even in the absence of this feature of CCPs, the default of a CCP has the potential to harm the market in all financial instruments cleared by that CCP, creating liquidity constraints with respect to such financial instruments in the market. Such liquidity constraints would affect all parties transacting in such instruments.¹⁵⁹⁵

Given the mutualization of losses, a CCP's concentration of risk, and its responsibility for risk management, the effectiveness of a CCP's risk controls and the adequacy of its financial

¹⁵⁹¹ See Culp, *supra* note 111. See also Clearing Agency Standards Adopting Release, 77 FR at 66264.

¹⁵⁹² See *e.g.*, Duffie and Zhu, *supra* note 110; see also Clearing Agency Standards Adopting Release, 77 FR at 66264.

¹⁵⁹³ See Risk Management Supervision of Designated Clearing Entities (July 2011), Report by the Board of Governors of the Federal Reserve System, Securities and Exchange Commission and Commodity Futures Trading Commission to the Senate Committees on Banking, Housing, and Urban Affairs and Agriculture in fulfillment of Section 813 of Title VIII of the Dodd-Frank Act, at 12.

¹⁵⁹⁴ See Craig Pirrong, "The Economics of Central Clearing: Theory and Practice," ISDA Discussion Papers Series, No. 1 (2011), at 34-35.

¹⁵⁹⁵ *Id.* See also Risk Management Supervision of Designated Clearing Entities (July 2011), Report by the Board of Governors of the Federal Reserve System, Securities and Exchange Commission and Commodity Futures Trading Commission to the Senate Committees on Banking, Housing, and Urban Affairs and Agriculture in fulfillment of Section 813 of Title VIII of the Dodd-Frank Act, at 8-9.

resources are critical aspects of the infrastructure of the market it serves.¹⁵⁹⁶ Registration and clearing agency standards are designed to address these considerations.

The Commission preliminarily believes its interpretation that a clearing agency that provides CCP services for security-based swaps directly to U.S. persons must register pursuant to Section 17A(g) of the Exchange Act¹⁵⁹⁷ generates the benefits of protecting the U.S. financial system against systemic risk that may arise from central clearing functions performed in the United States. In the case of a foreign clearing agency that provides CCP services directly to U.S. persons, the Commission preliminarily believes that requiring such foreign clearing agency to register with the Commission and comply with the Commission's regulatory regime for security-based swap clearing would generate the key benefit of reducing the magnitude of any systemic risk flowing into or within the United States originating in the activities of other members of a clearing agency.

Specifically, the clearing agency standards would provide the minimum standards for CCPs' management of financial risks, including counterparty credit risk, legal risk, and liquidity risk. For example, the clearing agency standards established by the Commission are designed to minimize the CCPs' credit risk by, among other things, establishing eligibility standards for clearing members and requiring registered clearing agencies to measure their credit exposures on a daily basis. The Commission's clearing agency standards also require a registered clearing agency that acts as a CCP to collect initial and variation margin from members, and maintain sufficient financial resources to withstand, at a minimum, a default by the participant family to which it has the largest exposure in extreme but plausible market conditions and, with respect to

¹⁵⁹⁶ See Clearing Agency Standards Adopting Release, 77 FR at 66265.

¹⁵⁹⁷ 15 U.S.C. 78q-1(g).

a registered clearing agency acting as a CCP for security-based swaps, maintain additional financial resources sufficient to withstand, at a minimum, a default by the two participant families to which it has the largest exposures in extreme but plausible market conditions.¹⁵⁹⁸ The benefits and costs of the clearing agency standards have been discussed in detail in the Clearing Agency Standards Adopting Release.¹⁵⁹⁹ The proposed interpretive guidance does not change the benefits associated with the substantive registration requirement and clearing agency standards. The aggregate programmatic benefits of the proposed interpretive guidance would flow from its programmatic effect on the number of clearing agencies registered as discussed above.

The proposed interpretive guidance would also entail certain costs, such as direct registration and compliance costs on CCPs.¹⁶⁰⁰ The proposed interpretive guidance does not change the costs associated with the substantive registration requirement and clearing agency standards. As with the programmatic benefits, the aggregate programmatic costs of the proposed interpretive guidance would flow from its programmatic effect on the number of clearing agencies registered as discussed above.

(iv) Assessment Costs

¹⁵⁹⁸ See 17 CFR § 240.17Ad-22(b)(3); see also Clearing Agency Standards Adopting Release, 77 FR at 66234-35 and 66274-75.

¹⁵⁹⁹ See Section V Economic analysis of the Clearing Agency Standards Adopting Release, 77 FR at 66263-84.

¹⁶⁰⁰ The Commission previously estimated the costs for each registered clearing agency associated with compliance with clearing agency standards adopted in the Clearing Agency Standards Adopting Release could total approximately \$3.7 million in initial costs and \$10.1 million in annual ongoing costs. See Clearing Agency Standards Adopting Release, 77 FR at 66273.

A clearing agency would incur assessment costs to determine whether it would be required to register by determining whether it provides CCP services directly to a U.S. person. Such determination may be made as part of its clearing membership application approval process. As part of the membership application, a prospective clearing member would be required to provide corporate organization documents, such as certificates of incorporation or articles of organization, which would enable the clearing agency to determine whether a prospective clearing member is a U.S. person. Since corporate organization documents are part of the clearing membership application package,¹⁶⁰¹ the Commission preliminarily believes that the assessment costs associated with the proposed interpretive guidance should be minimal.

(v) Alternatives

An alternative to the proposed interpretive guidance would be to require a clearing agency to register if such clearing agency provides CCP services to non-U.S. intermediaries that have U.S. persons as customers. Such an alternative would focus on the fact that intermediaries, whose financial stress or failure would mostly likely affect the U.S. financial system, are exposed to the risk of CCPs, and also transmit that risk to their U.S. customers. However, the Commission believes that the risk exposure that a U.S. customer could incur under its contractual agreements with an intermediary is generally much lower than the risk exposure a U.S. member could incur under a membership agreement with a CCP because a customer is only risking up to the full amount of property entrusted to an intermediary, but is not under any obligation to perform under the contractual agreements that the intermediary enters into with third parties. Consequently, if a clearing agency provides CCP services to an intermediary that has a U.S.

¹⁶⁰¹ See, e.g., Clearing membership Application Instructions and Forms, ICE Clear U.S., Inc. (Aug. 2012), available at: https://www.theice.com/publicdocs/clear_us/Clear_US_Member_Application.pdf.

person as a customer, the ripple effect of the failure of such clearing agency on the U.S. financial system may not rise to the systemic level.

Alternatively, the Commission could have proposed to require a clearing agency to register if such clearing agency has a member whose obligations under the clearing membership agreement are guaranteed by a U.S. person. The Commission recognizes that guarantees may expose the U.S. guarantor to the performance obligations under the clearing membership agreement and represent conduits through which the risks associated with foreign CCP default may transfer to the U.S. financial system. A non-U.S. member of a foreign CCP will still participate in loss mutualization in the event of member default. In the presence of a guarantee, the losses associated with mutualization may flow back to the guarantor.

However, the Commission preliminarily believes that interpreting a U.S. person providing a guarantee to a non-U.S. clearing member with respect to obligations under a clearing membership agreement as an indication of the clearing agency providing CCP services to a U.S. person may lead to a result that is over-inclusive with respect to the statutory clearing agency registration requirement. A U.S. person could guarantee its foreign affiliate's obligations under a clearing membership agreement with a foreign clearing agency that does not provide CCP services to any U.S. persons. Therefore, as a matter of policy, the Commission declines to propose such alternative interpretation at this time.

Finally, the Commission is not proposing to apply clearing agency registration requirements to a clearing agency solely based on a U.S. domicile of the clearing agency. The Commission believes that the domicile location of a clearing agency is not a sufficient indicator of whether a CCP is performing the functions of a CCP in the United States and the transmission of systemic risk across borders by providing CCP services directly to U.S. persons.

(b) Proposed Exemption of Foreign Clearing Agency from Registration

As discussed above, the Commission preliminarily believes that it may be appropriate to consider an exemption as an alternative to application of the registration requirement to a foreign clearing agency in circumstances where the foreign clearing agency is subject to comparable, comprehensive supervision and regulation by appropriate government authorities in its home country, and the nature of the clearing agency's activities and performance of functions within the United States suggest that registration is not necessary to achieve the Commission's regulatory objectives.

The Commission preliminarily believes that the benefits of considering such exemption would be to increase the range of registered and exempt clearing agencies that could be used to satisfy the mandatory clearing requirement. Since the exemption would be considered in circumstances where the foreign clearing agency is subject to comparable, comprehensive supervision and regulation in its home country, the Commission preliminarily believes that such exemption would not compromise the programmatic benefits of the mandatory clearing requirement and at the same time may decrease the costs to market participants associated with the mandatory clearing requirement. In addition, to the extent that the exemption eliminates or decreases duplicative compliance costs, a foreign clearing agency eligible for the exemption may incur lower programmatic costs associated with implementation of, or compliance with, the clearing agency registration requirements and clearing agency standards than it would otherwise incur without the option of the proposed exemption.

On the other hand, in the case of an exemption order granted with Commission-imposed conditions, it is possible that the programmatic costs may increase because market participants would be required to incur costs to satisfy these conditions. However, the proposed availability

of an exemption from registration may enable a foreign clearing agency that would, due to conflicting local laws, otherwise not be able to provide CCP services to U.S. market participants in the absence of an exemption. In such cases, an exemption with Commission-imposed conditions may increase the number of clearing agencies in the U.S. security-based swap market, contributing to the programmatic benefits and costs that flow from the clearing agency registration requirement.

(c) Programmatic Effects of Alternative Standards

As stated above,¹⁶⁰² Section 17A(i) of the Exchange Act permits the Commission to adopt rules for registered clearing agencies that clear security-based swaps and conform its regulatory standards and supervisory practices to reflect evolving United States and international standards.

The Commission preliminarily believes that this approach may be appropriate where the Commission determines not to grant a general exemption from registration under Section 17A(k) of the Exchange Act, but where consistency with some regulatory standards suggests that a targeted regulatory approach is warranted. To avoid compromising the benefits of clearing agency registration discussed above, the Commission would consider the costs and benefits of applying such alternative standards when it contemplates such an action. The Commission preliminarily believes that the alternative standards approach could provide great flexibility for the Commission to promote a great range of registered and exempt clearing agencies for market participants to satisfy the mandatory clearing requirement without compromising the benefit of clearing agency registration by considering the adoption of targeted standards when warranted by the circumstances.

¹⁶⁰² See Section V.B.3, supra.

2. Programmatic Benefits and Costs Associated with the Mandatory Clearing Requirement of Section 3C(a)(1) of the Exchange Act

Prior to the Dodd-Frank Act, ICE Clear Credit and ICE Clear Europe engaged in credit default swap clearing activities pursuant to exemptive orders issued by the Commission.¹⁶⁰³ In part, the exemptive orders were conditioned on those CCPs making certain information available to the Commission, including risk assessment reports and information regarding future changes to risk management practices.¹⁶⁰⁴

Following the Dodd-Frank Act becoming effective, ICE Clear Credit and ICE Clear Europe were deemed to be registered with the Commission in July 2011 as clearing agencies for security-based swaps.¹⁶⁰⁵ ICE Clear Credit began clearing corporate single-name credit default swaps in December 2009,¹⁶⁰⁶ and, as of December 14, 2012, had cleared a total \$1.8 trillion

¹⁶⁰³ See, e.g., Exchange Act Release No. 59527 (Mar. 6, 2009), 74 FR 10791 (Mar. 12, 2009) (“ICE Clear Credit Exemptive Order”); Exchange Act Release No. 60372 (July 23, 2009), 74 FR 37748 (July 29, 2009) (“ICE Clear Europe Exemptive Order”). In connection with those orders, Commission staff considered a number of aspects of those CCPs’ clearing practices, including, *inter alia*, their risk management methodologies.

¹⁶⁰⁴ See ICE Clear Credit Exemptive Order, *supra* note 1603, at 10799; ICE Clear Europe Exemptive Order, *supra* note 1603, at 37756–57.

¹⁶⁰⁵ Section 17A(l) of the Exchange Act provides in relevant part that a derivative clearing organization registered with the CFTC that clears security-based swaps would be deemed to be registered as a clearing agency under section 17A if, prior to the enactment of the Dodd-Frank Act, it cleared swaps pursuant to an exemption from registration as a clearing agency.

Both ICE Clear Credit and ICE Clear Europe also are registered with the CFTC as Designated Clearing Organizations.

¹⁶⁰⁶ See Exchange Act Release No. 61662 (Mar. 5, 2010), 75 FR 11589, 11591 (Mar. 11, 2010) (discussing ICE Clear Credit’s CDS clearing activities as of March 2010).

ICE Clear Credit (then known as ICE US Trust LLC) began clearing index-based CDS in March 2009. See Exchange Act Release No. 59527 (Mar. 6, 2009), 74 FR 10791 (Mar. 12, 2009) (order granting temporary exemptions under the Exchange Act on behalf of ICE US Trust LLC).

gross notional of single-name credit default swaps on 153 North American corporate reference entities.¹⁶⁰⁷ ICE Clear Europe began clearing credit default swaps on single-name corporate reference entities in December 2009,¹⁶⁰⁸ and, as of December 14, 2012, had cleared a total €1.5 trillion in gross notional of single-name credit default swaps on 121 European corporate reference entities.¹⁶⁰⁹ The level of clearing activity appears to have steadily increased as more CDS have become eligible to be cleared.¹⁶¹⁰ To date, all of ICE Clear Credit's and ICE Clear Europe's security-based swap clearing activity has involved proprietary transactions between clearing members.¹⁶¹¹

The economic effects of mandatory clearing may be expected to vary depending on the scope of the requirement and the financial instruments subject to mandatory clearing. Within the

¹⁶⁰⁷ ICE Clear Credit also has cleared a total of \$19.1 trillion gross notional on 59 index CDS as of December 14, 2012. See ICE Clear Credit, Volume of ICE CDS Clearing, available at: https://www.theice.com/clear_credit.jhtml.

In addition to clearing single-name CDS on North American corporate reference entities, ICE Clear Credit also clears CDS on certain non-U.S. sovereign entities, and on certain indices based on North American reference entities.

¹⁶⁰⁸ See Exchange Act Release No. 61973 (Apr. 23, 2010), 75 FR 22656, 22657 (Apr. 29, 2010) (discussing ICE Clear Europe's CDS clearing activity as of April 2010).

ICE Clear Europe commenced clearing index-based CDS in July 2009. See Exchange Act Release No. 60372 (July 23, 2009), 74 FR 37748 (July 29, 2009) (order granting temporary exemptions under the Exchange Act on behalf of ICE Clear Europe).

¹⁶⁰⁹ ICE Clear Europe also has cleared a total of €9.7 trillion in gross notional on 44 index-based CDS. See ICE Clear Europe, Volume of ICE CDS Clearing, available at: https://www.theice.com/clear_credit.jhtml.

Aside from clearing single-name CDS on European corporate reference entities, ICE Clear Europe also clears CDS on indices based on European reference entities, as well as futures and instruments on OTC energy and emissions markets.

¹⁶¹⁰ See Clearing Procedures Adopting Release, 77 FR at 41636-38 (discussing the steady increase in the volume of cleared CDS transactions).

¹⁶¹¹ For purposes of the discussion here, "clearing members," "clearing participants," and similar terms encompass market participants that are approved by a clearing agency to become the clearing agency's counterparty when a single-name CDS is cleared.

subset of instruments that could be subject to a mandatory clearing requirement, a broader clearing mandate may be expected generally to lead to more effective risk mitigation, but it may also increase costs to market participants. The ultimate economic impact of the mandatory clearing requirement in part will be affected by the total set of security-based swaps that will be subject to mandatory clearing, following Commission determinations pursuant to Section 3C(b) of the Exchange Act.¹⁶¹²

Accordingly, this section does not seek to address the full range of economic consequences of the mandatory clearing requirement and the proposed application of mandatory clearing in the cross-border context that may result from the Commission's determination to require certain security-based swap transactions to be subject to mandatory clearing. Instead, this section contains two subsections. The first discusses programmatic effects of the mandatory clearing requirement and the second discusses costs and benefits that result from the mandatory clearing requirement generally. We consider these programmatic costs and benefits through analyzing the potential programmatic effects of mandatory clearing based on the data of voluntary clearing activity available to us and the assumptions stated below.

¹⁶¹² 15 U.S.C. 78c-3(b). Section 3C(b) of the Exchange Act includes two mandatory clearing determination review processes. One is Commission-initiated review and the other is a swaps submissions review processes. The mandatory clearing determinations to be made by the Commission would have impact on the economic consequences of the mandatory clearing requirement. For example, with respect to single-name CDS on certain corporate entities that have high notional size outstanding but are not currently cleared on a voluntary basis, the determination of clearing of these single-name credit default swaps would have impact on the volume of security-based swap transactions subject to mandatory clearing.

(a) Programmatic Effects of the Mandatory Clearing Requirement

As stated above, voluntary clearing of security-based swaps in the United States is currently limited to the CDS products cleared by ICE Clear Credit and ICE Clear Europe.¹⁶¹³ The level of clearing activity appears to have steadily increased over time as more products have become eligible to be cleared.¹⁶¹⁴ The notional volume of cleared transactions reported by ICE Clear Credit for U.S.-index CDS products in 2009, 2010 and 2011 represented approximately 32%, 54% and 57% of the total notional volume of the U.S.-index CDS market, and the notional volume of cleared transactions reported by ICE Clear Credit for single-name CDS products referencing U.S. corporate in 2009, 2010 and 2011 represented approximately 0%, 16% and 25% of the total notional volume of the single-name U.S. corporate CDS market.¹⁶¹⁵ These figures were calculated based on price-forming transactions submitted to the DTCC-TIW.¹⁶¹⁶

¹⁶¹³ See the discussion of levels of security-based swap clearing in Section XV.B.2(e) above. See also Clearing Procedures Adopting Release, 77 FR at 41636 (noting that central clearing of security-based swaps began in March 2009 for index-based CDS products, in December 2009 for single-name CDS products on corporate reference entities, and in November 2011 for single-name CDS products on sovereign reference entities; also noting that at present, there is no central clearing in the United States for security-based swaps that are not CDS products, such as those based on equity securities).

¹⁶¹⁴ See Clearing Procedures Adopting Release, 77 FR at 41636-38 (discussing the steady increase in the volume of cleared CDS transactions).

¹⁶¹⁵ These figures are based on information regarding names accepted for clearing reported by ICE Clear Credit on its public Website and are calculated based on "price forming transactions" submitted to the DTCC-TIW. See Section XV.B.2(e), supra. These figures include the clearing of trades on the same day the trade was executed as well as the clearing of trades entered into in prior years and submitted for clearing on retroactive basis. These figures do not include trades that resulted from the compression of trades previously submitted for clearing. See id. The CME Group also clears index CDS products and has reported clearing \$144 billion in gross notional volumes of transactions since inception, with \$21 billion in open interest as of the end of 2011. See CME Group, Cleared OTC Credit Default Swaps, available at: <http://www.cmegroup.com/trading/cds/>. These volumes are small relative to total market activity and are not included in the calculation of notional volume of cleared index CDS

Our prior analysis of the level of clearing activity also demonstrated steady increases of CDS transaction volume in names accepted for clearing over time.¹⁶¹⁷ Such analysis compared two measures of transaction volumes in names accepted for clearing within a year and across years and showed the increase in percentage from 2009 to 2011 in the volume of new transactions in names that have “accepted for clearing” status. See Table 1 below.

TABLE 1—CLEARED TRADES AND ACCEPTED TRADES AS A PERCENTAGE OF GROSS NOTIONAL TRANSACTION VOLUME

	U.S. -Index CDS			Single Name U.S. Corporate CDS		
	2009	2010	2011	2009	2010	2011

in 2011 performed by the Commission staff in the Clearing Procedures Adopting Release. See Clearing Procedures Adopting Release, 77 FR at 41636.

¹⁶¹⁶ See Section XV.B.2(e) and note 1615, *supra*.

¹⁶¹⁷ See Clearing Procedures Adopting Release, 77 FR at 41637-38. The analysis there presents two measures with respect to transaction volume accepted for clearing (which ultimately may have been cleared or uncleared). The first measure includes all transaction volume in names accepted for clearing at any time during the calendar year, whether or not a trade was accepted for clearing at the time of its execution. The calculation of this measure was performed by staff in the Division of Risk, Strategy, and Financial Innovation by totaling the sum of price forming transactions reported to DTCC-TIW in the calendar year for index-based and single-name corporate CDS products that match the list of names accepted for clearing at ICE Clear Credit during the same period. See ICE Clear Credit, Clearing Eligible Products, available at: https://www.theice.com/publicdocs/clear_credit/ICE_Clear_Credit_Clearing_Eligible_Products.xls.

The second measure includes only transaction volume in names accepted for clearing at the time of trade execution. The calculation of this measure was performed by staff in the Division of Risk, Strategy, and Financial Innovation by totaling the sum of price forming transactions reported to DTCC-TIW in the calendar year for index-based and single-name corporate CDS products that match the list of names accepted for clearing at ICE Clear Credit, including only those transactions executed following the accepted for clearing date reported by ICE Clear Credit. This measure accounts for the fact that, although transactions executed in names prior to the name being accepted for clearing can be cleared later in the same calendar year through a process referred to as “backloading,” names accepted for clearing towards the end of the year allow less time for this to occur. Backloading refers to the submission for clearing of pre-existing bilateral trades that were not submitted for clearing on the date of the transaction. See Clearing Procedures Adopting Release, 77 FR at 41637-38.

Notional volume (\$ billions).....	10,400	8,900	9,900	4,100	3,900	2,800
Percentage of Notional in Names Accepted for Clearing						
---at calendar year end.....	88%	90%	91%	1%	23%	33%
---at time of trade execution.....	55%	87%	91%	0%	16%	29%
Cleared transactions: % of total notional volume.....	32%	54%	57%	0%	16%	25%

Although data suggested that clearing of security-based swaps has been increasing, significant segments of the security-based swap market remain uncleared.¹⁶¹⁸ Due in part to this data, the Commission recognized in the Clearing Procedures Adopting Release that mandatory clearing determinations made pursuant to Section 3C(a)(1) of the Exchange Act¹⁶¹⁹ could alter current clearing practices at the time such determinations are made. One potential consequence of mandatory clearing determinations that require mandatory clearing for certain security-based swaps could be a higher level of clearing for security-based swaps than would take place under a voluntary system.¹⁶²⁰ Where the amount of clearing taking place under a voluntary system is significantly different from the level of clearing that would take place if trading in a product were mandatory and where such difference marks a shift in existing market clearing practices, the mandatory clearing determination could potentially have a material economic impact.¹⁶²¹

¹⁶¹⁸ Because clearing is voluntary, counterparties to the transaction have no obligation to clear and may elect not to do so for various individual reasons. Further, if the counterparties choose to transact in a reference entity that is accepted for clearing in a currency other than U.S. dollars, the transaction is no longer eligible for clearing. In addition, because clearing was performed exclusively on a backloading basis prior to April 2011, some transactions have not been cleared because they may have been subject to portfolio compression or otherwise terminated prior to when the option to submit the transactions for clearing became available. See Clearing Procedures Adopting Release, 77 FR at 41638.

¹⁶¹⁹ 15 U.S.C. 78c-3(a)(1).

¹⁶²⁰ See Clearing Procedures Adopting Release, 77 FR 41638.

¹⁶²¹ Id.

(b) Programmatic Benefits and Costs of the Mandatory Clearing Requirement

A key benefit of mandatory clearing is reduction of counterparty credit risk. In a regime with central clearing, the CCP is the counterparty to all trades. Central clearing mitigates counterparty credit risk among dealers and other institutions by shifting that risk from individual counterparties to CCPs, thereby helping protect counterparties from sequential default. CCPs require that members apply mark-to-market pricing and margin requirements in a consistent manner, and generally use liquid margin collateral to manage the risk of a member's failure. Accordingly, where CCPs operate under high standards relating to risk management, counterparty credit risk can be lower than in a regime without CCPs where counterparties can engage only in bilateral netting and face margin requirements that may vary significantly between transactions.¹⁶²²

Although central clearing reduces counterparty risk, it is less certain whether a mandatory requirement to centrally clear security-based swap transactions reduces the overall risks to the financial system. Some have expressed the view that central clearing should be imposed wherever possible to help control systemic risk; others, by contrast, have contended that concentrating the default risk of numerous counterparties within a single CCP (or within a small number of CCPs) could introduce new risks.¹⁶²³ For instance, those expressing concern about

¹⁶²² See note 1021, *supra*.

¹⁶²³ See Craig Pirrong, Mutualization of Default Risk, Fungibility, and Moral Hazard: The Economics of Default Risk Sharing in Cleared and Bilateral Markets, at 5 (Univ. of Houston Working Paper, 2010), available at: http://business.nd.edu/uploadedFiles/Academic_Centers/Study_of_Financial_Regulation/pdf_and_documents/clearing_moral_hazard_1.pdf ("Clearing of OTC derivatives has been touted as an essential component of reforms designed to prevent a repeat of the financial crisis. A back-to-basics analysis of the economics of clearing suggests that such claims are overstated, and that traditional OTC mechanisms may be more efficient for some instruments and some counterparties."); see also Derivatives Clearinghouses:

the systemic effects of central clearing state that risk sharing between members of a CCP may encourage excessive risk taking because the costs of imprudent decisions by one clearing member are borne by other clearing members. This moral hazard concern may be exacerbated to the extent that CCPs are viewed as too important to fail and thus would likely be subject to bailout remedies that would benefit all CCP members.¹⁶²⁴

While lower counterparty credit risk benefits the financial system as a whole, it can also make hedging less expensive for market participants. An environment in which central clearing is common may see increased participation, greater liquidity, and more efficient risk sharing that promotes capital formation. There also are circumstances under which central clearing can increase participation costs for certain participants. In certain cases where counterparties to a security-based swap transaction are exposed to one another in multiple asset markets, they may face lower costs by bilaterally clearing new contracts against existing exposures instead of clearing through a central counterparty.¹⁶²⁵

Mandatory clearing can play an important role in developing a strong infrastructure for central clearing.¹⁶²⁶ For instance, mandatory clearing reduces operational risk by promoting the

Opportunities and Challenges: Hearing Before the Subcomm. on Secs., Ins., & Inv., of the S. Comm. on Banking, Hous., & Urban Affairs, 112th Cong. 21, 49 (2011) (statement of Chester S. Spatt, Professor of Finance, Carnegie Mellon Univ.) (stating that “[t]he clearinghouse is subject to considerable moral hazard and systemic risk” in part because “there is a strong incentive for market participants to trade with weak counterparties” and noting that “it is unclear whether the extent of use of clearinghouses will ultimately lead to a reduction in systemic risk in the event of a future crisis.”).

¹⁶²⁴ See Pirrong, note 1623, *supra*, at 5 (“Risk sharing through a clearinghouse makes the balance sheets of the clearinghouse members public goods, and encourages excessive risk taking. That is, the clearing mechanism is vulnerable to moral hazard.”).

¹⁶²⁵ Duffie and Zhu, *supra* note 110, at 74-95.

¹⁶²⁶ See note 991 and accompanying text, *supra*.

standardization of contract terms. Standardization can simplify the valuation of security-based swaps, increase the liquidity of security-based swaps contracts, and promote competition. Standardized contract terms help avoid inefficiencies in contracting that result from human and processing errors. Standardized terms also facilitate the development of infrastructure technologies that facilitate the prompt and accurate clearance and settlement of security-based swaps.¹⁶²⁷ Mandatory clearing may also have the effect of reducing total transaction costs by eliminating obscured margin-related pricing that customers may otherwise incur in connection with non-cleared instruments. As with standardization, this would promote inter-dealer competition. However, dealers may take other actions to offset lost revenues resulting from the shift from non-cleared to cleared instruments. Separate from these considerations, several analyses have been conducted suggesting that mandatory clearing would increase the overall margin costs associated with security-based swap transactions compared to the margin market participants would post in the absence of a clearing requirement, though the estimates of the aggregate cost to market participants vary widely.¹⁶²⁸

¹⁶²⁷ See id.

¹⁶²⁸ See Manmohan Singh, Collateral, Netting and System Risk in the OTC Derivatives Market (IMF Working Paper, 2010), available at: <http://www.imf.org/external/pubs/ft/wp/2010/wp1099.pdf> (concluding that the initial margin requirements for the central clearing of approximately two-thirds of the then estimated \$36 trillion notional market for credit default swaps would amount to \$40 to \$80 billion, likely closer to \$80 billion due to the increased jump risk associated with single-name credit default swaps even if portfolio compression is available); Daniel Heller & Nicholas Vause, Collateral Requirements for Mandatory Central Clearing of Over-the-Counter Derivatives (BIS Working Paper No. 373, Mar. 2012), available at: <http://www.bis.org/publ/work373.pdf> (concluding that margin required to clear multi-name and single-name credit default swaps held by the largest 14 derivative dealers would vary depending on market volatility, requiring \$10 billion of collateral in a low volatility market, \$51 billion in medium volatility, and \$107 billion in high volatility; further stating that with the inclusion of non-dealer positions, margin requirements would amount to \$36 billion in a low volatility market, \$219 billion in medium volatility and

On the other hand, mandatory clearing of certain security-based swaps may reduce the use of security-based swaps to manage the risks associated with other financial products or commercial activity. This could occur if margin requirements prove too burdensome and make cleared transactions expensive relative to alternative means of risk management.

3. Programmatic Benefits and Costs of Proposed Rule 3Ca-3

As discussed above, the Commission is proposing Rule 3Ca-3 to apply the mandatory clearing requirement of Section 3C(a)(1) of the Exchange Act¹⁶²⁹ to cross-border security-based swap transactions. Proposed Rule 3Ca-3(a) specifies the security-based swap transactions to which the mandatory clearing requirement would apply, and proposed Rule 3Ca-3(b) carves out

\$425 billion in high volatility; study assumed the existence of one centralized clearing entity, which produced an estimated 25 percent savings compared to a market with multiple regional clearing agencies, where the benefits of portfolio margining would be limited); Che Sidanius & Filip Zikes, OTC Derivatives Reform and Collateral Demand Impact, (Bank of England Fin. Stability Paper No. 18, Oct. 2012), available at: http://www.bankofengland.co.uk/publications/Documents/fsr/fs_paper18.pdf (estimating an incremental increase in total initial margin for central clearing of credit default swaps between \$78 billion and \$156 billion, assuming that 80 percent of credit default swaps are cleared and netting is achieved between 90 and 95 percent while noting that the presence and extent of portfolio margining available could affect the analysis); IMF, Safe Assets: Financial System Cornerstone, Global Financial Stability Report (April 2012), available at: <http://www.imf.org/external/pubs/ft/gfsr/2012/01/pdf/c3.pdf> (estimating incremental initial margin and guarantee fund contributions for central clearing of over-the-counter derivatives will amount to between \$100 billion and \$200 billion, and may be higher if mutual recognition is not common among CCPs); see also Letter from Robert Pickel, Chief Executive Officer, ISDA, and Kenneth Bentsen, EVP, Public Policy and Advocacy, SIFMA, to David Stawick, Secretary, CFTC, at 35–37, Sept. 14, 2012 (estimating that the initial margin call for all swap products would be \$193 billion to financial entities and \$428 billion to dealers, and that variation margin calls would total \$320 billion to financial entities and \$80 billion to dealers, further noting that anywhere from \$20 to \$228 billion in additional liquidity would be necessary to meet the variation margin calls).

¹⁶²⁹

15 U.S.C. 78c-3(a)(1).

certain security-based swap transactions from application of the mandatory clearing requirement.¹⁶³⁰

Specifically, under proposed Rule 3Ca-3(a), the mandatory clearing requirement would apply to a person that engages in a security-based swap transaction if such person engages in a security-based swap transaction in the United States. The Commission would view a person to be engaging in a security-based swap transaction in the United States if a security-based swap transaction involves (i) a counterparty that is a U.S. person; (ii) a counterparty that is a non-U.S. person whose performance under such security-based swap transaction is guaranteed by a U.S. person (hereinafter referred to as a “guaranteed non-U.S. person”); or (iii) such security-based swap transaction is a transaction conducted within the United States.¹⁶³¹ Under proposed Rule 3Ca-3(b), the mandatory clearing requirement would not apply to (i) a security-based swap transaction described in proposed Rule 3Ca-3(a) that is not a transaction conducted within the United States if (x) one counterparty is a foreign branch or a guaranteed non-U.S. person and (y) the other counterparty to the transaction is a non-U.S. person whose performance under the security-based swap is not guaranteed by a U.S. person (hereinafter referred to as “non-guaranteed non-U.S. persons”) and who is not a foreign security-based swap dealer as defined in proposed Rule 3a71-3(a)(3) under the Exchange Act, and would not apply to (ii) a security-based swap transaction described in proposed Rule 3Ca-3(a) that is a transaction conducted within the United States if (x) both counterparties to the transaction are non-guaranteed non-U.S. persons

¹⁶³⁰ This is similar to the proposed approach for the mandatory trade execution requirement. See Section XV.G.4, *infra*.

¹⁶³¹ See proposed Rule 3Ca-3(a) under the Exchange Act. The terms “transaction conducted within the United States” and “U.S. person” would have the meanings set forth in proposed Rules 3a71-3(a)(5) and (7) under the Exchange Act.

and (y) neither counterparty to the transaction is a foreign security-based swap dealer, as defined in proposed Rule 3a71-3(a)(3) under the Exchange Act.¹⁶³²

Therefore, proposed Rule 3Ca-3(a) and proposed Rule 3Ca-3(b) apply the mandatory clearing requirement to security-based swap transactions in the cross-border context based on the U.S.-person status of a counterparty, the existence of a guarantee provided by a U.S. person, the registered security-based swap dealer status of a non-U.S. person counterparty, and the location where the transaction is conducted. Taken together, proposed Rules 3Ca-3(a) and 3Ca-3(b) would not apply the mandatory clearing requirement to (i) transactions conducted outside the United States between two counterparties who are non-guaranteed non-U.S. persons, (ii) transactions conducted outside the United States between a foreign branch or a guaranteed non-U.S. person, and a counterparty who is a non-guaranteed non-U.S. person and is not a foreign security-based swap dealer, and (iii) transactions conducted within the United States between two counterparties who are non-guaranteed non-U.S. persons and are not foreign security-based swap dealers.

The Commission preliminarily believes that the combined effect of the proposed Rules 3Ca-3(a) and (b) described above would be that non-guaranteed non-U.S. persons who are not security-based swap dealers may engage in security-based swap transactions with each other both within and without the United States without being subject to the Commission's mandatory clearing requirement. These non-guaranteed non-U.S. persons that are not security-based swap dealers may include non-U.S. persons that are swap dealers, major swap participants, major security-based swap participants, commodity pools, private funds, employee benefit plans, or persons predominantly engaged in activities that are banking or financial in nature, as defined in

¹⁶³² See proposed Rule 3Ca-3(b) under the Exchange Act.

Section 4(k) of the Bank Holding Company Act of 1956.¹⁶³³ Such non-U.S. persons would also be able to engage in security-based swap transactions without being subject to the mandatory clearing requirement when the transaction is conducted outside the United States with U.S. persons that are foreign branches of U.S. banks or guaranteed non-U.S. persons or transacting with a foreign security-based swap dealer whose performance under security-based swaps is not guaranteed by a U.S. person.¹⁶³⁴ As discussed below,¹⁶³⁵ the Commission preliminarily believes that the exclusion of transactions between two non-guaranteed non-U.S. persons who are not foreign security-based swap dealers could potentially reduce the aggregate programmatic costs associated with the mandatory clearing requirement. However, these non-guaranteed non-U.S. persons, despite their status of not being foreign security-based swap dealers, may be financial entities that play significant roles in the U.S. or a foreign financial system and their failure may present spillover effect on the stability of the U.S. financial system and security-based swap market.

(a) Programmatic Effect of Proposed Rule 3Ca-3

It is not possible to quantify the potential programmatic effect of proposed Rule 3Ca-3 on the future volume of security-based swap transactions when the mandatory clearing requirement

¹⁶³³ 12 U.S.C. 1843(k).

¹⁶³⁴ In addition, transactions that are subject to the mandatory clearing requirement by operation of the proposed Rule 3Ca-3(a) and (b) may be excepted from the mandatory clearing requirement if the end-user exception is applicable. See Section 3C(g)(1) of the Exchange Act, 15 U.S.C. 78c-3(g)(1). Therefore, the combined effects of the proposed Rule 3Ca-3 may be affected by the implementation of the end-user exception to the mandatory clearing requirement. The Commission has proposed, but not yet adopted, Rule 3Cg-1 under the Exchange Act regarding the end-user exception to mandatory clearing of security-based swaps. See End-User Exception Proposing Release, 75 FR 79992.

¹⁶³⁵ See Section XV.F.3(b), infra (discussing the programmatic benefits and costs of proposed Rule 3Ca-3).

becomes effective partly because the Commission has not made any mandatory clearing determinations, partly because the Commission has yet to finalize the end-user exception to the mandatory clearing requirement,¹⁶³⁶ and partly because we do not know future trading volumes of security-based swaps. However, the Commission has examined the data available to it to analyze the potential programmatic effects of proposed Rule 3Ca-3. In particular, the Commission has tried to analyze the effects of proposed Rule 3Ca-3 by looking at the portion of single-name U.S. reference CDS transactions that may provide an indication of the size of the security-based swap market that may be included in or excluded from the application of the mandatory clearing requirement as a result of proposed Rule 3Ca-3.

A limitation we face when analyzing the data in order to estimate the size of the security-based swap market that may be affected by proposed Rule 3Ca-3 is that the domicile classifications in the DTCC-TIW database are not identical to the counterparty status or transaction status, both of which are described in proposed Rules 3Ca-3(a) and (b) and would trigger application of, or an exception from, the mandatory clearing requirement. Although the information provided by the data in the DTCC-TIW does not allow us to identify the existence of a guarantee provided by a U.S. person with respect to a counterparty to a transaction or the location where the transaction is conducted, the Commission nevertheless preliminarily believes that the approach taken below would provide the best available estimate of the size of the security-based swap market that could be included in or excluded from the application of the mandatory clearing requirement by proposed Rule 3Ca-3.

¹⁶³⁶ See id.

As a starting point, the Commission has examined all transactions in single-name CDS during 2011¹⁶³⁷ and estimated that the notional amount of single-name CDS transactions executed during 2011 is \$2,400 billion.¹⁶³⁸ Proposed Rule 3Ca-3(a) provides that the mandatory clearing requirement shall apply to a security-based swap transaction if (i) a counterparty to the transaction is a U.S. person or a non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person or (ii) such transaction is a transaction conducted within the United States. In applying proposed Rule 3Ca-3(a) to the \$2,400 billion single-name CDS transactions executed in 2011, the Commission uses account holders and their domicile

¹⁶³⁷ For purposes of analyzing the programmatic effect of proposed Rule 3Ca-3, we do not consider historical data regarding the U.S. index-based CDS transactions. The statutory definition of security-based swap in relevant part includes swaps based on single securities or on narrow-based security indices. See Section 3(a)(68)(A) of the Exchange Act, 15 U.S.C.78c(a)(68)(A). The historical data regarding the U.S. index-based CDS transactions encompass broad-based index CDS transactions that do not fall within the definition of security-based swaps.

¹⁶³⁸ This estimate is based on the calculation by staff of the Division of Risk, Strategy and Financial Innovation of all price-forming DTCC-TIW single-name CDS transactions that are based on North American corporate reference entities, U.S. municipal reference entities, U.S. loans or mortgage-backed securities (“MBS”), using ISDA North American documentation, ISDA U.S. Muni documentation, or other standard ISDA documentation for North American Loan CDS and CDS on MBS, and are denominated in U.S. dollars and executed in 2011. Price-forming transactions include all new transactions, assignments, modifications to increase the notional amounts of previously executed transactions, and terminations of previously executed transactions. Transactions terminated, transactions entered into in connection with a compression exercise, and expiration of contracts at maturity are not considered price-forming and are therefore excluded, as are replacement trades and all bookkeeping-related trades. See note 1312, supra.

This figure differs from the single-name CDS notional volume calculated in the Clearing Procedures Adopting Release, \$2,800 billion, by \$400 billion. See Clearing Procedures Adopting Release, 77 FR at 41638; see also Section XV.F.2(a) (discussing the programmatic effects of the mandatory clearing requirement), supra. This difference is primarily a result of removing the notional amount of security-based swap terminations in 2011 from the set of \$2,800 billion price-forming transactions.

information in the DTCC-TIW database to determine the status of the counterparties.¹⁶³⁹

Because the Commission's proposed definition of "U.S. person" is based primarily on the place of organization or principal place of business of a legal person and a legal person's principal place of business and place of organization are usually in the same country, the Commission believes that the domicile of a legal person is a reliable indicator of such person's U.S.-person status. In addition, based on the Commission's understanding that the security-based swap transactions of foreign subsidiaries of U.S. entities, unless sufficiently capitalized to have their own independent credit ratings, are generally guaranteed by the most creditworthy U.S.-based entity within the corporate group, *i.e.*, the U.S. parent, the Commission preliminarily believes that it is reasonable to assume that foreign subsidiaries of U.S.-domiciled entities are non-U.S. persons whose performance under security-based swap transactions is guaranteed by a U.S. person. Finally, the DTCC-TIW data do not provide sufficient information for us to identify whether a transaction was conducted in the United States. Solely for purposes of this analysis,

¹⁶³⁹ For purposes of the analysis here, the determination of an account holder's domicile is based on the "registered office location" and the "settlement location" self-reported by account holders in DTCC-TIW. The registered office location typically represents the place of organization or principal place of business of a DTCC-TIW account holder. The settlement location may represent the parent, headquarter, or home office of a DTCC-TIW account holder. Staff in the Division of Risk, Strategy, and Financial Innovation has consistently observed that DTCC-TIW recorded the place of organization of an account holder that is a foreign subsidiary of a U.S. person or a foreign branch as such account holder's registered office location and the parent location or headquarter of the foreign branch (*i.e.*, the United States) as such account holder's settlement location. For purposes of identifying a counterparty's U.S. person status in the analysis here, staff in the Division of Risk, Strategy, and Financial Innovation uses the registered office location in DTCC-TIW as the domicile for a foreign subsidiary of a U.S. person and the settlement office location in DTCC-TIW as the domicile for a foreign branch. It is possible that some market participants may misclassify their "registered office location" and the "settlement location" because the databases in DTCC-TIW do not assign a unique legal entity identifier to each separate entity.

we have assumed that transactions involving a U.S.-domiciled counterparty (excluding a foreign branch) or a U.S. foreign branch counterparty were conducted in the United States.¹⁶⁴⁰

Based on these assumptions, we estimate that the subset of the single-name U.S. reference CDS market that includes a U.S.-domiciled counterparty (excluding a foreign branch of a U.S. bank), a foreign subsidiary of a U.S.-domiciled entity, or a U.S. branch of a foreign bank as a counterparty is \$1,900 billion notional amount of single-name U.S. reference CDS transactions.¹⁶⁴¹ The Commission preliminarily believes that this figure provides an indicative level of the single-name U.S. reference CDS activity, which may present an indicative size of the security-based swap market, that could become subject to mandatory clearing under proposed Rule 3Ca-3(a) when the requirement becomes effective.¹⁶⁴² In addition, we recognize that the

¹⁶⁴⁰ Since the origination location of a transaction is not available in DTCC-TIW, the Commission recognizes that its analysis here may undercount transactions conducted within the United States because some transactions may be solicited, negotiated, or executed within the United States by an agent other than U.S. branches of foreign banks (such as a non-U.S. person counterparty using an unaffiliated third-party agent).

¹⁶⁴¹ Such \$1,900 billion estimate does not capture transactions between two non-U.S. domiciled counterparties involving an agent to solicit, negotiate and execute security-based swaps in the United States and therefore, may be an underestimate of the aggregate notional amount of the single-name U.S. reference CDS transactions that may be included in the application of the mandatory clearing requirement under proposed Rule 3Ca-3(a) because of the assumption we make herein regarding transactions conducted within the United States. By the same token, the difference between the \$1,900 billion subset included in the application of the mandatory clearing requirement under proposed Rule 3Ca-3(a) and the \$2,400 billion total single-name U.S. reference CDS transactions (i.e., \$500 billion or 20.8% of the \$2,400 billion) may represent an overestimate of single-name U.S. reference CDS transactions in notional amount that are not included in the application of the mandatory clearing requirement under proposed Rule 3Ca-3(a).

¹⁶⁴² The Commission recognizes that the security-based swap market includes single-name CDS, CDS based on narrow-based indices, and other non-CDS security-based swaps, primary examples of which are equity swaps and total return swaps based on single equities or narrow-based indices of equities. As previously stated, we believe that the single-name CDS data are sufficiently representative of the security-based swap market as roughly 82% of the security-based swap market, as measured on a notional basis,

level of the security-based swap activity that could become subject to mandatory clearing under proposed Rule 3Ca-3(a) may be affected by the final rules adopted by the Commission regarding the end-user exception to mandatory clearing of security-based swaps.¹⁶⁴³

Next, we apply proposed Rule 3Ca-3(b) to the transactions described above in order to estimate the portion of the single-name U.S. reference CDS activity, which may present an indicative size of the security-based swap market, that would not be subject to the mandatory clearing requirement under the proposed rule. We restate the assumptions described above with respect to the counterparty status of a U.S. person and a non-U.S. person whose performance under security-based swap transactions is guaranteed by a U.S. person, and the assumption with respect to a transaction conducted within the United States. In addition, because of a lack of information about the location of transactions, solely for assessing the effect of proposed Rule 3Ca-3(b)(i), we have assumed that transactions between a counterparty that is a foreign branch or foreign subsidiary of a U.S.-domiciled entity and another counterparty that is a foreign-domiciled entity that is not a subsidiary of a U.S.-domiciled entity or an ISDA-recognized dealer are not transactions conducted within the United States; and solely for assessing the effect of proposed rule 3Ca-3(b)(ii), we have assumed that transactions conducted between two foreign-domiciled counterparties that are not ISDA-recognized dealers and are not foreign subsidiaries of U.S.-domiciled entities are conducted within the United States. These assumptions likely overestimate the notional volume carved-out by proposed Rule 3Ca-3(b). With respect to the counterparty status as a registered security-based swap dealer, we recognize that as yet there are no dealers

appears likely to be single-name CDS. See Section XV.B.2 and the text accompanying note 1301, supra.

¹⁶⁴³ Solely for purposes of this analysis, we assume that the end-user exception is not available for transactions included in the indicative volume estimated here.

designated as security-based swap dealers and subject to the registration requirement. Solely for purposes of this analysis, we have assumed that those counterparties to CDS transactions that were ISDA recognized dealers¹⁶⁴⁴ would be required to register as security-based swap dealers.

Based on the above assumptions, we have estimated that approximately 2.1% of the total notional amount¹⁶⁴⁵ of single-name U.S. reference CDS transactions executed in 2011, would be excluded from the scope of the application of the mandatory clearing requirement by proposed Rule 3Ca-3(b). Therefore, we preliminarily believe that 22.9% of the total size of the single-name U.S. reference CDS transactions in 2011 presents an indicative size of the U.S. security-based swap market that could be excluded from the application of the mandatory clearing requirement under proposed Rule 3Ca-3.¹⁶⁴⁶

¹⁶⁴⁴ See note 1306, *supra*.

¹⁶⁴⁵ Based on calculations by staff of the Division of Risk, Strategy, and Financial Innovation applying the criteria provided in proposed Rule 3Ca-3(b) and the assumptions stated herein, approximately \$51 billion in notional amount, constituting approximately 2.1% of the total notional amount, of single-name U.S. reference CDS transactions executed in 2011 would be excluded from the application of the mandatory clearing requirement. Because of the assumptions we make herein regarding transactions conducted within the United States and transactions conducted outside the United States, the 2.1% may be an overestimate of the aggregate notional amount of the single-name U.S. reference CDS transactions that may be excluded from the application of the mandatory clearing requirement under proposed Rule 3Ca-3(b) under the Exchange Act.

¹⁶⁴⁶ The 22.9% estimate is the sum of the 20.8% estimate of the single-name U.S. reference CDS transactions excluded from mandatory clearing under proposed Rule 3Ca-3(a) and the 2.1% estimate of the single-name U.S. reference CDS transactions excluded from mandatory clearing under proposed Rule 3Ca-3(b). The Commission reiterates that both 20.8% and 2.1% may overestimate the size of the single-name U.S. reference CDS transactions excluded from the application of the mandatory clearing requirement under proposed Rules 3Ca-3(a) and (b).

In addition, as stated above, this calculation is conducted using U.S. reference single-name CDS transaction data in 2011. See the text accompanying notes 1637 and 1787, *supra*. The Commission recognizes that the same calculation could generate a different result if both U.S. reference and non-U.S. reference single-name CDS transaction data were used. However, with respect to non-U.S. reference single-name CDS transaction

The Commission preliminarily believes that this estimate provides the best available proxy for the overall programmatic effect of the application of the mandatory clearing requirement in the cross-border context in terms of the portion of the single-name U.S. reference CDS activity that may be included or excluded in the scope of the application of the mandatory clearing requirement, given the data limitations and the underlying assumptions described above.¹⁶⁴⁷ The Commission is mindful that the above analysis represents only an indicative estimate of the portion of the single-name U.S. reference CDS activity, which may present an indicative size of the security-based swap market, that may be included or excluded from the scope of the application of the mandatory clearing requirement as a result of the proposed Rule 3Ca-3. The Commission also recognizes that the above analysis represents an extrapolation from the limited data that is currently available to the Commission.

(b) Programmatic Benefits and Costs of Proposed Rule 3Ca-3

The Commission's approach to application of the mandatory clearing requirement generally focuses on any person engaging in a security-based swap in the United States. As stated above, the Commission would preliminarily interpret the statutory language "engage in a security-based swap" to include transactions in which a counterparty performs any of the functions that are central to carrying out a security-based swap transaction (*i.e.*, solicitation, negotiation, execution, or booking of the transaction) within the United States. The Commission proposes to interpret that a transaction in which one of the counterparties is a U.S. person is a

data, the Commission currently does not have access to the part of such data in DTCC-TIW regarding non-U.S. reference single-name CDS transactions that do not involve a U.S. counterparty on either side of the transaction. See Section XV.B.2, *supra*.

¹⁶⁴⁷ The Commission reiterates that the assumptions made here are solely for purposes of this economic analysis.

security-based swap in the United States. The Commission also is proposing to interpret the statutory language “engage in a security-based swap” to include transactions in which a U.S. person provides a guarantee on a non-U.S. person’s performance under a security-based swap because of the involvement of the U.S. person in the transaction. Therefore, the Commission is proposing a rule that would apply the mandatory clearing requirements to a security-based swap if (i) a counterparty to the security-based swap transaction is (x) a U.S. person or (y) a non-U.S. person counterparty whose performance of obligations under the security-based swap is guaranteed by a U.S. person, or (ii) such transaction is a transaction conducted within the United States, subject to certain exceptions.

Economically, a U.S. person’s security-based swap activity poses risk to the U.S. financial system because security-based swap transactions give rise to ongoing obligations on the part of the U.S. person and at the same time the U.S. person is exposed to the credit risk of its non-U.S. counterparties. Similarly, a guarantee provided by a U.S. person gives the counterparty of the guaranteed entity direct recourse to the U.S. guarantor with respect to any obligations owed by the guaranteed entity under the security-based swap. As a result, the U.S. guarantor exposes itself to the security-based swap risk as if it were a direct counterparty. Therefore, the Commission preliminarily believes that U.S. persons and non-U.S. person whose performance in security-based swap transactions is guaranteed by U.S. persons serve as major conduits of systemic risk to the U.S. financial system, and therefore, transactions involving U.S. persons and non-U.S. persons whose performance under security-based swaps are guaranteed by U.S. persons should fall within the scope of application of the mandatory clearing requirement, regardless of where the security-based swap activity takes place.

On the other hand, as previously discussed,¹⁶⁴⁸ the Commission has acknowledged that subjecting U.S. persons and non-U.S. persons whose performance in security-based swap transactions is guaranteed by U.S. persons to these requirements may have key consequences for competition, liquidity, and efficiency, and for U.S. persons' access to the foreign security-based swap market.

To the extent that foreign law does not subject participants in the foreign security-based swap market to mandatory clearing or impose margin requirements on non-cleared security-based swaps equivalent to margin that would be required by CCPs, this requirement under Title VII may make it more costly for non-U.S. persons to transact with U.S. person and guaranteed non-U.S. person counterparties because these transactions may be subject to higher margin requirements imposed by CCPs than under foreign law. This may make it difficult for U.S. persons and guaranteed non-U.S. persons to access foreign markets and liquidity provided by non-guaranteed non-U.S. persons, and could generate incentives for U.S. persons and guaranteed non-U.S. persons to restructure their security-based swap businesses to fall outside the scope of Title VII. In such instances, the incentive to restructure operations may decrease if foreign jurisdictions impose margin requirements on non-cleared security-based swaps. If these margin requirements on non-cleared security-based swaps are economically equivalent to or higher than CCP margin requirements for cleared security-based swaps, restructuring operations would provide few private benefits for market participants.

The Commission preliminarily believes that the carve-out in Rule 3Ca-3(b)(1) excludes from the mandatory clearing requirement those transactions involving foreign branches and guaranteed non-U.S. persons who are most likely to engage in transactions under foreign law.

¹⁶⁴⁸ See Section XV.C, *supra*,

Such a carve-out reduces potential disruption to the foreign business of U.S. persons and guaranteed non-U.S. persons in the foreign security-based swap market.¹⁶⁴⁹ These benefits come at the cost of increased systemic risk. The counterparty risk associated with non-cleared transactions that involve foreign branches and guaranteed non-U.S. persons is ultimately borne by the U.S. financial system.

The incremental increase in systemic risk would likely be small, since the carve-out in proposed Rule 3Ca-3(b)(1) does not apply to security-based swap dealers. Moreover, as mentioned before, the magnitude of these risks may be further reduced by subjecting non-cleared security-based swap positions to margin requirements that are economically equivalent to margin requirements imposed by a CCP. However, the transactions carved-out by proposed Rule 3Ca-3(b)(1) remain a route over which systemic risk may enter the United States from abroad.

In addition, the Commission recognizes that, in the case of counterparty risk and central clearing, the location of a transaction is not necessarily a proxy for the U.S. market's exposure to counterparty risk. As a result, proposed Rule 3Ca-3(b)(2) would except transactions conducted within the United States between two non-U.S. persons who are not security-based swap dealers and whose performance under security-based swap transactions are not guaranteed by U.S. persons. The Commission preliminarily believes that such an exception could potentially reduce the aggregate programmatic costs associated with the mandatory clearing requirement to non-U.S. participants that engage in security-based swap transactions within the United States. The Commission recognizes that non-guaranteed non-U.S. persons who are not foreign security-based swap dealers may include financial entities that are systemically important, such as major swap participants or major security-based swap participants, or otherwise play an important role

¹⁶⁴⁹ See Section XV.C, supra.

in the U.S. or a foreign financial system or the derivatives market, such as swap dealers, commodity pools, private funds, or banking entities that are financial holding companies. The failure of such financial entities, although they are non-guaranteed non-U.S. persons, may have spillover effects on the U.S. financial system. Such spillover effects may be mitigated by the capital and margin requirements imposed on swap dealers, major swap participants, or major security-based swap participants, the prudential regulators' supervision under banking regulations, the Employee Retirement Income Security Act of 1974¹⁶⁵⁰ or other applicable law and regulations.

On the other hand, the Commission also preliminarily believes that the proposed application of the mandatory clearing requirement in the cross-border context would still mitigate the U.S. financial system's exposure to systemic risk since the carve-out in proposed Rule 3Ca-3(b)(2) would not apply to participants that are registered security-based swap dealers and those that carry U.S. guarantees on their performance in security-based swap transactions. The Commission has separately considered the potential implications of this exception on competition and efficiency in the security-based swap market.¹⁶⁵¹ Specifically, the Commission preliminarily believes that imposing mandatory clearing on U.S. persons, guaranteed non-U.S. persons and foreign security-based swap dealers when they conduct security-based swaps in the United States will mitigate the counterparty credit risk among trading counterparties and increase confidence in trading security-based swaps, thereby increasing competition in the U.S. security-based swap market.

¹⁶⁵⁰ 28 U.S.C. 1002, et seq.

¹⁶⁵¹ See Section XV.C, supra.

(c) Alternatives

The Commission has considered several alternatives in proposing Rule 3Ca-3. First, commenters proposed an alternative framework in which transactions that are “required to be cleared under foreign law” not be “required to be cleared under [Title VII].”¹⁶⁵² Commenters noted, for example, that conflicts may arise between Title VII and “foreign laws that require swaps to be cleared through local clearinghouses.”¹⁶⁵³ Another comment stated that mandatory clearing “is not necessary to protect U.S. financial institutions, markets or customers” where mandatory clearing requirements are imposed by foreign law because “the risks associated with such transactions reside in the relevant foreign central clearing counterparty.”¹⁶⁵⁴

The Commission preliminarily believes that the commenters’ proposed approach to the mandatory clearing of cross-border security-based swap transactions would not sufficiently address the risk to the U.S. financial system posed by transactions being conducted by non-U.S. persons,¹⁶⁵⁵ and accordingly seeks comment on whether this preliminary assessment is correct. Whether a security-based swap transaction that is cleared under foreign law represents a risk to the U.S. financial system depends upon whether the foreign jurisdiction has a robust legal framework for the regulation of, and maintains adequate regulatory oversight over, CCPs. Although the Commission recognizes that this alternative may reduce costs to counterparties, the Commission cannot at this time assess the quality of regulation of foreign CCPs. Rather than

¹⁶⁵² Davis Polk Letter II at 21.

¹⁶⁵³ Id. at 22 n.92.

¹⁶⁵⁴ Davis Polk Letter I at 8.

¹⁶⁵⁵ The Commission notes that commenters’ concerns regarding a potential conflict arising between foreign law requirements that security-based swaps be cleared locally and Title VII are, in part, also addressed by the registration regime for clearing agencies proposed in Section V.B above.

categorically exclude from the scope of the proposed rule any transaction required to be cleared under foreign law, the Commission preliminarily believes that such transactions should be captured by the rule to further the purposes of Title VII to, among other things, mitigate systemic risk. Determinations regarding substituted compliance and determinations imposing mandatory clearing could address whether and when to include or exclude transactions from the mandatory clearing requirement based on the particular characteristics of the foreign regulatory regime, counterparties, or swap instruments in question.

Second, the Commission could have proposed to apply the mandatory clearing requirement in the same way as the CFTC's proposed interpretive guidance. The CFTC would apply the mandatory clearing requirement to a transaction conducted outside the United States between a foreign branch and a non-guaranteed non-U.S. person. Although we recognize that the guarantees provided by U.S. persons remain a conduit for systemic risk to be transmitted to the United States, the Commission preliminarily believes that subjecting such a transaction to mandatory clearing would impede the ability of U.S.-based dealing entities to access foreign markets and potentially promote market fragmentation.

Finally, and in lieu of the proposed rule, the Commission could have proposed Rule 3Ca-3(a) only to apply the mandatory clearing requirement contained in Section 3C(a)(1) of the Exchange Act, without also proposing the carve-out in proposed Rule 3Ca-3(b). The Commission preliminarily believes, however, that proposed Rule 3Ca-3(a), acting alone, does not sufficiently account for the proposed approach's potential effect on competition between security-based swap market participants, as required under Section 3C(b)(4) of the Exchange

Act.¹⁶⁵⁶ As discussed above, market participants seeking to avoid clearing of cross-border security-based swaps may avoid doing business with members of clearing agencies registered with the Commission, U.S. persons who provide guarantees on performance under such swaps, or the foreign branches of U.S. persons, to avoid being subject to the mandatory clearing requirement. This may also create dislocations in the security-based swap market, reducing the anticipated risk-sharing benefits of clearing. As mentioned above, the Commission preliminarily believes that these benefits would come at the cost of increased risk that counterparty failures in foreign jurisdictions generate losses to U.S. financial market participants engaging in uncleared security-based swap transactions under Rule 3Ca-3(b).

(d) Assessment Costs

The assessment costs associated with proposed Rule 3Ca-3 would be primarily related to identification of counterparty status and where the transaction was conducted in order to determine whether the mandatory clearing requirement would apply. The same assessment would be performed not only in connection with the proposed application of the mandatory clearing requirement in the cross-border context but also in connection with proposed application of the SDR reporting,¹⁶⁵⁷ real-time reporting,¹⁶⁵⁸ and mandatory trade execution requirements¹⁶⁵⁹ in the cross-border context, and therefore, would be part of overall Title VII compliance costs.

¹⁶⁵⁶ See 15 U.S.C. 78c-3(b)(4) (requiring the Commission, in considering whether to impose a mandatory clearing requirement for security-based swaps, to consider, among other factors, the “effect on competition”).

¹⁶⁵⁷ See proposed Rule 908(a) under the Exchange Act, as discussed in Section VIII.C.1, supra, and Section XV.H.3(a), infra.

¹⁶⁵⁸ See proposed Rule 908(b) under the Exchange Act, as discussed in Section VIII.C.2, supra, and Section XV.H.3(c), infra.

¹⁶⁵⁹ See proposed Rule 3Ch-1 under the Exchange Act, as discussed in Section X.B, supra, and Section XV.G.4, infra.

We preliminarily believe that market participants would request representations from their transaction counterparties to determine the U.S.-person status of their counterparties. In addition, if the transaction is guaranteed by a U.S. person, the guarantee would be part of the trading documentation, and therefore the existence of the guarantee would be a readily ascertainable fact. Similarly, market participants would be able to rely on their counterparty's representation as to whether a transaction is solicited, negotiated or executed by a person within the United States.¹⁶⁶⁰ Therefore, the Commission preliminarily believes that the assessment costs associated with proposed Rule 3Ca-3 should be limited to the costs of establishing a compliance policy and procedure for requesting and collecting representations from trading counterparties and maintaining the representations collected as part of the recordkeeping procedures. The Commission preliminarily believes that such assessment costs would be approximately \$15,160.¹⁶⁶¹ The Commission preliminarily believes that requesting and collecting representations would be part of the standardized transaction process reflected in the policies and procedures regarding security-based swap sales and trading practices and should not result in separate assessment costs.¹⁶⁶²

¹⁶⁶⁰ See proposed Rules 3a71-3(a)(4)(ii) and (a)(5)(ii) under the Exchange Act, as discussed in Section III.B.6, *supra*.

¹⁶⁶¹ This estimate is based on an estimated 40 hours of in-house legal or compliance staff's time to establish a procedure of requesting and collecting representations from trading counterparties, taking into account that such representation may be built into the form of standardized trading documentation. Based upon data from SIFMA's Management & Professional Earnings in the Securities Industry 2012 (modified by the SEC staff to account for an 1800-hour-work year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead), the staff estimates that the average national hourly rate for an in-house attorney is \$379.

¹⁶⁶² There will be ongoing costs associated with processing representations received from counterparties, including additional due diligence and verification to the extent that a counterparty's representation is contrary to or inconsistent with the knowledge of the

We also consider the likelihood that market participants may implement systems to maintain information about counterparty status for purposes of future trading of security-based swaps that are similar to, if not the same as, the systems implemented by market participants for purposes of assessing security-based swap dealer or major security-based swap participant status. As stated above, we estimated that market participants that perceived the need to perform the security-based swap dealer assessment or major security-based swap participant calculations would incur one-time programming costs of 12,870.¹⁶⁶³ Therefore, the Commission estimates the total one-time costs per entity associated with proposed Rule 3Ca-3 could be \$28,030.¹⁶⁶⁴ To the extent that market participants have incurred costs relating to similar or the same assessments with respect to counterparty status and location of the transactions for other Title VII requirements, their assessment costs with respect to proposed Rule 3Ca-3 may be less.

collecting party. The Commission believes that these would be compliance costs encompassed within the programmatic costs associated with substituted compliance.

¹⁶⁶³ This is based on an estimate of the time required for a programmer analyst to modify the software to track the U.S.-person status of a counterparty and to record and classify whether a transaction is a transaction conducted within the United States, including consultation with internal personnel, and an estimate of the time such personnel would require to ensure that these modifications conformed to proposed definitions of U.S. person and transaction conducted within the United States. Using the estimated hourly costs described above, we estimate the costs as follows: (Compliance Attorney at \$310 per hour for 2 hours) + (Compliance Manager at \$269 per hour for 4 hours) + (Programmer Analyst at \$234 per hour for 40 hours) + (Senior Internal Auditor at \$217 per hour for 4 hours) + (Chief Financial Officer at \$473 per hour for 2 hours) = \$12,870. For the source of the estimated per hour costs. See note 1425, supra.

¹⁶⁶⁴ The \$28,030 per entity cost is derived from a \$15,160 cost of establishing a written compliance policy and procedures regarding obtaining counterparty representations plus a \$12,870 one-time programming cost relating to system implementation to maintain counterparties representations and track the counterparty status in the system.

Request for Comment

The costs and benefits of the proposed rule discussed above represent the Commission's preliminary view regarding the mandatory clearing requirement in the cross-border context. The Commission seeks comment on the proposed rule in all aspects. Interested persons are encouraged to provide supporting data and analysis and, when appropriate, suggest modifications to proposed rule text and interpretations. Responses that are supported by data and analysis provide great assistance to the Commission in considering the benefits and costs of proposed requirements, as well as considering the practicality and effectiveness of the proposed application. In addition, the Commission seeks comment on the following specific questions:

- Are there any benefits and costs not discussed herein? If so, please identify, discuss, analyze, and supply relevant data, information, or statistics regarding any such costs or benefits?
- Are the benefits and costs discussed herein accurate? If not, how can the Commission most accurately assess the benefits and costs arising from the mandatory clearing requirement and the proposed rule?
- Are there quantifiable costs associated with either the mandatory clearing requirement generally or the proposed rule specifically that have not been addressed and should be? If so, identify and describe them as thoroughly as possible, using relevant data and statistics where available.
- To what extent, if any, do the benefits and costs change when comparing the application of mandatory clearing to security-based swap transactions occurring within the United States and outside the United States? Is there relevant data not

considered here that would assist the Commission in assessing such potentially disparate benefits and costs? If so, supply the relevant data, information, or statistics.

- To what extent, if any, do the benefits and costs change when considering the application of mandatory clearing of security-based swap transactions to a U.S. person in comparison to a guaranteed non-U.S. person? To a non-guaranteed non-U.S. person? To a foreign branch? To a counterparty that is a security-based swap dealer? Would the benefits and costs differ significantly if we applied mandatory clearing requirements to a person who is a member of a registered clearing agency? Is there relevant data not considered here that would assist the Commission in assessing such disparate costs and benefits? If so, supply the relevant data, information, or statistics.
- (i) The CFTC has proposed to apply the mandatory clearing requirement to all transactions entered into by U.S.-based swap dealers, including foreign branches and transactions entered into by foreign affiliates of U.S. persons or non-U.S.-based swap dealer with U.S. persons or non-U.S. persons guaranteed by U.S. persons, without differentiating where the swap transactions are conducted within the United States or outside the United States. Should the Commission adopt the CFTC's approach to application of the mandatory clearing requirement in the cross-border context from the cost and benefit perspective? What are the cost and benefit considerations associated with taking the CFTC's approach? (ii) The Commission's proposed approach to application of the mandatory clearing requirement differentiates transactions conducted within the United States and transactions conducted outside the United States. Is such differentiation appropriate from the cost and benefit

perspective? Has the Commission appropriately considered the costs and benefits associated with such differentiation? (iii) Are there any other approaches to application of the mandatory clearing requirement that the Commission should consider adopting from a cost and benefit perspective?

- To what extent, if any, should the Commission consider the characteristics of the underlying reference entity in assessing the benefits and costs flowing from the mandatory clearing requirement? Are there any other characteristics of a security-based swap transaction not discussed here that might affect an assessment of the benefits and costs of imposing a mandatory clearing requirement?
- Has the Commission appropriately considered the benefits and costs of the alternative approaches discussed above for application of the mandatory clearing requirement in the cross-border context? In answering this question, consider addressing whether the Commission has appropriately valued the benefits and costs of possible duplicative clearing requirements and whether the Commission has appropriately valued the benefits and costs of creating overlap in the regulatory regimes of the United States and a foreign regulator. Also consider whether the Commission has appropriately valued the benefits and costs of the possible effects on the competitiveness of persons subject to the mandatory clearing requirement and those persons carved out or otherwise excluded from the requirement.

G. The Economic Analysis of Application of Rules Governing Security-Based Swap Trading in the Cross-Border Context

A key goal of the Dodd-Frank Act is to increase the transparency and oversight of the OTC derivatives market by, among other things, bringing trading of security-based swaps onto

regulated markets.¹⁶⁶⁵ Section 763 of the Dodd-Frank Act amends the Exchange Act by adding a mandatory trade execution requirement¹⁶⁶⁶ and various new statutory provisions governing SB SEFs.¹⁶⁶⁷ Specifically, Section 3D(a)(1) of the Exchange Act states that no person may operate a facility for the trading or processing of security-based swaps, unless the facility is registered as a SB SEF or as a national securities exchange under that section.¹⁶⁶⁸ In addition, Section 3C(h)(1) of the Exchange Act requires, with respect to transactions involving security-based swaps subject to the mandatory clearing requirement of Section 3C(a)(1) of the Exchange Act, that counterparties execute such transactions on an exchange or a SB SEF that is registered under Section 3D of the Exchange Act or is exempt from registration under Section 3D(e) of the Exchange Act,¹⁶⁶⁹ subject to the exceptions set forth in Section 3C(h)(2) of the Exchange Act.¹⁶⁷⁰

¹⁶⁶⁵ See Public Law 111-203, preamble.

¹⁶⁶⁶ See Pub. L. No. 111-203, § 763 (adding Section 3C(h) of the Exchange Act).

¹⁶⁶⁷ See Pub. L. No. 111-203, § 763 (adding Sections 3C and 3D of the Exchange Act).

¹⁶⁶⁸ See Pub. L. No. 111-203, § 763(a) (adding Section 3D(a)(1) of the Exchange Act). The Commission views this requirement as applying only to facilities that meet the definition of “security-based swap execution facility” in Section 3(a)(77) under the Exchange Act. See SB SEF Proposing Release, 76 FR at 10949 n.10.

¹⁶⁶⁹ See 15 U.S.C. 78c-3(h)(1). Section 3D(e) of the Exchange Act states that the Commission may exempt, conditionally or unconditionally, a SB SEF from registration under Section 3D if the Commission finds that the facility is subject to comparable, comprehensive supervision and regulation on a consolidated basis by the CFTC. 15 U.S.C. 78c-4(e).

¹⁶⁷⁰ Section 3C(h)(2) provides two exceptions to compliance with the mandatory trade execution requirement: (i) if no exchange or SB SEF makes the security-based swap available to trade; or (ii) for security-based swap transactions subject to the clearing exception under Section 3C(g) of the Exchange Act. See 15 U.S.C. 78c-3(h)(2). Security-based swaps that are not subject to the mandatory trade execution requirement would not have to be traded on a registered SB SEF and could be traded in the OTC market for security-based swaps. See SB SEF Proposing Release, 76 FR at 10949 n.10.

This portion of the economic analysis addresses the programmatic benefits and costs associated with these statutory requirements and their proposed application in the cross-border context. Specifically, this section addresses the programmatic benefits and costs of: (1) the Commission's proposed interpretation of the application of the registration requirements of Section 3D of the Exchange Act to foreign security-based swap markets; (2) the potential availability to foreign security-based swap markets of exemptive relief from the registration requirements; (3) the mandatory trade execution requirement of Section 3C(h) of the Exchange Act; and (4) proposed Rule 3Ch-1 regarding application of the mandatory trade execution requirement in the cross-border context.

1. Programmatic Benefits and Costs of the Proposed Application of the Registration Requirements of Section 3D of the Exchange Act to Foreign Security-Based Swap Markets

As discussed above, the Commission has proposed herein to interpret when the registration requirements of Section 3D of the Exchange Act¹⁶⁷¹ would apply to a foreign security-based swap market.¹⁶⁷² The Commission is endeavoring to draw the appropriate lines for the application of those requirements to foreign security-based swap markets when they act in capacities that meet the definition of "security-based swap execution facility" under the Dodd-Frank Act.¹⁶⁷³ As stated above, not all foreign security-based swap markets would be subject to

¹⁶⁷¹ 15 U.S.C. 78c-4.

¹⁶⁷² See Section VII.B., *supra*. A foreign security-based swap market that would be subject to the registration requirement of Section 3D of the Exchange Act also would be subject to the proposed registration rules for SB SEFs, if adopted. See SB SEF Proposing Release, 76 FR at 10949.

¹⁶⁷³ See Pub. L. No. 111-203, § 761(a) (adding Section 3(a)(77) of the Exchange Act to define "security-based swap execution facility," 15 U.S.C. 78c(a)(77)). Entities that do not meet the definition of SB SEF may nonetheless be required to register in another capacity under the Exchange Act.

the registration requirements of Section 3D of the Exchange Act and the rules proposed thereunder. The Commission preliminarily believes that only those foreign security-based swap markets that engage in certain activities with respect to U.S. persons, or non-U.S. persons located in the United States, would be subject to the registration requirements.¹⁶⁷⁴

The Commission preliminarily believes that the lines the Commission is proposing to draw with respect to the application of Section 3D's registration requirements in the cross border context would result in programmatic benefits for the U.S. security-based swap market as a whole that are intended by Title VII, *i.e.*, increased pre-trade transparency, increased competition, and improved oversight.¹⁶⁷⁵ The Commission also is mindful, however, that certain costs would be associated with our proposal. The Commission's consideration and discussion of the programmatic benefits and costs of the formation and registration of a SB SEF in the SB SEF Proposing Release did not differentiate between domestic and foreign security-based swap markets. The Commission notes, however, that the SB SEF Proposing Release contemplated that foreign security-based swap markets would seek to register as SB SEFs and proposed certain requirements specifically for non-resident¹⁶⁷⁶ persons seeking to register as a SB SEF.¹⁶⁷⁷ The Commission received no comments on the SB SEF Proposing Release indicating that the benefits and costs associated with SB SEF registration would be different for foreign and

¹⁶⁷⁴ See Section VII.B, *supra*, for the non-exhaustive discussion of activities that the Commission preliminarily believes would warrant the application of the SB SEF registration requirements to a foreign security-based swap market.

¹⁶⁷⁵ See SB SEF Proposing Release, 76 FR at 11036-38.

¹⁶⁷⁶ See note 834, *supra* (noting that usage of the term "non-resident," as well as the term "foreign," in connection with a security-based swap market refers to a security-based swap market that is not a U.S. person).

¹⁶⁷⁷ See note 1697, *infra*, and accompanying text.

domestic security-based swap markets.¹⁶⁷⁸ Accordingly, the Commission preliminarily believes that the programmatic benefits and costs associated with a security-based swap market registered with the Commission as a SB SEF and subject to the requirements set forth in Section 3D of the Exchange Act, and the proposed rules and regulations thereunder, would be substantially the same for both a domestic and a foreign security-based swap market.¹⁶⁷⁹

(a) Programmatic Benefits

The Commission preliminarily believes that application of the statutory registration requirements and Regulation SB SEF to foreign security-based swap markets that engage in the activities noted above with respect to U.S. persons, or non-U.S. persons located in the United States,¹⁶⁸⁰ would generate programmatic benefits similar to those described in the SB SEF Proposing Release with respect to the registration and regulation of SB SEFs, *i.e.*, enhanced transparency, competition, and oversight of security-based swaps,¹⁶⁸¹ which are discussed below. The Commission also believes that our proposed application of the statutory registration requirements and Regulation SB SEF to foreign security-based swap markets is appropriately

¹⁶⁷⁸ In the SB SEF Proposing Release, the Commission estimated that as many as 20 security-based swap trading platforms or systems could seek to register with the Commission as SB SEFs. See SB SEF Proposing Release, 76 FR at 11023. No commenter indicated that the Commission's estimate was erroneous.

¹⁶⁷⁹ A more detailed description of the benefits and costs associated with the formation and registration of SB SEFs is set forth in the SB SEF Proposing Release, 76 FR at 11035-48. As set forth in the Request for Comment section below, the Commission invites comment on whether the benefits and costs associated with SB SEF registration would be the same for domestic and foreign security-based swap markets.

¹⁶⁸⁰ See Section VII.B, *supra*.

¹⁶⁸¹ See SB SEF Proposing Release, 76 FR at 11036. One commenter on the SB SEF Proposing Release stated that certain benefits would result from the trading of security-based swaps occurring on SB SEFs, including narrower bid-ask spreads and lower transaction costs as a result of increased competition and pre-trade price transparency. See SDMA Letter I at 8-9 and SDMA Letter II at 2; see also Section XXII, *infra*.

tailored to extend these benefits to the security-based swap activity that is most likely to raise the concerns that Congress intended to address in Title VII.¹⁶⁸² In the Commission's preliminary view, a different application could undermine these goals. By way of example and without limitation, if a foreign security-based swap market could provide proprietary electronic trading screens for the execution or trading of security-based swaps by, or grant membership or participation in the foreign security-based swap market to, U.S. persons, or non-U.S. persons located in the United States, without being required to register under Section 3D, there could be security-based swap trading venues available to U.S. persons, or non-U.S. persons located in the United States, that are not subject to Commission regulation and oversight. The regulatory benefits that the Commission believes Title VII intends to bring to the U.S. security-based swap market would not be fully realized in such a scenario.

Improved Transparency. The trading of security-based swaps on regulated markets, such as SB SEFs, should help bring more transparency to the U.S. marketplace for security-based swaps. Increased pre-trade transparency should help alleviate informational asymmetries that may exist today in the security-based swap market and allow an increased number of market participants to see the trading interest of other market participants prior to submitting trades, which should lead to increased price competition among market participants.¹⁶⁸³ As such, the Commission preliminarily believes that proposed Regulation SB SEF should lead to more

¹⁶⁸² See Section II.B., *supra*.

¹⁶⁸³ See SB SEF Proposing Release, 76 FR at 11036; see also Ananth Madhavan, "Market Microstructure: A Practitioner's Guide," *Fin. Analysts J.*, Vol. 58 (2002), at 38 (nondisclosure of pre-trade price information benefits dealers by reducing price competition).

efficient pricing in the security-based swap market,¹⁶⁸⁴ but is mindful that, under certain circumstances, pre-trade transparency also could discourage the provision of liquidity by some market participants, as discussed in more detail below.¹⁶⁸⁵

Improved Competition. The Commission preliminarily believes that registration and regulation of SB SEFs, as described in the SB SEF Proposing Release, also would foster greater competition in the trading of security-based swaps by increasing access to security-based swap trading venues.¹⁶⁸⁶ The proposed SB SEF rules would require SB SEFs to permit all eligible persons that meet the requirements for becoming participants, as set forth in the SB SEF's rules, to become participants in the SB SEF.¹⁶⁸⁷ The proposed SB SEF rules would require each SB SEF to establish fair, objective and not unreasonably discriminatory standards for granting impartial access to trading on the SB SEF.¹⁶⁸⁸ These proposed requirements are designed to provide market participants with impartial access.¹⁶⁸⁹ Having impartial access should, in turn,

¹⁶⁸⁴ See SB SEF Proposing Release, 76 FR at 11036; see also Ekkehart Boehmer, et al., "Lifting the Veil: An Analysis of Pre-trade Transparency at the NYSE," J. of Fin., Vol. LX (2005) (greater pre-trade price transparency leads to more efficient pricing).

¹⁶⁸⁵ See SB SEF Proposing Release, 76 FR at 11036; see also Section XV.G.1(b), *infra*; see also Ananth Madhavan, et al., "Should Securities Markets Be Transparent?" J. of Fin. Markets, Vol. 8 (2005) (finding that an increase in pre-trade price transparency leads to lower liquidity and higher execution costs, because limit-order traders are reluctant to submit orders given that their orders essentially represent free options to other traders).

¹⁶⁸⁶ See SB SEF Proposing Release, 76 FR at 11037-38.

¹⁶⁸⁷ *Id.* at 11037. Proposed Rule 809(a) in Regulation SB SEF would require SB SEFs to permit a person to become a participant in the SB SEF only if such person is registered with the Commission as a security-based swap dealer, major security-based swap participant, or broker (as defined in Section 3(a)(4) of the Exchange Act, 15 U.S.C. 78c(a)(4)), or if such person is an eligible contract participant (as defined in Section 3(a)(65) of the Exchange Act, 15 U.S.C. 78c(a)(65)).

¹⁶⁸⁸ See SB SEF Proposing Release, 76 FR at 11037.

¹⁶⁸⁹ *Id.*; see also Section 3D(d)(2)(B)(i) of the Exchange Act, 15 U.S.C. 78c-4(d)(2)(B)(i).

promote greater participation by liquidity providers and increased competition on each SB SEF.¹⁶⁹⁰ Impartial access requirements also should help guard against the potential for certain participants in a SB SEF (who also might be owners of the SB SEF) to seek to limit the number of other participants in the SB SEF as a way to reduce competition and increase their own profits.¹⁶⁹¹

Improved Oversight. As set forth in the SB SEF Proposing Release, the proposed registration rules for SB SEFs would incorporate the requirement under the Dodd-Frank Act that a SB SEF, to be registered and maintain registration, must comply with the 14 Core Principles governing SB SEFs in Section 3D(d) of the Exchange Act¹⁶⁹² (“Core Principles”) and any requirement that the Commission may impose by rule or regulation.¹⁶⁹³ The proposed SB SEF rules and proposed Form SB SEF are intended to implement the statutory registration requirements and assist the Commission in overseeing and regulating the security-based swap market.¹⁶⁹⁴ The information to be provided on proposed Form SB SEF (and the exhibits thereto) is designed to enable the Commission to assess whether an applicant seeking to become a registered SB SEF has the capacity and the means to perform the duties of a SB SEF and to

¹⁶⁹⁰ See SB SEF Proposing Release, 76 FR at 11037; see also Section XV.C.3, *supra* (stating that in markets with impartial access, security-based swaps would be available to more participants, and that fair and equal access to security-based swaps not only promotes competition, but also encourages participants to express their true valuations for security-based swaps and lowers search costs for participants deciding to enter or exit a security-based swap position).

¹⁶⁹¹ See SB SEF Proposing Release, 76 FR at 11037.

¹⁶⁹² 15 U.S.C. 78c-4(d).

¹⁶⁹³ See SB SEF Proposing Release, 76 FR at 10949.

¹⁶⁹⁴ See *id.* at 10949-50.

comply with the Core Principles and other requirements governing registered SB SEFs.¹⁶⁹⁵ In addition, the amendments, supplemental information and notices that the Commission proposed to require registered SB SEFs to file pursuant to Rules 802, 803, and 804 of proposed Regulation SB SEF are designed to further the ability of the Commission to efficiently monitor SB SEFs' compliance with the provisions of the Exchange Act and to oversee the marketplace for security-based swaps and, specifically, the trading of security-based swaps on SB SEFs.¹⁶⁹⁶ Moreover, as discussed in the SB SEF Proposing Release, any non-resident persons seeking to register as a SB SEF must comply with certain requirements, including that such non-resident persons provide assurances that they are legally permitted to provide the Commission with prompt access to their books and records and to be subject to inspection and examination by the Commission.¹⁶⁹⁷

Registration and regulation of SB SEFs would require SB SEFs to maintain an audit trail and surveillance systems to monitor trading.¹⁶⁹⁸ Proposed Regulation SB SEF also would require comprehensive reporting and recordkeeping by SB SEFs.¹⁶⁹⁹ These requirements would put in place a structure that would provide the SB SEF with information to better enable it to

¹⁶⁹⁵ See proposed Form SB SEF under the Exchange Act; see also SB SEF Proposing Release, 76 FR at 11004-08.

¹⁶⁹⁶ See proposed Rules 802-804 under the Exchange Act; see also SB SEF Proposing Release, 76 FR at 11002-04.

¹⁶⁹⁷ See proposed Rule 801(f) under the Exchange Act; see also SB SEF Proposing Release, 76 FR at 11001.

¹⁶⁹⁸ See proposed Rule 818(c) under the Exchange Act, which would require each SB SEF to keep audit trail records relating to all orders, requests for quotations, responses, quotations, other trading interest, and transactions that are received by, originated on, or executed on, the SB SEF; and proposed Rules 811(j), 813(a)(2) and 813(b) under the Exchange Act, which would require each SB SEF to electronically surveil its market and to maintain an automated surveillance system; see also SB SEF Proposing Release, 76 FR at 11037-38.

¹⁶⁹⁹ See proposed Rule 818 under the Exchange Act; see also SB SEF Proposing Release, 76 FR at 11037-38.

oversee trading on its market by its participants, including detecting and deterring fraudulent and manipulative acts.¹⁷⁰⁰ The proposed rules for SB SEFs also would provide the Commission with greater access to information on the trading of security-based swaps to support its responsibilities to oversee the security-based swap market.¹⁷⁰¹ Further, the proposed rules for SB SEFs would enable the Commission to share that information with other federal financial regulators, including in instances of broad market turmoil.¹⁷⁰²

Improved regulatory oversight could encourage participation in the U.S. security-based swap market by investors who could benefit from such participation but currently choose to avoid transacting in that market in part because the market is opaque and largely has not been subject to oversight by U.S. regulatory authorities. Indeed, to the extent that market participants consider a well-regulated market as significant to their investment decisions, trust, which is a component of investor confidence, is improved and market participants may be more willing to participate in the U.S. security-based swap market.¹⁷⁰³

(b) Programmatic Costs

Although the Commission believes that application of the registration requirements of Section 3D and proposed Regulation SB SEF to foreign security-based swap markets would result in significant benefits to the U.S. security-based swap market, the Commission recognizes that foreign security-based swap markets also would incur significant costs to comply with the proposed registration requirements for foreign security-based swap markets similar to those that

¹⁷⁰⁰ See SB SEF Proposing Release, 76 FR at 11037.

¹⁷⁰¹ Id.

¹⁷⁰² Id.

¹⁷⁰³ See id. at 11037.

domestic SB SEFs would incur, as discussed in the Regulation SB SEF proposal.¹⁷⁰⁴ These costs are summarized below.

SB SEF Formation. According to industry sources consulted by Commission staff in connection with the issuance of the SB SEF Proposing Release, the monetary cost of forming a SB SEF is estimated to range from approximately \$15 million to \$20 million per SB SEF for the first year of operation, if an entity were to establish a SB SEF without the benefit of modifying an already existing trading system.¹⁷⁰⁵ The industry sources consulted by Commission staff estimated at that time that, for the SB SEF's first year of operation, the cost of software and product development would range from approximately \$6.5 million to \$10.5 million per SB SEF.¹⁷⁰⁶ The technological costs would be expected to decline considerably during the second and subsequent years of operation, with an estimated range of \$3 million to \$4 million per year per SB SEF.¹⁷⁰⁷

¹⁷⁰⁴ See id. 11040-48. A detailed breakdown of the cost estimates associated with all aspects of SB SEF formation and compliance with the rules proposed under proposed Regulation SB SEF are contained in the SB SEF Proposing Release. See id. Moreover, the Commission notes that it has received comment letters on those cost estimates. See MarketAxess Letter and UBS Letter. One commenter remarked on the cost estimates in the SB SEF Proposing Release for many of the individual aspects of SB SEF formation, noting that, in its view, some cost estimates were high and others were low. See MarketAxess Letter at 15-17. The commenter stated that generally the estimates in the SB SEF Proposing Release were realistic and that accurate estimates of the true expected costs of establishing and operating a SB SEF and the hourly rates relied upon for the estimates were broadly consistent with industry standards. Id. Another commenter urged the Commission to consider the impact of the Regulation SB SEF proposal on broker-dealers and the potential costs that could result. See UBS Letter at 3. Neither of these commenters indicated that the costs associated with SB SEF formation and registration would be different for foreign security-based swap markets as compared to domestic security-based swap markets.

¹⁷⁰⁵ See SB SEF Proposing Release, 76 FR at 11041.

¹⁷⁰⁶ Id.

¹⁷⁰⁷ Id.

For entities that currently own and/or operate platforms for the trading of security-based swaps, the cost of forming a SB SEF would be more incremental, given that these entities already have viable technology that could be modified to comply with the requirements that the Commission may impose for SB SEFs.¹⁷⁰⁸ According to industry sources consulted by Commission staff in connection with the issuance of the SB SEF Proposing Release, the incremental costs of enhancing a trading platform to be compatible with any SB SEF requirements ultimately established by the Commission would range from as low as \$50,000 to as much as \$3 million per SB SEF, depending on the enhancements needed to make a particular platform compatible with the final Commission rules governing SB SEFs.¹⁷⁰⁹ As noted in the SB SEF Proposing Release, the annual ongoing cost of maintaining the technology and any improvements is estimated to be in the range of \$2 million to \$4 million.¹⁷¹⁰

In the SB SEF Proposing Release, the Commission preliminarily estimated that the cost for an applicant to file Form SB SEF, including all exhibits thereto, would be approximately \$675,297 per SB SEF.¹⁷¹¹

Complying with Core Principles. As is also discussed in the SB SEF Proposing Release, the regulatory requirement that SB SEFs comply with the statutory Core Principles would increase the ongoing regulatory obligations of SB SEFs with respect to their operations and

¹⁷⁰⁸ Id. Several commenters on the SB SEF Proposing Release that currently operate swap trading facilities have indicated their intention to register as SB SEFs. See, e.g., Bloomberg Letter; GFI Letter; MarketAxess Letter; and Tradeweb Letter.

¹⁷⁰⁹ See SB SEF Proposing Release, 76 FR at 11041.

¹⁷¹⁰ Id.

¹⁷¹¹ Id. A more detailed breakdown of the cost estimates associated with each exhibit to Form SB SEF, as well as with registration withdrawal and supplementation, is contained in the SB SEF Proposing Release. See SB SEF Proposing Release, 76 FR at 11041-43.

oversight.¹⁷¹² Industry sources consulted by Commission staff in connection with the issuance of the SB SEF Proposing Release estimated that the cost to a SB SEF to comply with the rules relating to surveillance and oversight that they expect the Commission to propose would be in the range of \$1 million to \$3 million annually, with initial costs likely to be at the higher end of that range, since a SB SEF would need to create the technology necessary to monitor and surveil its market participants, as well as establish a rulebook that reflects the Core Principles and related rules.¹⁷¹³ The ongoing annual compliance costs estimated by those same industry sources would be approximately \$1 million, which would include the salary of a Chief Compliance Officer and at least two junior compliance personnel, who are expected to be attorneys.¹⁷¹⁴

Unquantifiable Costs. The Commission also has considered some costs relating to registered SB SEFs that are difficult to quantify precisely.¹⁷¹⁵ Security-based swaps traded on registered SB SEFs may be perceived to be subject to increased costs, monetary and otherwise. For example, some industry participants expressed their belief that any proposed pre-trade transparency requirement would force market participants to reveal valuable information regarding their trading interest more broadly than they believed would be economically prudent, which in their view could discourage participation in the security-based swap market.¹⁷¹⁶ There are perceived costs associated with frontrunning, if customers or dealers were required to show

¹⁷¹² See SB SEF Proposing Release, 76 FR at 11041.

¹⁷¹³ Id.

¹⁷¹⁴ Id.

¹⁷¹⁵ These unquantifiable costs are discussed more fully in the SB SEF Proposing Release. See SB SEF Proposing Release, 76 FR at 11040.

¹⁷¹⁶ Id. Several commenters on the SB SEF Proposing Release expressed concerns about pre-trade transparency requirements in the context of block trades. See ABC Letter at 2, 4-5; MFA Letter III at 7; ISDA SIFMA Letter II at 7; SIFMA AMG Letter II at 4-5; Blackrock Letter at 8; Cleary Letter III at 20; CME Letter at 3-4; Phoenix Letter at 3-4.

their trading interest before a trade is executed.¹⁷¹⁷ These potential costs of pre-trade transparency could change market participants' trading strategies, which could result in their working more orders or finding ways to hide their interest.¹⁷¹⁸

If market participants viewed the Commission's proposed Regulation SB SEF as too burdensome with respect to pre-trade transparency, security-based swap dealers could be less willing to supply liquidity for security-based swaps that trade on SB SEFs, thus reducing liquidity and competition.¹⁷¹⁹ On the other hand, if the requirement with respect to pre-trade transparency were too loose, the result could be that there would be no substantive change from the status quo, and thus no potential reduction in asymmetric information, increase in price competition, or improvement in executions, beyond the changes in response to the other requirements of the Dodd-Frank Act.¹⁷²⁰

The import of this concern depends on the degree of pre-trade transparency required and the characteristics of the trading market.¹⁷²¹ The proposed rules for SB SEFs are intended to provide for greater pre-trade transparency than currently exists without requiring pre-trade transparency in a manner that would cause participants to avoid providing liquidity on SB SEFs.¹⁷²²

An additional unquantifiable cost could result if foreign security-based swap markets perceive the Commission's proposed requirements for SB SEFs as too burdensome or

¹⁷¹⁷ See SB SEF Proposing Release, 76 FR at 11040.

¹⁷¹⁸ Id.

¹⁷¹⁹ Id.

¹⁷²⁰ Id.

¹⁷²¹ Id.

¹⁷²² Id.

detrimental to their security-based swap business. A foreign security-based swap market that has such a view and that currently operates in a manner that would cause it to be subject to the SB SEF registration requirements could decide to restructure its security-based swap business such that it would not be subject to the SB SEF registration requirements. This result could have several potential negative implications for participants in the U.S. financial system such as, among other things, fewer registered venues on which security-based swaps could be executed, less competition between the remaining SB SEFs, and thus potentially higher costs for such executions. If restructuring raises trading costs in the domestic security-based swap market, liquidity could flow away from SB SEFs and U.S. participants could find fewer trading opportunities and potentially decreased liquidity in the domestic security-based swap market.

(c) Alternatives

The Commission could have proposed a different interpretation regarding registration of foreign security-based swap markets. For example, the Commission could have interpreted Section 3D of the Exchange Act broadly to apply the registration requirement to a foreign security-based swap market that meets the definition of “security-based swap execution facility,”¹⁷²³ regardless of whether such foreign security-based swap market has engaged in any of the activities, discussed above, with respect to U.S. persons, or non-U.S. persons located in the United States.¹⁷²⁴ The Commission preliminarily believes that, if a foreign security-based swap market is not engaging in such activities with respect to U.S. persons, or non-U.S. persons located in the United States, then it would not trigger the registration requirements under Section 3D of the Exchange Act.

¹⁷²³ See Section 3(a)(77) of the Exchange Act, 15 U.S.C. 78c(a)(77).

¹⁷²⁴ See Section VII.B, *supra*.

In addition, the Commission could have interpreted Section 3D of the Exchange Act more narrowly than proposed herein, such that, for example, the registration requirement would not apply to a foreign security-based swap market even if it meets the definition of “security-based swap execution facility” and provides U.S. persons, or non-U.S. persons located in the United States, with proprietary electronic trading screens or similar devices for executing or trading security-based swaps on its market. The Commission preliminarily believes that such a narrow interpretation would not accommodate the evolving technological innovation of electronic trading and the availability of global access to electronic trading platforms, and therefore could result in U.S. persons, or non-U.S. persons located in the United States, having the ability to directly execute or trade security-based swaps on a foreign security-based swap market that is not subject to the SB SEF registration requirements. As discussed above in this section, the Commission preliminarily believes that this, in turn, could result in the intended programmatic benefits of the SB SEF registration requirements, *i.e.*, increased pre-trade transparency, increased competition, and improved oversight, not being extended to all of the security-based swap activity that the Commission believes is most likely to raise the concerns that Congress intended to address in Title VII.¹⁷²⁵

2. Programmatic Benefits and Costs of the Potential Availability of Exemptive Relief to Foreign Security-Based Swap Markets

As discussed above, the Commission may consider exempting a foreign security-based swap market from registration as a SB SEF under Section 3D of the Exchange Act if the foreign security-based swap market is subject to comparable, comprehensive supervision and regulation

¹⁷²⁵ See Section II.B, *supra*.

by the appropriate governmental authorities in its home country.¹⁷²⁶ Any foreign security-based swap market granted such an exemption would be subject to supervision and regulation as a registered security-based swap market in its home jurisdiction that the Commission has determined to be comparable to the supervision and regulation of registered SB SEFs. As a result, the Commission preliminarily believes that the programmatic benefits and costs, as discussed above,¹⁷²⁷ that would result from subjecting registered SB SEFs to the Commission's supervision and regulation also would be realized by any exempted foreign security-based swap market because of the comparable supervision and regulation of that foreign market by its home jurisdiction.

While a number of foreign jurisdictions are in the process of developing standards for the regulation of security-based swaps and the security-based swap market, few foreign jurisdictions have adopted such standards as yet.¹⁷²⁸ As a result, at this time, the Commission believes that it does not have a sufficient basis to provide an estimate as to how many foreign security-based swap markets would be required to register as SB SEFs and potentially be eligible for an exemption from that requirement because the Commission currently has no basis to determine whether such foreign security-based swap markets would be subject to comparable, comprehensive supervision and regulation in their home jurisdictions.

Nevertheless, the Commission believes that certain additional programmatic benefits and costs could result specifically from an exempted foreign security-based swap market not having to register as a SB SEF under Section 3D of the Exchange Act while continuing to serve U.S.

¹⁷²⁶ See Section VII.C, *supra*.

¹⁷²⁷ See Section XV.G.1, *supra*.

¹⁷²⁸ See Section VII.C, *supra*.

security-based swap market participants. These additional benefits and costs are discussed below.

(a) Programmatic Benefits

Facilitating Cross Border Security-Based Swap Transactions. As discussed above,¹⁷²⁹ following the publication of the SB SEF Proposing Release, the Commission received comments from the public expressing concerns about the requirements and implications of Section 3D of the Exchange Act and the Commission's proposed rules governing SB SEFs for foreign-security-based swap markets and the global security-based swap market generally.¹⁷³⁰ Several commenters urged the Commission to work with foreign regulators to develop harmonized rules for the trading of security-based swaps.¹⁷³¹ As noted above, the Commission currently is in discussions with its foreign counterparts to explore steps toward such harmonization.¹⁷³² The Commission is proposing, as a means to facilitate cross-border security-based swap transactions, that it may consider exempting a foreign security-based swap market from the registration requirements under Section 3D in the circumstances described above.¹⁷³³ The Commission preliminarily believes that the potential availability of such an exemption should provide foreign security-based swap markets operating in the United States with appropriate flexibility with respect to SB SEF registration when they are subject to comparable, comprehensive supervision

¹⁷²⁹ Id.

¹⁷³⁰ See, e.g., Thomson Letter at 3-4; Blackrock Letter at 12-13; Bloomberg Letter at 6-7; TradeWeb Letter at 2; ISDA SIFMA Letter II at 2; WMBAA Letter at 10-11; Cleary Letter III at 4; and Cleary Letter IV at 5, 13; see also Section XXII., infra.

¹⁷³¹ See Thomson Letter; BlackRock Letter; TradeWeb Letter; ISDA SIFMA Letter II; and WMBAA Letter; see also Section XXI, infra.

¹⁷³² See Section VII.C, supra.

¹⁷³³ Id.

and regulation in their home markets. In addition, the Commission preliminarily believes that the programmatic benefits associated with registration and other requirements for SB SEFs under Section 3D of the Exchange Act, and rules and regulations thereunder, would not be diminished as a result of the proposed exemptive relief. Therefore, those U.S. financial system participants that opt to trade on any exempted foreign security-based swap market operating in the United States would remain adequately protected because such an exempted foreign market would be subject to oversight and regulation in a manner comparable to the Commission's proposed requirements for SB SEFs.

Reduction in Programmatic Costs Associated with Registration. The Commission preliminarily believes that the availability of an exemption from SB SEF registration requirements based on comparable, comprehensive supervision and regulation in the foreign security-based swap market's home country could serve to reduce any potentially duplicative or conflicting regulatory burdens faced by security-based swap markets that operate on a cross-border basis and that otherwise would be required to register in both their home country and the United States. Therefore, to the extent that such foreign security-based swap markets would qualify for and pursue such an exemption, there could be a reduction in the programmatic costs that those foreign security-based swap markets otherwise would incur.

One commenter on the SB SEF Proposing Release stated that harmonized rules for trading security-based swaps would reduce potentially duplicative or conflicting regulatory burdens.¹⁷³⁴ As noted above, few foreign jurisdictions have enacted legislation or adopted standards for the regulation of security-based swaps markets, although a number of foreign

¹⁷³⁴ See Bloomberg Letter.

jurisdictions are in the process of developing such standards.¹⁷³⁵ As the process of developing legislation or regulation regarding security-based swaps continues in other jurisdictions, the Commission believes that the availability of an exemption from the U.S. registration requirements is a reasonably designed measure to address the potential for conflicting or unnecessarily duplicative regulatory burdens that could arise from requiring dual registration in the United States and in a comparably regulated foreign jurisdiction.

For example, a foreign security-based swap market that is registered in a foreign jurisdiction and that provides U.S. persons, or non-U.S. persons located in the United States, the ability to execute or trade security-based swaps, or that facilitates the execution or trading of security-based swaps, on its market could be required to incur the cost of full registration twice—once to register in the foreign jurisdiction and once more to register as a SB SEF in the United States—if there was no possibility of obtaining an exemption from the U.S. registration requirements. As a further example, such a foreign security-based swap market, as a result of its registration as a SB SEF, would be required to establish rules governing the operation of its trading facility, including rules specifying trading procedures to be used in entering and executing orders traded or posted on the facility.¹⁷³⁶ A conflict could arise if, for example, the U.S. requirements for SB SEFs require the foreign market's trading rules to allow trading interest in security-based swaps to be expressed or responded to in a manner that is different from, and that makes it impossible also to comply with, the foreign jurisdiction's requirements regarding trading rules. These examples are not meant to be exhaustive, but rather to be illustrative of scenarios involving potentially conflicting or unnecessarily burdensome regulation that foreign

¹⁷³⁵ See Section VII.C, *supra*.

¹⁷³⁶ See SB SEF Proposing Release, 76 FR at 10967, 10971-73.

security-based swap markets could face, absent an exemption. The Commission preliminarily believes that the availability of an exemption from registration as a SB SEF should help mitigate the potential impact of such scenarios. At the same time, as discussed above, the Commission believes that granting such an exemption to a foreign security-based swap market would not reduce the programmatic benefits achieved by requiring security-based swap markets to register as a SB SEF because any exempted foreign market would be comparably supervised and regulated by its home country.

As stated above, few jurisdictions have adopted standards for the regulation of security-based swap markets and therefore the Commission does not have a sufficient basis to provide an estimate as to how many foreign security-based swap markets would request, and potentially receive, an exemption from registration.¹⁷³⁷ The Commission preliminarily believes that the estimate in the SB SEF Proposing Release of programmatic costs associated with registration as a SB SEF would apply equivalently to a foreign security-based swap market that is subject to Section 3D's registration requirement.

Any potential exemption from registration (even though the foreign security-based swap market would incur costs associated with compliance with the comparable regulation in its home country), could result in minimizing the burden of the programmatic costs associated with registration as a SB SEF, and so these programmatic costs constitute an upper bound for the potential cost savings from any such exemption. However, the Commission is not able to estimate the aggregate reduction in programmatic costs that would be associated with reliance on any proposed exemption by foreign security-based swap markets.

¹⁷³⁷ See Section VII.C, supra.

(b) Programmatic Costs

Compliance with Potential Conditions of Exemption. As discussed above, any grant of an exemption from the SB SEF registration requirements may be subject to certain appropriate conditions, which could include, but not be limited to, requiring the exempted foreign security-based swap market to provide the Commission with prompt access to its books and records, including, for example, data related to orders, quotes and transactions, as well as providing an opinion of counsel that, as a matter of law, it is able to provide such access.¹⁷³⁸ The Commission also could require that the foreign security-based swap market appoint an agent for service of process in the United States.¹⁷³⁹

The Commission preliminarily believes that the costs associated with a commitment by the foreign security-based swap market to provide the Commission with access to books and records would be part of the Commission's \$1 million to \$3 million estimate of the annual cost to a SB SEF to comply with the Commission's proposed rules relating to surveillance and oversight,¹⁷⁴⁰ but would be difficult to quantify separately at this time. The foreign security-

¹⁷³⁸ Id.

¹⁷³⁹ Id. These potential conditions of an exemption from SB SEF registration requirements for a foreign security-based swap market – granting the Commission access to its books and records, providing an opinion of counsel that such access can be granted under the foreign jurisdiction's law, and appointing a process agent in the United States – are proposed requirements of SB SEF registration. See SB SEF Proposing Release, 76 FR at 11000. Thus, a foreign security-based swap market that is required to register as a SB SEF would incur the costs associated with complying with these requirements, which costs are included in the estimate provided in Section XV.G.1(b) above of the cost for an applicant to file Form SB SEF, including all exhibits thereto. See id. at 11016-17, 11041-42. A foreign security-based swap market that is granted an exemption from SB SEF registration requirements also could incur the costs of complying with these requirements to the extent that the Commission imposes them as conditions to the exemption.

¹⁷⁴⁰ See note 1713 and accompanying text, supra,; see also SB SEF Proposing Release, 76 FR at 11041.

based swap market would maintain books and records in the ordinary course of its business and in conformance with the requirements of its appropriate regulatory authority.¹⁷⁴¹ If, after issuance of any such exemptive relief, the Commission considered it necessary to have access to the foreign security-based swap market's books and records, there would be costs to the foreign security-based swap market in granting such access, for example, in copying the requested books and records and supplying them to Commission staff. However, the circumstances that would prompt any Commission request for access to the foreign security-based swap market's books and records and the exact scope of any such request would not be known at the time the Commission were to grant an exemption from the requirements of Section 3D of the Exchange Act.

The Commission believes that the costs for a foreign security-based swap market to appoint an agent for service of process in the United States would be minimal in circumstances in which the foreign security-based swap market has a subsidiary or staff in the United States that is capable of receiving service of process and acting as the foreign market's appointed agent. In circumstances in which a foreign security-based swap market must appoint a third party as its process agent, Commission staff estimates, based on an industry source that provides process agent services, that the cost to do so would be approximately \$400 for the first year and approximately \$300 annually thereafter.

The Commission also believes that an exempted foreign market could incur costs in complying with any additional conditions that accompany the grant of the exemption, but the scope of these conditions and the costs associated with them would depend on the specific

¹⁷⁴¹ Prior to the issuance of any exemption the foreign security-based swap market could, however, need to incur the cost of obtaining an opinion of counsel letter stating that it is able to provide access to its books and records. See Section XV.G.2(d), *infra*.

circumstances for which the exemption is granted and could vary from foreign jurisdiction to foreign jurisdiction. As a result, the Commission cannot provide an estimated dollar value of the costs that would be associated with such additional conditions at this time.

(c) Alternatives

Harmonization with Foreign Counterparts. Apart from interpreting Section 3D of the Exchange Act to apply to foreign security-based swap markets that engage in certain activities with respect to U.S. persons or non-U.S. persons located in the United States,¹⁷⁴² and potentially providing an exemption from the SB SEF registration requirements for qualifying foreign security-based swap markets that are covered by Section 3D,¹⁷⁴³ the Commission could adopt the approach of harmonizing our rules with the rules of foreign jurisdictions. As noted above, few foreign jurisdictions have enacted legislation or adopted standards for the regulation of security-based swaps markets, although a number of foreign jurisdictions are in the process of developing such standards. Accordingly, the Commission preliminarily believes that our proposal to consider exemptive relief from SB SEF registration for foreign security-based swap markets that are subject to comparable, comprehensive supervision and regulation is a reasonable measure at this time that acknowledges the cross-border nature of the security-based swap market.

Not Consider Exemptive Relief. The Commission could have determined not to consider making exemptive relief from Section 3D's registration requirements available. In such a scenario, a foreign security-based swap market subject to Section 3D's registration requirements would be required to register as a SB SEF—and incur the costs attendant to such registration—even if it is subject to comparable, comprehensive supervision and regulation in its home

¹⁷⁴² See Section VII.B, supra.

¹⁷⁴³ See Section VII.C, supra.

jurisdiction. Moreover, without the availability of an exemption, the Commission believes that there would be a greater potential for such a dually-registered foreign security-based swap market to face duplicative or conflicting regulatory burdens. The Commission preliminarily believes that considering exemptive relief is a more cost-effective and, for the reasons stated above, reasonable measure given the cross-border nature of the security-based swap market.

(d) Assessment Costs

A foreign security-based swap market would incur costs in submitting a request or application for an exemption from the SB SEF registration requirement. The Commission estimates that the costs of submitting such a request or application would be approximately \$110,320.¹⁷⁴⁴ The use of internal counsel in lieu of outside counsel would reduce this estimate.

¹⁷⁴⁴ The Commission preliminarily believes that the costs of submitting a request or application for the proposed exemption would be similar to the costs associated with submitting a request for a substituted compliance determination, *i.e.*, \$110,320. See Section XV.I.3, *infra*. This estimate is based on information regarding the average costs associated with preparing and submitting an application to the Commission for a Commission order for exemptive relief under Section 36 of the Exchange Act in accordance with the procedures set forth in 17 CFR § 240.0-12. The Commission estimates that preparation of the request would require approximately 80 hours of in-house counsel time and 200 hours of outside counsel time. Such estimate takes into account the time required to prepare supporting documents necessary for the Commission to make a substituted compliance determination, including, without limitation, information regarding applicable requirements established by the foreign financial regulatory authority or authorities, as well as the methods used by the foreign financial regulatory authority or authorities to monitor compliance with these rules. Based upon data from SIFMA's Management & Professional Earnings in the Securities Industry 2012 (modified by the SEC staff to account for an 1800-hour-work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead), the staff estimates that the average national hourly rate for an in-house attorney is \$379. The Commission estimates the costs for outside legal services to be \$400 per hour. Accordingly, the Commission estimates the cost to be \$110,320 (\$30,320 (based on 80 hours of in-house counsel time * \$379) + \$80,000 (based on 200 hours of outside counsel time * \$400)) to submit a request for a substituted compliance determination.

An additional assessment cost that a foreign security-based swap market could incur in connection with submitting such an exemption request or application would be obtaining an opinion of counsel letter stating that the foreign security-based swap market is able to give access to its books and records to the Commission, if the Commission were to include such a condition in any exemptive relief. The Commission estimates that the cost associated with obtaining such a letter would be approximately \$25,000.¹⁷⁴⁵

Request for Comment

- Would the benefits and costs associated with becoming a SB SEF be the same for domestic and foreign security-based swap markets? For example, would the costs of implementing the systems and other necessary technology to operate as a SB SEF be different for foreign security-based swap markets? To the extent the benefits or costs of SB SEF registration would be different for foreign security-based swap markets as

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This estimate is based on prior Commission estimates of the cost of obtaining an opinion of counsel, and assumes that foreign security-based swap dealers would seek outside legal counsel to prepare the letter at an hourly rate of \$400. See SB SEF Proposing Release, 76 FR at 11025, 11042; Registration Proposing Release, 76 FR at 65811; see also note 1744, supra. In the SB SEF Proposing Release, the Commission preliminarily estimated that the average initial paperwork cost for a non-resident SB SEF to provide an opinion of counsel that the SB SEF can, as a matter of law, provide the Commission with access to its books and records and submit to onsite inspection and examination by representatives of the Commission would be one hour and \$900 in outside legal costs per non-resident SB SEF. See SB SEF Proposing Release, 76 FR at 11025, 11042. In the Registration Proposing Release, the Commission stated that, upon further reflection, it believed that a non-resident security-based swap entity would incur, on average, approximately \$25,000 in outside legal costs to obtain an opinion of counsel that a non-resident security-based swap entity could provide the Commission with access to its books and records and submit to onsite inspection and examination by the Commission. See Registration Proposing Release, 76 FR at 65811. The Commission preliminarily believes that an estimate of \$25,000 may be the more appropriate estimate of the cost that a foreign security-based swap market would incur in obtaining an opinion of counsel from outside counsel with respect to the ability to grant the Commission access to books and records given the research and legal analysis that the Commission believes would be involved in the preparation of the opinion.

compared to domestic markets, please identify, discuss, analyze, and supply relevant data, information, or statistics regarding any such different benefits or costs for foreign security-based swap markets.

- Would the costs associated with developing the other aspects of the infrastructure necessary for SB SEFs be different for foreign security-based swap markets? If so, please describe such differences and quantify them to the extent possible.
- Would the non-infrastructure costs associated with forming and operating a SB SEF be different for foreign security-based swap markets? If so, please describe such differences and quantify them.
- Are there any programmatic benefits and costs associated with the SB SEF registration requirements or the proposed availability of an exemption from those requirements that are not discussed herein? If so, please identify, discuss, analyze, and supply relevant data, information, or statistics regarding any such costs or benefits.
- Are the programmatic benefits and costs associated with the SB SEF registration requirements and the proposed availability of an exemption from those requirements that are discussed herein accurate? If not, how can the Commission more accurately estimate these costs?
- Do the benefits of the proposed availability of an exemption from the SB SEF registration requirements justify the costs? Are there quantifiable programmatic costs associated with the proposed availability of an exemption from those requirements that should be addressed? If so, please identify them. Are there any additional assessment costs not discussed herein? If so, what are they and are they quantifiable?

- Do commenters agree with the preliminary estimates of the assessment costs relating to the proposed exemption from the SB SEF registration requirement? Are the estimated costs a foreign security-based swap market would incur in submitting an application for an exemption from the SB SEF registration requirements accurate? If not, how should the Commission adjust the cost estimate? Are there other assessment costs not considered here?

3. Programmatic Benefits and Costs Associated With the Mandatory Trade Execution Requirement of Section 3C(h) of the Exchange Act

Unlike the markets for cash equity securities and listed options, the market for security-based swaps currently is characterized by bilateral negotiation in the OTC swap market and is largely decentralized.¹⁷⁴⁶ The lack of uniform rules concerning the trading of security-based swaps and the historical one-to-one nature of trade negotiation in security-based swaps has resulted in the formation of distinct types of trading venues and execution practices, ranging from bilateral negotiations carried out over the telephone,¹⁷⁴⁷ to single-dealer RFQ platforms,¹⁷⁴⁸

¹⁷⁴⁶ See SB SEF Proposing Release, 76 FR at 10951.

¹⁷⁴⁷ “Bilateral negotiation” refers to the execution practice whereby one party uses the telephone, e-mail or other communications to contact directly a potential counterparty to negotiate and execute a security-based swap. The bilateral negotiation and execution practice provides no pre-trade or post-trade transparency because only the two parties to the transaction are aware of the terms of the negotiation and the final terms of the agreement. See SB SEF Proposing Release, 76 FR at 10951; see also Section II.A.5, *supra*.

¹⁷⁴⁸ A single-dealer RFQ platform refers to an electronic trading platform where a dealer may post indicative quotes for security-based swaps in various asset classes that the dealer is willing to trade. Only the dealer’s approved customers would have access to the platform. When a customer wishes to transact in a security-based swap, the customer requests an executable quote, the dealer provides one, and if the customer accepts the dealer’s quote, the transaction is executed electronically. This type of platform generally provides pre-trade transparency in the form of indicative quotes on a pricing screen, but

to multi-dealer RFQ platforms,¹⁷⁴⁹ to central limit order books,¹⁷⁵⁰ and brokerage trading.¹⁷⁵¹

These various trading venues and execution practices provide different degrees of pre-trade transparency and different levels of access. While the Commission currently does not have sufficient information with respect to the volume of security-based swap transactions executed across these different trading venues and execution practices, a common thread to these transactions is that they have all been executed in the unregulated OTC derivatives market.

Thus, for purposes of analyzing the economic impact of the statutory mandatory trade execution

only from one dealer to its customer. See SB SEF Proposing Release, 76 FR at 10951; see also Section II.A.5, supra.

¹⁷⁴⁹ A multi-dealer RFQ electronic trading platform refers to a multi-dealer RFQ system whereby a requester can send an RFQ to solicit quotes on a certain security-based swap from multiple dealers at the same time. After the RFQ is submitted, the recipients have a prescribed amount of time in which to respond to the RFQ with a quote. Responses to the RFQ are firm. The requestor then has the opportunity to review the responses and accept the best quote. A multi-dealer RFQ platform provides a certain degree of pre-trade transparency, depending on its characteristics. See SB SEF Proposing Release, 76 FR at 10952; see also Section II.A.5, supra.

¹⁷⁵⁰ A limit order book system or similar system refers to a trading system in which firm bids and offers are posted for all participants to see, with the identity of the parties withheld until a transaction occurs. Bids and offers are then matched based on price-time priority or other established parameters and trades are executed accordingly. The quotes on a limit order book system are firm. In general, a limit order book system provides greater pre-trade transparency than the three platforms described above because all participants can view bids and offers before placing their bids and offers. See SB SEF Proposing Release, 76 FR at 10952; see also Section II.A.5, supra. Currently, limit order books for the trading of security-based swaps in the United States are utilized by inter-dealer brokers for dealer-to-dealer transactions.

¹⁷⁵¹ “Brokerage trading” refers to an execution practice used by brokers to execute security-based swaps on behalf of customers, often in larger sized transactions. In such a system, a broker receives a request from a customer (which may be a dealer) who seeks to execute a specific type of security-based swaps. The broker then interacts with other customers to fill the request and execute the transaction. This model often is used by dealers that seek to transact with other dealers through the use of an interdealer broker as an intermediary. In this model, there may be pre-trade transparency to the extent that participants are able to see bids and offers of other participants. See SB SEF Proposing Release, 76 FR at 10952; see also Section II.A.5, supra.

requirement, as well as proposed Rule 3Ch-1, the Commission is starting from a baseline in which no security-based swaps are currently traded in the United States on an exchange or on a system or platform that otherwise meets the statutory definition of “security-based swap execution facility,” the statutory Core Principles governing SB SEFs, and the Commission’s proposed requirements governing SB SEFs, if they were to be adopted by the Commission.¹⁷⁵²

As noted above, this section XV.G.3 addresses the programmatic effect, and benefits and costs of, the mandatory trade execution requirement of Section 3C(h) of the Exchange Act generally. Section XV.G.4 further below addresses the programmatic effect, and benefits and costs of, the proposed application of this requirement to cross-border security-based swap transactions, as delineated by proposed Rule 3Ch-1. The Commission preliminarily believes that proposed Rule 3Ch-1 is appropriately tailored to extend the regulatory benefits intended by the mandatory trade execution requirement—*i. e.*, enhanced transparency and competition, which are discussed below—to the security-based swap activity that the Commission believes is most likely to raise the concerns that Congress intended to address in Title VII.¹⁷⁵³ In the Commission’s preliminary view, a different rule, and in particular a rule that would not apply the mandatory trade execution requirement to all such security-based swap activity, could undermine these goals.

(a) Programmatic Effect of the Statutory Mandatory Trade Execution Requirement

¹⁷⁵² Several commenters on the SB SEF Proposing Release that currently operate swap trading facilities have indicated their intention to register as SB SEFs. See note 1708, supra. The Commission believes that it is likely that these entities would have to revise their operations to meet the definition of “security-based swap execution facility,” the statutory Core Principles governing SB SEFs, and the proposed requirements set forth in the SB SEF Proposing Release, if they were to be adopted by the Commission.

¹⁷⁵³ See Sections II.B., supra.

As discussed above, to increase the transparency and oversight of the OTC derivatives market, Section 763(a) of the Dodd-Frank Act amended the Exchange Act by adding the mandatory trade execution requirement of Section 3C(h).¹⁷⁵⁴ Security-based swap transactions subject to Section 3C(h)'s mandatory trade execution requirement cannot be executed over-the-counter, but instead must be executed on an exchange or SB SEF that is registered or exempt from registration under the Exchange Act, unless an applicable exception applies.¹⁷⁵⁵ As such, the mandatory trade execution requirement is important in helping to bring the trading of security-based swaps onto more transparent, regulated markets, from the unregulated OTC swap markets.¹⁷⁵⁶

Consequently, the Commission preliminarily believes that an overall programmatic—and positive—effect of the mandatory trade execution requirement would be the potential for a large volume of security-based swap transactions that are currently executed in the OTC market to become subject to the mandatory trade execution requirement and, therefore, be required to be executed on a regulated platform, such as an exchange or SB SEF. Moreover, because the programmatic benefits and costs attendant to the mandatory trade execution requirement, which are discussed below, would be realized for the volume of security-based swap transactions that are executed on exchanges or SB SEFs, the Commission preliminarily believes that the extent to which those benefits and costs could be realized may best be demonstrated by generating an indicative volume estimate of security-based swap transactions that may potentially be subject to the mandatory trade execution requirement.

¹⁷⁵⁴ 15 U.S.C. 78c-3(h).

¹⁷⁵⁵ Id.

¹⁷⁵⁶ See SB SEF Proposing Release, 76 FR at 10949.

As stated above, because the Commission currently does not have comprehensive information regarding the volume of security-based swap transactions currently executed on security-based swap trading platforms,¹⁷⁵⁷ to estimate the volume of such transactions that could become subject to the mandatory trade execution requirement, as a starting point, the Commission relies on clearing data for single-name CDS transactions, which the Commission believes is currently the best available data for providing an indicative level of security-based swap transaction volume subject to the mandatory trade execution requirement.¹⁷⁵⁸ The Commission utilizes this data regarding single-name CDS transactions to generate an indicative volume of security-based swap transactions in the U.S. security-based swap market that could be subject to the mandatory clearing requirement of Section 3C(a) of the Exchange Act.¹⁷⁵⁹ Given that the mandatory trade execution requirement of Section 3C(h) of the Exchange Act¹⁷⁶⁰ could

¹⁷⁵⁷ While several commenters on the SB SEF Proposing Release that currently operate swap trading facilities in the OTC market have indicated their intention to register as SB SEFs, see note 1708, supra, as is currently the case for the security-based swap market as a whole, the Commission does not have comprehensive information regarding the volume of security-based swap transactions currently executed on security-based swap trading platforms.

¹⁷⁵⁸ For purposes of the analysis of the programmatic effect of the mandatory trade execution requirement, we do not consider the historical data regarding the clearing level of U.S. index CDS transactions. The statutory definition of security-based swap in relevant part includes swaps based on single securities or on narrow-based security-indices. See Section 3(a)(68)(A) of the Exchange Act, 15 U.S.C.78c(a)(68)(A). The historical data regarding the clearing level of U.S. index CDS transactions encompass broad-based index CDS transactions that do not fall within the definition of security-based swaps. The Commission recognizes that the security-based swap market includes not only single-name CDS, but also CDS based on narrow-based indices, and other non-CDS security-based swaps, primary examples of which are equity swaps and total return swaps based on single equities or narrow-based indices of equities. As previously stated, we believe that the single-name CDS data are sufficiently representative of the security-based swap market. See note 1301, supra.

¹⁷⁵⁹ See Section XV.F.3(a), supra.

¹⁷⁶⁰ 15 U.S.C. 78c-3(h).

apply to any security-based swap that is subject to the mandatory clearing requirement in Section 3C(a)(1) of the Exchange Act,¹⁷⁶¹ the Commission preliminarily believes that the volume of single-name CDS transactions that could be subject to the mandatory clearing requirement¹⁷⁶² presents an indicative level of the volume of security-based swap transactions that potentially could be subject to the mandatory trade execution requirement if these security-based swaps are made available to trade on an exchange or SB SEF.

The Commission notes that it has not yet determined the criteria for assessing whether an exchange or SB SEF has made a security-based swap available to trade. The Commission, however, recognizes that the “made available to trade” determination is an essential element of the mandatory trade execution requirement. Any analysis of the benefits and costs flowing from the full complement of the mandatory trade execution requirement, when it is implemented, would need to take into consideration the Commission’s determination of the scope of security-based swaps that would be “made available to trade,” as well as the cross-border rules that may be adopted by the Commission regarding application of the mandatory trade execution requirement. As a result, the “made available to trade” determination, when made by the Commission, will affect the ultimate benefits and costs associated with the mandatory trade execution requirement discussed in this release.¹⁷⁶³ Solely for purposes of analyzing herein the

¹⁷⁶¹ 15 U.S.C. 78c-3(a)(1).

¹⁷⁶² As previously stated, the estimate of the volume of single-name CDS transactions that could be subject to the mandatory clearing requirement is conditioned upon and will be affected by the mandatory clearing determination and the final rules regarding the end-user exception to the mandatory clearing requirement and other qualification. See Section XV.F.2, supra.

¹⁷⁶³ The Commission has indicated its preliminary view that the decision as to when a security-based swap would be considered to be “made available to trade” should be made

volume of security-based swap transactions that could be subject to the mandatory trade execution requirement, the Commission is assuming that all security-based swaps that would be subject to mandatory clearing also would be deemed made available to trade and hence could be subject to the mandatory trade execution requirement.

As stated above, due in part to the data of the level of clearing activity during the years of 2009 to 2011, the Commission has recognized that mandatory clearing determinations made pursuant to Section 3C(a)(1) of the Exchange Act could alter current clearing practices at the time such determinations are made and potentially could result in a higher level of clearing for security-based swaps than would take place under a voluntary system.¹⁷⁶⁴ Therefore, the Commission preliminarily estimates that 33% of the \$2,800 billion total gross notional volume of the total U.S. single-name CDS market¹⁷⁶⁵ would provide an indicative volume of the U.S.

pursuant to objective measures to be established by the Commission. See SB SEF Proposing Release, 76 FR at 10969.

¹⁷⁶⁴ As stated above, due in part to the data of the level of clearing activity during the years of 2009 to 2011, the Commission has recognized that mandatory clearing determinations made pursuant to Section 3C(a)(1) of the Exchange Act, 15 U.S.C. 78c-3(a)(1), could alter current clearing practices at the time such determinations are made and potentially could result in a higher level of clearing for security-based swaps than would take place under a voluntary system. See Section XV.F.2(a), supra, and the Clearing Procedures Adopting Release, 77 FR at 41638.

¹⁷⁶⁵ The Commission previously calculated three measures to represent the clearing level of the U.S. single-name CDS transactions. The first measure is the gross notional volume of cleared U.S. single-name CDS transactions reported by ICE Clear Credit in 2011, which represents approximately 25% of the total \$2,800 billion notional U.S. single-name CDS market. The second measure is the gross notional volume of U.S. single-name CDS accepted for clearing at any time during the calendar year of 2011, which represents approximately 33% of the total \$2,800 billion notional U.S. single-name CDS market. The third measure is the gross notional volume of U.S. single-name CDS accepted for clearing at the time of execution, which represents approximately 29% of the total \$2,800 billion notional U.S. single-name CDS market. For reasons stated above, the Commission preliminarily believes that the highest measure among these three would provide an indicative volume of the U.S. single-name CDS transaction that may be

single-name CDS transactions that may be subject to the mandatory clearing requirement.¹⁷⁶⁶ Because the mandatory trade execution requirement of Section 3C(h) of the Exchange Act¹⁷⁶⁷ could apply to any security-based swap that is subject to the mandatory clearing requirement in Section 3C(a)(1) of the Exchange Act, subject to the “made available to trade” determination, this estimate may provide an indicative volume of U.S. single-name CDS transactions that could have been subject to the “made available to trade” determination in Section 3C(h)(2) of the Exchange Act (if such determination had been made in 2011) and, therefore, subject to the mandatory trade execution requirement.¹⁷⁶⁸

The Commission is mindful that this estimate is only an indicative volume of U.S. single-name CDS transactions that may be subject to the mandatory trade execution requirement in

subject to the mandatory clearing requirement. See the text accompanying Table 1 in Section XV.F.2(a), supra.

¹⁷⁶⁶ The Commission recognizes that, even if a transaction is determined to be subject to mandatory clearing, such transaction may be excepted from clearing pursuant to the end-user clearing exception under Section 3C(g) of the Exchange Act. See 15 U.S.C. 78c-3(g). However, based on the available data, the Commission estimated that commercial end users that are eligible for the clearing exception currently participate in the security-based swap market on a very limited basis. Data compiled by the Commission’s Division of Risk, Strategy, and Financial Innovation on credit default transactions from the DTCC-TIW between January 1, 2011 and December 31, 2011 suggest that the total percentage of trades between buyer and seller principals during the calendar year 2011 for single name credit default swaps was only 0.03% of the total trade counterparty distribution for non-financial end users, which are composed of non-financial companies and family trusts. See Capital, Margin and Segregation Proposing Release, 77 FR at 70302, in particular, n.960. For purposes of the analysis and estimate here, we assume that the volume of transactions subject to the end user clearing exception under Section 3C(g) of the Exchange Act is negligible.

¹⁷⁶⁷ 15 U.S.C. 78c-3(h).

¹⁷⁶⁸ As stated earlier in this Section XV.G.3(a), this indicative volume estimate is based on an assumed scenario in which all mandatorily cleared security-based swaps are deemed made available to trade. The Commission reiterates that this assumption is being made solely for purposes of analyzing herein the volume of security-based swap transactions that could be subject to the mandatory trade execution requirement.

Section 3C(h) of the Exchange Act,¹⁷⁶⁹ as the Commission currently does not have reliable information available with respect to security-based swap transactions due to the fact that such transactions are currently executed on trading platforms that are not exchanges or SB SEFs. However, the Commission preliminarily believes that the statutory mandatory trade execution requirement, together with the statutory definition of SB SEF¹⁷⁷⁰ and the Commission's proposed interpretation,¹⁷⁷¹ when implemented, could alter existing security-based swap execution practices. As more security-based swap products are determined to be mandatorily cleared and once the Commission addresses how to determine whether such security-based swaps are made available for trading on an exchange or SB SEF, the level of trade execution in security-based swaps taking place on such exchanges or SB SEFs should be higher than in the current trading environment, in which no security-based swaps are traded on exchanges or SB SEFs. As a result, the mandatory trade execution requirement could have a material programmatic impact on execution practices in the U.S. security-based swap market by increasing the volume of transactions executed on an exchange or SB SEF.

(b) Programmatic Benefits of the Statutory Mandatory Trade Execution Requirement

Given that exchanges and SB SEFs are the essential infrastructure for implementing the mandatory trade execution requirement, there are additional benefits—separate from the fact that a large volume of security-based swap transactions would become subject to that requirement—flowing from the mandatory trade execution requirement that inevitably would overlap with the benefits associated with SB SEF registration, as described in the SB SEF Proposing Release.

¹⁷⁶⁹ See 15 U.S.C. 78c-3(h).

¹⁷⁷⁰ See Section 3(a)(77) of the Exchange Act, 15 U.S.C. 78c(a)(77).

¹⁷⁷¹ See SB SEF Proposing Release, 76 FR at 10952-58.

These benefits would be realized for the volume of security-based swap transactions that become subject to the mandatory trade execution requirement and are summarized below.

Increased Pre-Trade Price Transparency. One of the primary benefits of the mandatory trade execution requirement is to bring increased pre-trade transparency to the currently opaque security-based swap market. Increased pre-trade transparency should: (i) help reduce informational asymmetries that may exist today in the security-based swap market, often to the benefit of large dealers who observe order flow;¹⁷⁷² (ii) allow an increased number of market participants to see the trading interest of other market participants prior to trading, which should lead to increased price competition among market participants; and, in turn, (iii) lead to more efficient pricing in the security-based swap market.¹⁷⁷³

Impartial Access and Competitive Security-Based Swaps Market. The Dodd-Frank Act's mandate to bring security-based swaps that are subject to the mandatory clearing requirement onto regulated markets, unless the security-based swap is not made available to trade, coupled with the proposed access requirements for SB SEFs in Regulation SB SEF,¹⁷⁷⁴ should help foster greater competition in the trading of security-based swaps by increasing access to security-based swap trading venues.¹⁷⁷⁵ Such increased competition could lead to more efficient pricing in the security-based swap market.¹⁷⁷⁶

(c) Programmatic Costs of the Statutory Mandatory Trade Execution Requirement

¹⁷⁷² See Sections XV.C.1, XV.C.2, and XV.C.3, *supra*.

¹⁷⁷³ See SB SEF Proposing Release, 76 FR at 11036.

¹⁷⁷⁴ See proposed Rules 809 and 811(b) under the Exchange Act; see also SB SEF Proposing Release, 76 FR at 10961-62.

¹⁷⁷⁵ See SB SEF Proposing Release, 76 FR at 11037.

¹⁷⁷⁶ *Id.*

The Commission is mindful that programmatic costs also would be incurred for security-based swap transactions that become subject to the mandatory trade execution requirement.¹⁷⁷⁷ The Commission preliminarily believes that there would be transaction costs, such as fees and connectivity costs, that trading counterparties would incur in executing or trading security-based swaps subject to the mandatory trade execution requirement on SB SEFs. The Commission believes that a potential increase in transaction costs could result if the fees and connectivity costs associated with utilizing SB SEFs to secure trading interest and execute security-based swap transactions are higher than the current fees and costs associated with such practices in the OTC market. However, the Commission currently does not have information available to estimate the fees and costs that would be associated with transacting on SB SEFs, as no registered SB SEFs currently exist. Likewise, although unregulated trading venues exist in today's OTC derivatives market, the Commission does not have information regarding what, if any, fees and connectivity costs are associated with transacting on these unregulated trading venues.

In addition, studies suggest that pre-trade transparency can be costly for block trades as prices are likely to move adversely if the existence of a large unexecuted order becomes

¹⁷⁷⁷ The Commission's consideration of the programmatic costs associated with setting up a SB SEF in the SB SEF Proposing Release and further discussion of such costs in the context of discussing when the SB SEF registration requirements would apply to foreign security-based swap markets and in considering the proposed availability of an exemption to foreign security-based swap markets from the registration requirements could be relevant to the costs associated with the mandatory trade execution requirement given that security-based swaps subject to the mandatory trade execution requirement would be required to be traded on an exchange or a SB SEF that is registered under Section 3D of the Exchange Act or is exempt from such registration. See SB SEF Proposing Release, 76 FR at 11040-48; see also Sections XV.G.1 and XV.G.2, supra.

known.¹⁷⁷⁸ As mentioned earlier, pre-trade transparency could also produce concerns about information leakage and frontrunning of trades. These effects could cause market participants to alter their trading strategies in order to hide their interest, potentially reducing liquidity on SB SEFs.¹⁷⁷⁹

4. Programmatic Benefits and Costs of Proposed Rule 3Ch-1 Regarding Application of the Mandatory Trade Execution Requirement in Cross-Border Context

As discussed above,¹⁷⁸⁰ the Commission is proposing Rule 3Ch-1 to clarify the applicability of the mandatory trade execution requirement of Section 3C(h) of the Exchange Act¹⁷⁸¹ with respect to cross-border transactions in security-based swaps. Proposed Rule 3Ch-1(a) would identify the circumstances in which the mandatory trade execution requirement would apply, and proposed Rule 3Ch-1(b) then would carve out certain security-based swap transactions involving non-U.S. persons from the mandatory trade execution requirement.¹⁷⁸²

¹⁷⁷⁸ See SB SEF Proposing Release, 76 FR at 11040; see also Minder Cheng and Ananth Madhavan, "In Search of Liquidity: Block Trades in the Upstairs and Downstairs Markets," *Review of Financial Studies*, Vol. 10, No. 1 (1997) (analyzing data from equity block trades on components of the Dow Jones Industrial Average, the authors find that while the cost reductions for block trades on NYSE's "upstairs" market are economically small, the "upstairs markets allow trades that may not otherwise occur"); Terrence Henderschott and Ananth Madhavan, "Click or Call? Auction versus Search in the Over-the-Counter Market," Working Paper (2012) (using data from an electronic auction market, the authors find evidence that, controlling for venue selection, much of the cost savings from electronic platforms relative to dealer markets comes from small trades whereas coefficient estimates suggest that for large orders, the cost advantage of electronic auctions relative to the OTC market may be reversed).

¹⁷⁷⁹ See Section XV.G.1(b), *supra*.

¹⁷⁸⁰ See Section X, *supra*.

¹⁷⁸¹ 15 U.S.C. 78c-3(h).

¹⁷⁸² This is identical to the proposed approach for the mandatory clearing requirement. See Sections IX and XV.F.3, *supra*.

Specifically, under proposed Rule 3Ch-1(a), the mandatory trade execution requirement would apply to a person that engages in a security-based swap transaction if: (1) a counterparty to the transaction is (i) a U.S. person, or (ii) a non-U.S. person whose performance under such security-based swap transaction is guaranteed by a U.S. person (“guaranteed non-U.S. person”); or (2) such transaction is a transaction conducted within the United States.¹⁷⁸³ Under proposed Rule 3Ch-1(b), the mandatory trade execution requirement would not apply to: (1) a security-based swap transaction described in proposed Rule 3Ch-1(a) that is not a transaction conducted within the United States if (i) one counterparty is a foreign branch or a guaranteed non-U.S. person, and (ii) the other counterparty to the transaction is a non-U.S. person whose performance under the security-based swap is not guaranteed by a U.S. person (hereinafter referred to as “non-guaranteed non-U.S. persons”) and who is not a foreign security-based swap dealer; or (2) a security-based swap transaction described in proposed Rule 3Ch-1(a) that is a transaction conducted within the United States if (i) neither counterparty to the transaction is a U.S. person, (ii) neither counterparty’s performance under the security-based swap is guaranteed by a U.S. person; and (iii) neither counterparty to the transaction is a foreign security-based swap dealer.¹⁷⁸⁴

Therefore, proposed Rule 3Ch-1(a) and proposed Rule 3Ch-1(b) apply the mandatory trade execution requirement to security-based swap transactions in the cross-border context based on the U.S.-person status of a counterparty, the existence of a guarantee provided by a U.S. person, the registered security-based swap dealer status of a counterparty, and the location

¹⁷⁸³ See proposed Rule 3Ch-1(a) under the Exchange Act. The term “U.S. person” and “transaction conducted within the United States” would have the meanings set forth in proposed Rule 3a71-3(a) under the Exchange Act.

¹⁷⁸⁴ See proposed Rule 3Ch-1(b) under the Exchange Act.

where the transaction is conducted. Taken together, proposed Rules 3Ch-1(a) and 3Ch-1(b) would not apply the mandatory trade execution requirement to: (i) transactions conducted outside the United States between two counterparties who are non-guaranteed non-U.S. persons, (ii) transactions conducted outside the United States between a foreign branch or a guaranteed non-U.S. person, and another counterparty who is a non-guaranteed non-U.S. person and is not a foreign security-based swap dealer, and (iii) transactions conducted within the United States between two counterparties who are non-guaranteed non-U.S. persons and are not foreign security-based swap dealers. As stated above,¹⁷⁸⁵ the Commission preliminarily believes that proposed Rule 3Ch-1 is appropriately tailored to extend the regulatory benefits intended by the mandatory trade execution requirement to the security-based swap activity that the Commission preliminarily believes is most likely to raise the concerns that Congress intended to address in Title VII.¹⁷⁸⁶

The analysis in Section XV.G.4(a) below utilizes the best available information with respect to these criteria to assess the overall programmatic effect of proposed Rules 3Ch-1(a) and 3Ch-1(b) by estimating the size of the security-based swap market that would be subject to the mandatory trade execution requirement as a result of proposed Rules 3Ch-1(a) and 3Ch-1(b). The Commission then discusses in Section XV.G.4(b) below the benefits and costs that would flow from proposed Rule 3Ch-1 regarding application of the mandatory trade execution requirement in the cross border context.

¹⁷⁸⁵ See Section XV.G.3, supra.

¹⁷⁸⁶ See Section II.B, supra.

(a) Programmatic Effect of Proposed Rule 3Ch-1

It is not possible to quantify the potential programmatic effect of proposed Rule 3Ch-1 by estimating the future volume of security-based swap transactions when the mandatory trade execution requirement becomes effective partly because no “made available to trade” determinations have been made and partly because we do not know future trading volumes of security-based swaps. However, the Commission has examined the data available to it to analyze the potential programmatic effects of proposed Rule 3Ch-1. In particular, the Commission has tried to analyze the potential effects of proposed Rule 3Ch-1 by looking at the portion of the single-name U.S. reference CDS transactions that may provide an indication of the size of the security-based swap market that may be included in or excluded from the application of the mandatory trade execution requirement as a result of proposed Rule 3Ch-1.

A limitation we face when analyzing the data in order to estimate the size of the security-based swap market that may be affected by proposed Rule 3Ch-1 is that the domicile classifications in the DTCC-TIW database are not identical to the counterparty statuses that are described in proposed Rules 3Ch-1(a) and 3Ch-1(b), which would trigger application of, or an exception from, the mandatory trade execution requirement. Although the information provided by the data in the DTCC-TIW database does not allow us to identify the existence of a guarantee provided by a U.S. person with respect to a counterparty in a transaction, the registered security-based swap dealer status of a counterparty, or the location where the transaction is conducted, the Commission nevertheless preliminarily believes that the approach taken below would provide the best available estimate of the size of the security-based swap market that could be included in or excluded from the mandatory trade execution requirement by proposed Rule 3Ch-1.

As stated above, the commission has examined all transactions in single-name CDS during 2011 calendar year¹⁷⁸⁷ and estimated that the notional amount of the single-name CDS transactions executed during the 2011 calendar year is \$2,400 billion.¹⁷⁸⁸ Proposed Rule 3Ch-1(a) provides that the mandatory trade execution requirement shall apply to a security-based swap transaction if (1) a counterparty to the transaction is a U.S. person or a non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person or (2) such transaction is a transaction conducted within the United States. In applying proposed Rule 3Ch-1(a) to the \$2,400 billion single-name CDS transactions executed in 2011, the Commission uses account holders and their domicile information in the DTCC-TIW database to determine the status of the counterparties.¹⁷⁸⁹ Because the Commission's proposed definition of "U.S. person" is based primarily on the place of organization or principal place of business of a legal person and a legal person's principal place of business and place of organization are usually in the same country, the Commission believes that the domicile of a legal person is a reliable indicator of

¹⁷⁸⁷ See note 1637, *supra*, and the accompanying text in Section XV.F.2(a), *supra*.

¹⁷⁸⁸ This estimate is based on the calculation by staff of the Division of Risk, Strategy, and Financial Innovation of all price-forming DTCC-TIW single-name CDS transactions that are based on North American corporate reference entities, U.S. municipal reference entities, U.S. loans or mortgage-backed securities ("MBS"), using ISDA North American documentation, ISDA U.S. Muni documentation, or other standard ISDA documentation for North American Loan CDS and CDS on MBS, and are denominated in U.S. dollars and executed in 2011. Price-forming transactions include all new transactions, assignments, modifications to increase the notional amounts of previously executed transactions, and terminations of previously executed transactions. Transactions terminated, transactions entered into in connection with a compression exercise, and expiration of contracts at maturity are not considered price-forming and are therefore excluded, as are replacement trades and all bookkeeping-related trades. See notes 1312 and 1638, *supra*.

¹⁷⁸⁹ See note 1639, *supra*, in Section XV.F.2(a) for explanations of the determination of an account holder's domicile by the Commission staff in the Division of Risk, Strategy, and Financial Innovation using information in the DTCC-TIW.

such person's U.S.-person status. In addition, based on the Commission's understanding that the security-based swap transactions of foreign subsidiaries of U.S. entities, unless sufficiently capitalized to have their own independent credit ratings, are generally guaranteed by the most creditworthy U.S.-based entity within the corporate group, *i.e.*, the U.S. parent, the Commission preliminarily believes that it is reasonable to assume that foreign subsidiaries of U.S.-domiciled entities are non-U.S. persons whose performance under security-based swap transactions is guaranteed by a U.S. person. Finally, the DTCC-TIW data do not provide sufficient information for us to identify whether a transaction was conducted in the United States. Solely for purposes of this analysis, we have assumed that transactions involving a U.S.-domiciled counterparty (excluding foreign branch) or a U.S. branch counterparty were conducted in the United States.¹⁷⁹⁰

Based on these assumptions, we estimate that the subset of the size of the single-name U.S. reference CDS market that includes a U.S.-domiciled counterparty (excluding a foreign branch of a U.S. bank), a foreign subsidiary of a U.S.-domiciled entity, or a U.S. branch of a foreign bank as a counterparty is \$1,900 billion notional amount.¹⁷⁹¹ The Commission

¹⁷⁹⁰ Since the origination location of a transaction is not available in DTCC-TIW, the Commission recognizes that its analysis here may undercount transactions conducted within the United States because some transactions may be solicited, negotiated, or executed within the United States by an agent other than U.S. branches of foreign banks (such as a non-U.S. person counterparty using an unaffiliated third-party agent).

¹⁷⁹¹ Such \$1,900 billion estimate does not capture transactions between two non-U.S. domiciled counterparties involving an agent to solicit, negotiate and execute security-based swaps in the United States and therefore, may be an underestimate of the aggregate notional amount of the single-name U.S. reference CDS transactions that may be included in the application of the mandatory trade execution requirement under proposed Rule 3Ch-1(a) because of the assumption we make herein regarding transactions conducted within the United States. By the same token, the difference between the \$1,900 billion subset included in the application of the mandatory trade execution requirement under proposed Rule 3Ch-1(a) and the \$2,400 billion total single-name U.S.

preliminarily believes that this figure provides an indicative level of the single-name U.S. reference CDS activity that may represent an indicative size of the security-based swap market that could become subject to the mandatory trade execution requirement under proposed Rule 3Ch-1(a) when the requirement becomes effective.¹⁷⁹² In addition, we recognize that the level of the security-based swap activity that could become subject to mandatory trade execution under proposed Rule 3Ch-1(a) may be affected by the “made available to trade” determination by the Commission.¹⁷⁹³

Next, we apply proposed Rule 3Ch-1(b) to the transactions included in the analysis described above regarding proposed Rule 3Ch-1 in order to estimate the portion of the single-name U.S. reference CDS activity that may represent an indicative size of the security-based swap market that would not be subject to the mandatory trade execution requirement under the proposed rule. We reiterate the assumptions described above with respect to the counterparty status of a U.S. person and a non-U.S. person whose performance under security-based swap transactions is guaranteed by a U.S. person, and the assumption with respect to a transaction conducted within the United States. In addition, because of the lack of information about the

reference CDS transactions (i.e., \$500 billion or 20.8% of the \$2,400 billion) may represent an overestimate of single-name U.S. reference CDS transactions in notional amount that are not included in the application of the mandatory trade execution requirement under proposed Rule 3Ch-1(a).

¹⁷⁹² The Commission recognizes that the security-based swap market includes single-name CDS, CDS based on narrow-based indices, and other non-CDS security-based swaps, primary examples of which are equity swaps and total return swaps based on single equities or narrow-based indices of equities. As previously stated, we believe that the single-name CDS data are sufficiently representative of the security-based swap market as roughly 82% of the security-based swap market, as measured on a notional basis, appears likely to be single-name CDS. See Section XV.B.2 and the text accompanying note 1301, supra.

¹⁷⁹³ See note 1763 and accompanying text, supra.

location of transactions, solely for assessing the effect of proposed Rule 3Ch-1(b)(1), we have assumed that transactions between a counterparty that is a foreign branch or foreign subsidiary of a U.S.-domiciled entity and another counterparty that is a foreign-domiciled entity that is not a subsidiary of a U.S.-domiciled entity or an ISDA-recognized dealer are not transactions conducted within the United States; and solely for purposes of assessing the effect of proposed rule 3Ch-1(b)(2), we have assumed that transactions conducted between two foreign-domiciled counterparties that are not ISDA-recognized dealers and are not foreign subsidiaries of U.S.-domiciled entities are not conducted within the United States. These assumptions likely result in an overestimate of the notional volume carved-out by proposed Rule 3Ch-1(b). With respect to counterparty status as a registered security-based swap dealer, we recognize that as yet there are no dealers designated as security-based swap dealers and subject to the registration requirement. Solely for purposes of this analysis, we have assumed that those counterparties to CDS transactions that were ISDA recognized dealers¹⁷⁹⁴ would be required to register as security-based swap dealers.

Based on the above assumptions, we have estimated that approximately 2.1% of the total notional amount¹⁷⁹⁵ of single-name U.S. reference CDS transactions executed in 2011 would be

¹⁷⁹⁴ See note 1306, *supra*.

¹⁷⁹⁵ Based on calculations by the staff of the Division of Risk, Strategy and Financial Innovation applying the criteria provided in proposed rule 3Ch-1(b) and the assumptions stated herein, approximately \$51 billion in notional amount, constituting approximately 2.1% of the total notional amount, of single-name U.S. reference CDS transactions executed in 2011 would be excluded from the application of the mandatory trade execution requirement. Because of the assumptions we made herein regarding transactions conducted within the United States and transactions conducted outside the United States, the 2.1% may be an overestimate of the aggregate notional amount of the single-name U.S. reference CDS transactions that may be excluded from the application of the mandatory trade execution requirement under proposed Rule 3Ch-1(b).

excluded from the application of the mandatory trade execution requirement by proposed Rule 3Ch-1(b). Therefore, we preliminarily believe that 22.9% of the total size of the single-name U.S. reference CDS transactions in 2011 presents an indicative size of the U.S. security-based swap market that could be excluded from the application of the mandatory trade execution requirement under proposed Rule 3Ch-1.¹⁷⁹⁶

The Commission preliminarily believes that this estimate provides the best available proxy for the overall programmatic effect of the application of the mandatory trade execution requirement in the cross-border context in terms of the portion of the single-name U.S. reference CDS market that may be included in or excluded from the scope of the application of the mandatory trade execution requirement, given the data limitations and the underlying assumptions described above.¹⁷⁹⁷ The Commission is mindful that the above analysis represents only an indicative estimate of the portion of the single-name U.S. reference CDS activity that may represent an indicative size of the security-based swap market that may be included in or

¹⁷⁹⁶ . The 22.9% estimate is the sum of the 20.8% estimate of the single-name U.S. reference CDS transactions excluded from the mandatory trade execution requirement under proposed Rule 3Ca-3(a) and the 2.1% estimate of the single-name U.S. reference CDS transactions excluded from the mandatory trade execution requirement under proposed Rule 3Ca-3(b). The Commission reiterates that both 20.8% and 2.1% may overestimate the size of the single-name U.S. reference CDS transactions excluded from the application of the mandatory trade execution requirement under proposed Rules 3Ch-1(a) and (b).

In addition, this calculation is conducted using U.S. reference single-name CDS transaction data in 2011. See the text accompanying notes 1637 and 1787, *supra*. The Commission recognizes that the same calculation could generate a different result if both U.S. reference and non-U.S. reference single-name CDS transaction data were used. However, with respect to non-U.S. reference single-name CDS transaction data, the Commission currently does not have access to the part of such data in DTCC-TIW regarding non-U.S. reference single-name CDS transactions that do not involve a U.S. counterparty on either side of the transaction. See Section XV.B.2, *supra*.

¹⁷⁹⁷ The Commission reiterates that the assumptions made here are solely for purposes of this economic analysis.

excluded from the application of the mandatory trade execution requirement as a result of proposed Rule 3Ch-1. The Commission also recognizes that the above analysis represents an extrapolation from the limited data that is currently available to the Commission.

(b) Programmatic Benefits and Costs of Proposed Rule 3Ch-1

The Commission preliminarily believes that, in addition to the programmatic effect of a large volume of cross-border security-based swap transactions becoming subject to the mandatory trade execution requirement as a result of proposed Rule 3Ch-1, certain benefits and costs that overlap with the benefits and costs associated with SB SEF registration, as described in the SB SEF Proposing Release, would flow from proposed Rule 3Ch-1 because cross-border security-based swaps covered by proposed Rule 3Ch-1 would have to be executed or traded on SB SEFs or exchanges. Indeed, these benefits and costs would be realized for the volume of cross-border security-based swap transactions, estimated in Section XV.G.4(a) above,¹⁷⁹⁸ that would be covered by proposed Rule 3Ch-1(a) (and not excepted by proposed Rule 3Ch-1(b)) and, therefore, subject to the mandatory trade execution requirement.¹⁷⁹⁹ These benefits and costs, which are more fully described in the SB SEF Proposing Release, are summarized

¹⁷⁹⁸ See Section XV.G.4(a), *supra*.

¹⁷⁹⁹ To the extent that the estimated volume of security-based swap transactions that would be subject to the cross-border application of the statutory mandatory trade execution requirement in proposed Rules 3Ch-1(a) and 3Ch-1(b) (as analyzed in Section XV.G.4(a) above) differs from the estimated upper bound volume of the security-based transactions that would be subject to the statutory requirement (as set forth in Section XV.G.3(a) above), such differential reflects the aggregate programmatic effect of proposed Rules 3Ch-1(a) and 3Ch-1(b), and that the volume of security-based swap transactions that would be subject to those proposed cross-border rules is a subset of the upper bound volume estimate of transactions subject to the statutory requirement, which is not limited to the cross-border context.

above.¹⁸⁰⁰

(c) Alternatives

The Commission has considered alternatives to proposed Rule 3Ch-1. The Commission could propose to apply the mandatory trade execution requirement in the same way as the CFTC's proposed interpretive guidance. The major difference between the CFTC's proposed application of the mandatory trade execution requirement and the Commission's proposed Rule 3Ch-1 is that the CFTC would apply the mandatory trade execution requirement to a transaction conducted outside the United States between a foreign branch and a non-guaranteed non-U.S. person. The Commission preliminarily believes that subjecting such a transaction to mandatory trade execution may hinder a foreign branch's ability to access the foreign local market to a degree that fails to justify the pre-trade transparency benefits to the U.S. financial market.

(d) Assessment Costs for Proposed Rule 3Ch-1

The assessment costs associated with proposed Rule 3Ch-1 would be related primarily to identification of the counterparty status and origination location of the transaction to determine whether the mandatory trade execution requirement would apply. The same assessment would be performed not only in connection with the proposed application of the mandatory trade execution requirement in the cross border context, but also in connection with the proposed application of the reporting,¹⁸⁰¹ public dissemination,¹⁸⁰² and mandatory clearing¹⁸⁰³

¹⁸⁰⁰ See Sections XV.G.3(b) and (c), supra.

¹⁸⁰¹ See re-proposed Rule 908(a)(1) under the Exchange Act, as discussed in Section VIII.C.1, supra, and Section XV.H, infra.

¹⁸⁰² See re-proposed Rule 908(a)(2) under the Exchange Act, as discussed in Section VIII.C.1, supra, and Section XV.H, infra.

¹⁸⁰³ See proposed Rule 3Ca-3 under the Exchange Act, as discussed in Sections IX.C and XV.F, supra.

requirements in the cross-border context and, therefore, would be part of the overall Title VII compliance costs.

The Commission preliminarily believes that market participants would request representations from their transaction counterparties to determine the U.S.-person status of their counterparties. In addition, if the transaction is guaranteed by a U.S. person, the guarantee would be part of the trading documentation and, therefore, the existence of the guarantee would be a readily ascertainable fact. Similarly, market participants would be able to rely on their counterparties' representations as to whether a transaction is solicited, negotiated or executed by a person within the United States.¹⁸⁰⁴ Therefore, the Commission preliminarily believes that the assessment costs associated with proposed Rule 3Ch-1 should be limited to the costs of establishing a compliance policy and procedure of requesting and collecting representations from trading counterparties and maintaining the collected representations as part of the market participants' recordkeeping procedures. The Commission preliminarily believes that such assessment costs would be approximately \$15,160.¹⁸⁰⁵ The Commission preliminarily believes that requesting and collecting representations would be part of the standardized transaction

¹⁸⁰⁴ See proposed Rules 3a71-3(a)(4)(ii) and (a)(5)(ii), as discussed in Sections III.B.5 and III.B.6, supra.

¹⁸⁰⁵ This estimate is based on an estimated 40 hours of in-house legal or compliance staff's time to establish a procedure of requesting and collecting representations from trading counterparties, taking into account that such representations may be built into a form of standardized trading documentation. Based upon data from SIFMA's Management & Professional Earnings in the Securities Industry 2012 (modified by the SEC staff to account for an 1800-hour-work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead), the staff estimates that the average national hourly rate for an in-house attorney is \$379.

process reflected in the policies and procedures regarding security-based swap sales and trading practices and should not result in separate assessment costs.¹⁸⁰⁶

The Commission also considers the likelihood that market participants may implement systems to keep track of counterparty status for purposes of future trading of security-based swaps that are similar to, if not the same as, the systems implemented by market participants for purposes of assessing security-based swap dealer or major security-based swap participant status. As stated above, the Commission estimated that market participants that perceived the need to perform the security-based swap dealer assessment or major security-based swap participant calculations would incur one-time programming costs of \$12,870.¹⁸⁰⁷ Therefore, the Commission estimates the total one-time costs per entity associated with proposed Rule 3Ch-1 could be \$28,030.¹⁸⁰⁸ To the extent that market participants have incurred costs relating to similar or the same assessments with respect to counterparty status and transaction location for other Title VII requirements, their assessment costs with respect to proposed Rule 3Ch-1 may be less.

Request for Comment

¹⁸⁰⁶ There will be ongoing costs associated with processing representations received from counterparties, including additional due diligence and verification to the extent that a counterparty's representation is contrary to or inconsistent with the knowledge of the collecting party. The Commission believes that these would be compliance costs encompassed within the programmatic costs associated with substituted compliance.

¹⁸⁰⁷ See note 1428, supra. For the source of the estimated per hour costs, see note 1425, supra.

¹⁸⁰⁸ The estimated \$28,030 per-entity cost is the sum of the estimated \$15,160 cost of establishing written compliance policies and procedures regarding obtaining counterparty representations and the estimated \$12,870 one-time programming cost relating to system implementation to maintain counterparties' representations and track counterparty status in the system.

- Are there any benefits and costs not discussed herein? How would the benefits and costs affect the various groups of market participants involved in the trading of security-based swaps? To the extent the benefits or costs of complying with mandatory trade execution described above are different for different groups of market participants, please identify, discuss, analyze, and supply relevant data, information, or statistics regarding any such different benefits or costs.
- Would the benefits of complying with mandatory trade execution be the same for foreign and domestic market participants?
- Would the costs associated with complying with mandatory trade execution be the same for domestic and foreign market participants? If not, how would they be different and how could the Commission most accurately estimate them? For example, would either domestic or foreign market participants face higher costs in gaining access to SB SEFs to comply with the mandatory trade execution requirement? Or would the costs be comparable?
- To the extent that the benefits or costs of complying with mandatory trade execution would be different for foreign market participants as compared to domestic market participants, please identify, discuss, analyze, and supply relevant data, information, or statistics regarding any such different benefits or costs.
- Are the assessment cost estimates provided herein appropriate? If not, how should the estimates be adjusted? Please provide data and analysis to support differing cost estimates.

H. Application of Rules Governing Security-Based Swap Data Repositories in Cross-Border Context

SDRs are intended to play a critical role in enhancing transparency in the security-based

swap market, bolstering market efficiency and liquidity, promoting standardization, and reducing systemic risks by serving as centralized recordkeeping facilities that collect and maintain information relating to security-based swap transactions.¹⁸⁰⁹ More broadly, the goal of the Dodd-Frank Act is, among other things, to promote the financial stability of the United States by improving accountability and transparency in the financial system.¹⁸¹⁰ In furtherance of these goals, the Dodd Frank Act amended the Exchange Act to require the reporting of security-based swaps (whether cleared or uncleared) to an SDR registered with the Commission,¹⁸¹¹ and to require certain persons that perform the functions of an SDR to register with the Commission.¹⁸¹² SDRs that are registered with the Commission are subject to Section 13(n) of the Exchange Act¹⁸¹³ and the rules and regulations thereunder (collectively, “SDR Requirements”), as well as other requirements applicable to SDRs registered with the Commission.¹⁸¹⁴ In this section, the

¹⁸⁰⁹ See SDR Proposing Release, 75 FR at 77354; see also 156 Cong. Rec. S5920 (daily ed. July 15, 2010) (statement of Sen. Lincoln) (“These new ‘data repositories’ will be required to register with the CFTC and the SEC and be subject to the statutory duties and core principles which will assist the CFTC and the SEC in their oversight and market regulation responsibilities.”).

¹⁸¹⁰ See Dodd-Frank Act, Pub. L. No. 111-203 at Preamble.

¹⁸¹¹ Section 13(m)(1)(G) of the Exchange Act, 15 U.S.C. 78m(m)(1)(G), as added by Section 763(i) of the Dodd-Frank Act.

¹⁸¹² Section 3(a)(75) of the Exchange Act, 15 U.S.C. 78c(a)(75), as added by Section 761(a) of the Dodd-Frank Act (defining a “security-based swap data repository” to mean “any person that collects and maintains information or records with respect to transactions or positions in, or the terms and conditions of, security-based swaps entered into by third parties for the purpose of providing a centralized recordkeeping facility for security-based swaps”) and Section 13(n)(1) of the Exchange Act, 15 U.S.C. 78m(n)(1), as added by Section 763(i) of the Dodd-Frank Act (providing that it is “unlawful for any person, unless registered with the Commission, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of a security-based swap data repository”).

¹⁸¹³ 15 U.S.C. 78m(n), as added by Section 763(i) of the Dodd-Frank Act.

¹⁸¹⁴ See note 703, *supra*.

Commission first discusses the benefits and costs of the Commission's proposed interpretive guidance regarding the application of the SDR Requirements and exemption from the SDR Requirements. The Commission then discusses the benefits and costs of the Commission's proposed interpretive guidance regarding relevant authorities' access to security-based swap information and exemption from the statutory indemnification requirement that could hinder such access. Finally, the Commission discusses the benefits and costs associated with the Commission's re-proposed Regulation SBSR, which sets forth the reporting obligations of counterparties to security-based swaps in the cross-border context.

1. Benefits and Costs Associated with Application of the SDR Requirements in the Cross-Border Context

(a) Benefits of Proposed Approach to SDR Requirements

As discussed above,¹⁸¹⁵ the Commission proposes that any U.S. person that performs the functions of an SDR would be required to register with the Commission pursuant to Section 13(n)(1) of the Exchange Act¹⁸¹⁶ and previously proposed Rule 13n-1 thereunder. As further discussed above,¹⁸¹⁷ the Commission further proposes that, to the extent that any non-U.S. person performs the functions of an SDR within the United States, it would be required to register with the Commission pursuant to Section 13(n)(1) of the Exchange Act¹⁸¹⁸ and previously proposed Rule 13n-1 thereunder, absent an exemption. The Commission also is proposing new Rule 13n-12 under the Exchange Act, which provides that a non-U.S. person that performs the functions of an SDR within the United States is exempt from the SDR

¹⁸¹⁵ See Section VI.B.3(a), supra.

¹⁸¹⁶ 15 U.S.C. 78m(n)(1), as added by Section 763(i) of the Dodd-Frank Act.

¹⁸¹⁷ See Section VI.B.3(b), supra.

¹⁸¹⁸ 15 U.S.C. 78m(n)(1), as added by Section 763(i) of the Dodd-Frank Act.

Requirements, provided that each regulator with supervisory authority over such non-U.S. person has entered into a supervisory and enforcement MOU or other arrangement with the Commission that addresses the confidentiality of data collected and maintained by such non-U.S. person, access by the Commission to such data, and any other matters determined by the Commission (“SDR Exemption”).¹⁸¹⁹

The Commission has considered the benefits and costs associated both with the Commission’s proposed interpretive guidance regarding U.S. persons and non-U.S. persons that would be required to register with the Commission as an SDR and with the SDR Exemption in light of the transparency and other objectives that the Dodd-Frank Act is intended to achieve. The Commission preliminarily believes that our proposed approach would be consistent with achieving these intended benefits of the SDR Requirements, but would avoid imposing the associated costs of these requirements on persons whose registration and regulation may not significantly advance these benefits.

i. Programmatic Benefits of Proposed Guidance Regarding Registration

The Commission preliminarily believes that there are a number of programmatic benefits to our proposal to require U.S. persons that perform the functions of an SDR and non-U.S. persons that perform the functions of an SDR within the United States to register with the Commission and to comply with the other SDR Requirements. These requirements are intended to help ensure that SDRs function in a manner that will further the transparency and other goals of the Dodd-Frank Act.¹⁸²⁰ The SDR Requirements, including requirements that SDRs register

¹⁸¹⁹ See Section VI.B.3(b), *supra*.

¹⁸²⁰ See SDR Proposing Release, 75 FR at 77354. See also Dodd-Frank Act, Pub. L. No. 111-203 at Preamble.

with the Commission, retain complete records of security-based swap transactions, maintain the integrity and confidentiality of those records, and provide effective access to those records to relevant authorities and the public in line with their respective information needs, are intended to help ensure that the data held by SDRs is reliable and that the SDRs provide information that contributes to the transparency of the security-based swap market while protecting the confidentiality of information provided by market participants.¹⁸²¹

Enhanced transparency should produce market-wide benefits by, for example, promoting stability in the security-based swap market,¹⁸²² and it should indirectly contribute to improved stability in related financial markets, including equity and bond markets.¹⁸²³ Enhanced transparency in the security-based swap market would assist the Commission and other relevant authorities in fulfilling their regulatory mandates and legal responsibilities such as performing market surveillance and detecting market manipulation, fraud, and other market abuses by providing the Commission and other relevant authorities with greater access to security-based swap information.¹⁸²⁴ Increased regulatory effectiveness should improve the integrity and transparency of the market and improve the confidence of market participants.¹⁸²⁵

¹⁸²¹ See SDR Proposing Release, 75 FR at 77307.

¹⁸²² See *id.* (“SDRs may be especially critical during times of market turmoil, both by giving relevant authorities information to help limit systemic risk and by promoting stability through enhanced transparency. By enhancing stability in the [security-based swap] market, SDRs may also indirectly enhance stability across markets, including equities and bond markets.”).

¹⁸²³ See Darrell Duffie, Ada Li, and Theo Lubke, “Policy Perspectives of OTC Derivatives Market Infrastructure,” Federal Reserve Bank of New York Staff Report No. 424 (Jan. 2010, as revised Mar. 2010) (“Transparency can have a calming influence on trading patterns at the onset of a potential financial crisis, and thus act as a source of market stability to a wider range of markets, including those for equities and bonds”).

¹⁸²⁴ See SDR Proposing Release, 75 FR at 77307 (“The enhanced transparency provided by an SDR is important to help regulators and others monitor the build-up and concentration

The Commission preliminarily believes that requiring U.S. persons performing the functions of an SDR to register with the Commission as SDRs and comply with the SDR Requirements, as well as other requirements applicable to SDRs registered with the Commission,¹⁸²⁶ would further the goals of the SDR Requirements and contribute to enhanced transparency in the security-based swap market in the United States. The Commission preliminarily believes that U.S. persons performing the functions of an SDR will play a key role in ensuring that security-based swap transactions affecting the transparency of the security-based swap market within the United States are reported; properly maintained; and made available to the Commission, other relevant authorities, and the public.¹⁸²⁷ Requiring such U.S. persons to comply with the SDR Requirements would help ensure that they maintain data and make it available in a manner that advances the transparency benefits that Title VII is intended to produce.

Non-U.S. persons performing the functions of an SDR within the United States also may affect the transparency of the security-based swap market within the United States, even if transactions involving U.S. persons or U.S. market participants are being reported to such non-U.S. persons in order to satisfy the reporting requirements of a foreign jurisdiction (and not those of Title VII). The Commission preliminarily believes that, to the extent that non-U.S. persons

of risk exposures in the [security-based swap] market.”); see also DTCC Letter I at 1 (“A registered SDR should be able to provide (i) enforcement agents with necessary information on trading activity; (ii) regulatory agencies with counterparty-specific information about systemic risk based on trading activity; (iii) aggregate trade information for publication on market-wide activity; and (iv) a framework for real-time reporting from swap execution facilities and derivatives clearinghouses.”).

¹⁸²⁵ See SDR Proposing Release, 75 FR at 77356.

¹⁸²⁶ See note 703, supra.

¹⁸²⁷ See SDR Proposing Release, 75 FR at 77356.

are performing the functions of an SDR within the United States, they will likely receive data relating to transactions involving U.S. persons and other U.S. market participants. Ensuring that such data is maintained and made available in a manner consistent with the SDR Requirements would likely contribute to the transparency of the U.S. market and reduce potential confusion that may arise from discrepancies in transaction data due to, among other things, differences in the operational standards governing persons who perform the functions of an SDR in other jurisdictions (or the absence of such standards for any such persons that are not subject to any regulatory regime). Moreover, given the sensitivity of reported security-based swap data and the potential for market abuse and subsequent loss of liquidity in the event that a person performing the function of an SDR within the United States fails to maintain the privacy of such data,¹⁸²⁸ the Commission preliminarily believes that requiring non-U.S. persons that perform the functions of an SDR within the United States to register with the Commission would help ensure that data relating to transactions involving U.S. persons or U.S. market participants is handled in a manner consistent with the confidentiality protections applicable to such data, thereby reducing the risk both of the loss or disclosure of proprietary or other sensitive data and of market abuse arising from the misuse of such data.

ii. Programmatic Benefits of the SDR Exemption

As noted above, the Commission is proposing new Rule 13n-12 under the Exchange Act to provide an exemption from the SDR Requirements for non-U.S. persons that perform the functions of an SDR within the United States, provided that each regulator with supervisory authority over any such non-U.S. person has entered into a supervisory and enforcement MOU or other arrangement with the Commission that addresses the confidentiality of data collected and

¹⁸²⁸ See *id.* at 77307.

maintained by such non-U.S. person, access by the Commission to such data, and any other matters determined by the Commission.¹⁸²⁹

The Commission preliminarily believes that this SDR Exemption would not significantly reduce the programmatic benefits associated with the SDR Requirements. Although the proposed approach would potentially reduce the number of persons performing the functions of an SDR that are registered with the Commission,¹⁸³⁰ data relating to transactions involving U.S. persons and U.S. market participants would still be required to be reported, pursuant to Regulation SBSR, to an SDR registered with the Commission and subject to all SDR Requirements, absent other relief from the Commission.¹⁸³¹

Moreover, the SDR Exemption would be conditioned on a supervisory and enforcement MOU or other arrangement with each regulator with supervisory authority over the non-U.S. person that seeks to rely upon the SDR Exemption. This MOU or arrangement would address the Commission's interest in having access to security-based swap data involving U.S. persons and other U.S. market participants that is maintained by non-U.S. persons that perform the functions of an SDR within the United States and in protecting the confidentiality of such data. Further, proposed Rule 13n-12 should not impair the integrity and accessibility of security-based swap data. The Commission, therefore, preliminarily believes that exempting certain non-U.S. persons performing the functions of an SDR within the United States, subject to the condition

¹⁸²⁹ Proposed Rule 13n-12(b) under the Exchange Act.

¹⁸³⁰ It appears that, as of April 2013, there were several non-U.S. persons performing the functions of an SDR or intending to do so in the future. See FSB Progress Report April 2013 at 20-21, 63-65. The Commission, however, does not possess data regarding how many, if any, of these persons perform the functions of an SDR within the United States.

¹⁸³¹ See discussion of Regulation SBSR in Section VIII, *supra* and discussion of substituted compliance in Section XI, *supra*.

described above, would likely not significantly affect the programmatic benefits that the SDR Requirements were intended to achieve.¹⁸³²

(b) Costs of Proposed Approach to SDR Requirements

i. Programmatic Costs of the Commission's Proposed Approach

Registering with the Commission and complying with the SDR Requirements will impose certain costs on an SDR.¹⁸³³ The Commission's proposed interpretive guidance and SDR Exemption do not change the costs associated with any particular SDR Requirement, but the Commission preliminarily believes that the SDR Exemption may reduce the costs for certain non-U.S. persons performing the functions of an SDR within the United States without reducing the expected benefits of the SDR Requirements.¹⁸³⁴ The Commission preliminarily believes that such persons would likely be performing the functions of an SDR in order to permit counterparties to satisfy reporting requirements under foreign law. An exemption, if available, would allow these non-U.S. persons to continue to perform this function within the United

¹⁸³² The Commission also anticipates that non-U.S. persons that avail themselves of the SDR Exemption would be subject to the regulatory requirements of one or more foreign jurisdictions. The SDR Exemption would help ensure that such persons do not incur costs arising from being required to comply with duplicative regulatory regimes while also ensuring, through the condition that each regulator with supervisory authority enter into a supervisory and enforcement MOU or other arrangement with the Commission, that they are subject to regulatory requirements that would prevent them from undermining the transparency and other purposes of the Title VII SDR Requirements, for example, by failing to protect the confidentiality of data relating to U.S. persons and other U.S. market participants.

¹⁸³³ See SDR Proposing Release, 75 FR at 77354-64.

¹⁸³⁴ As noted above, the data currently available to the Commission does not indicate how many non-U.S. persons performing the functions of an SDR perform such functions within the United States. See note 1830, *supra*. However, even if counterparties with reporting obligations under Regulation SBSR reported their transactions to a non-U.S. person that performs the functions of an SDR within the United States but is exempt from registration, they would still be required to report transactions under Regulation SBSR to an SDR registered with the Commission.

States, potentially reducing costs to U.S. market participants that have reporting obligations under foreign law and reducing the incentive for non-U.S. persons performing the functions of an SDR within the United States to restructure their operations to avoid registration with the Commission.

The Commission recognizes that making the exemption available subject to a condition may delay the availability of the exemption to certain non-U.S. persons. In some cases, the Commission may be unable to enter into an MOU or other arrangement with each regulator with supervisory authority over a non-U.S. person performing the functions of an SDR within the United States. The resulting delay or unavailability of the exemption may lead some of these non-U.S. persons to exit the U.S. market by, for example, restructuring their business so that they perform the functions of an SDR entirely outside the United States, potentially resulting in business disruptions in the security-based swap market.

ii. Assessment Costs

Under the Commission's proposed approach, non-U.S. persons that perform the functions of an SDR may be expected to incur certain assessment costs related to determining whether they can rely on the SDR Exemption and, if not, whether they perform the functions of an SDR within the United States.¹⁸³⁵

With respect to determining the availability of the SDR Exemption, the Commission preliminarily believes that the costs for a non-U.S. person that performs the functions of an SDR to determine whether the condition for the availability of the SDR Exemption has been satisfied with respect to it would arise from confirming whether the Commission and each regulator with

¹⁸³⁵ The Commission recognizes that some non-U.S. persons that perform the functions of an SDR may do so entirely outside the United States and thus may determine that they do not need to incur any assessment costs related to the Commission's proposed approach.

supervisory authority over such non-U.S. person have entered into a supervisory and enforcement MOU or other arrangement. The Commission preliminarily believes that, given that this information generally should be readily available,¹⁸³⁶ the cost involved in making such assessment should not exceed one hour of in-house counsel's time or \$379 per person,¹⁸³⁷ for an aggregate one-time cost of \$7,580.¹⁸³⁸

If the condition for the SDR Exemption has not been satisfied with respect to any authority with supervisory authority over such non-U.S. person, that person may determine to analyze where it performs its SDR functions in order to determine whether it performs such functions within the United States. This analysis may involve two separate sets of costs: costs associated with determining whether it has entered into contracts, including user or technical agreements, with a U.S. person to enable the U.S. person to report security-based swap data to it, and costs associated with determining whether it otherwise performs the functions of an SDR within the United States, for example, by maintaining certain operations within the United States.

The Commission preliminarily believes that the assessment costs associated with determining the U.S. person status of parties to agreements with the non-U.S. person that

¹⁸³⁶ As a general matter, the Commission provides a list of MOUs and other arrangements, which are available at the following link:
http://www.sec.gov/about/offices/oia/oia_cooparrangements.shtml.

¹⁸³⁷ Based upon data from SIFMA's Management & Professional Earnings in the Securities Industry 2012 (modified by the SEC staff to account for an 1800-hour-work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead), the staff estimates that the average national hourly rate for an in-house attorney is \$379.

¹⁸³⁸ This total is based on the assumption that as many as 20 non-U.S. persons that perform the functions of an SDR would seek outside legal counsel to determine the nature of any operations or other activity performed within the United States. Although there appear to be fewer than 10 such persons that are currently accepting and reporting on security-based swaps (see FSB Progress Report April 2013 at 20-21, 63-65), our estimate that as many as 20 such persons may perform this analysis is intended to account for the possibility that new market entrants may seek to provide such services in the future.

performs the functions of an SDR should be primarily one-time costs of establishing a practice or compliance procedure of requesting and collecting representations from the parties to such agreements and maintaining the representations collected as part of the recordkeeping procedures and limited ongoing costs associated with requesting and collecting representations. The Commission preliminarily believes that such one-time per-person costs would be approximately \$15,160,¹⁸³⁹ with aggregate one-time costs of approximately \$303,200.

The assessment costs associated with determining whether the non-U.S. person otherwise performs the functions of an SDR within the United States would likely involve an analysis of the location of the non-U.S. person's various operations and, with respect to any operations that occur within the United States, a determination of whether such operations constitute the performance of the functions of an SDR. The Commission preliminarily believes that the aggregate one-time costs associated with this analysis would be approximately \$500,000.¹⁸⁴⁰

(c) Alternative to Proposed Approach

In developing our approach to the application of the SDR Requirements to non-U.S. persons that perform the functions of an SDR, the Commission considered requiring such persons that perform the functions of an SDR within the United States to comply with the SDR Requirements, including registering with the Commission, as well as other requirements

¹⁸³⁹ This estimate is based on estimated 40 hours of in-house legal or compliance staff's time to establish a procedure of requesting and collecting representations from trading counterparties, taking into account that such representation may be built into form of standardized trading documentation. As noted above, the staff estimates that the average national hourly rate for an in-house attorney is \$379. See note 1426, supra.

¹⁸⁴⁰ We have estimated that this analysis would cost an average of \$25,000 per person and that as many as 20 non-U.S. persons may incur such costs. This estimate is based on staff experience in undertaking legal analysis of status under federal securities laws.

applicable to SDRs registered with the Commission.¹⁸⁴¹ In such a scenario, a non-U.S. person performing the functions of an SDR within the United States would be required to register as an SDR and incur the costs associated with the SDR Requirements,¹⁸⁴² as well as other requirements applicable to SDRs registered with the Commission.¹⁸⁴³ The Commission preliminarily believes that the marginal benefit of requiring all non-U.S. persons that perform the functions of an SDR within the United States to register with the Commission, even where similar objectives could be achieved through an exemption conditioned on a supervisory and enforcement MOU or other arrangement with each regulatory authority with supervisory authority over such non-U.S. persons, would be insignificant, particularly in light of the costs that such non-U.S. persons would incur in complying with the SDR Requirements, as well as other requirements applicable to SDRs registered with the Commission.¹⁸⁴⁴

Request for Comment

The Commission seeks comment on the proposed interpretive guidance and SDR Exemption, and alternatives to our proposed approach, in all aspects. Interested persons are encouraged to provide supporting data and analysis and, when appropriate, suggest modifications or alternatives to the proposed interpretive guidance and SDR Exemption. In addition, the Commission seeks comment on the specific questions below.

¹⁸⁴¹ See note 703, supra.

¹⁸⁴² See SDR Proposing Release, 75 FR at 77354-64.

¹⁸⁴³ See note 703, supra.

¹⁸⁴⁴ See id.

- Has the Commission appropriately considered the expected programmatic benefits of our proposed interpretive guidance and SDR Exemption? If not, please explain why and provide information on how such costs and benefits should be assessed.
- Are the programmatic benefits and costs discussed above accurate? If not, why not? How should the Commission assess the benefits and costs associated with our proposed interpretive guidance and SDR Exemption compared to their anticipated benefits of increasing transparency in the security-based swap market?
- Are there quantifiable programmatic benefits or costs associated with the Commission's proposed interpretive guidance and the SDR Exemption that are not discussed above, but that the Commission should consider? If so, please identify and describe them as thoroughly as possible, using relevant data and statistics where available.
- Has the Commission appropriately considered the benefits and costs of the alternative approach to the Commission's proposed interpretive guidance and SDR Exemption? In answering this question, consider addressing whether the Commission has appropriately considered the benefits and costs of duplicative regulatory regimes, including duplicative requirements governing SDRs.
- How would the Commission's proposed interpretive guidance and the SDR Exemption affect efficiency, competition, and capital formation, including the competitive or anticompetitive effects that such guidance and exemption may have on market participants? Are there other existing or proposed laws, rules, or regulations affecting SDRs in particular jurisdictions that affect efficiency, competition, and

capital formation that the Commission should consider? If so, please identify and describe these effects as thoroughly as possible.

- Are there costs in fulfilling the condition in the SDR Exemption that the Commission has not discussed above? If so, what?
- Would the condition requiring a supervisory and enforcement MOU with a foreign supervisory regulator impose costs on non-U.S. persons performing the functions of an SDR within the United States? Further, would delay in entering into a supervisory and enforcement MOU or other arrangement (or the inability to enter into such MOU or arrangement) impose costs on such non-U.S. persons or market participants more generally? Would it have adverse consequences for liquidity in the security-based swap market?
- Should the Commission consider other alternatives to our proposed interpretive guidance and the SDR Exemption? What would be the benefits and costs of such alternative approaches?

2. Relevant Authorities' Access to Security-Based Swap Information and the Indemnification Requirement

One key function that SDRs will perform is making available to the Commission and other relevant authorities information relating to security-based swap transactions. As described above,¹⁸⁴⁵ Section 13(n)(5)(G) of the Exchange Act¹⁸⁴⁶ and previously proposed Rule 13n-4(b)(9) thereunder provide that an SDR shall on a confidential basis, pursuant to Section 24 of the Exchange Act, and the rules and regulations thereunder, upon request, and after notifying the

¹⁸⁴⁵ See Section VI.C., *supra*.

¹⁸⁴⁶ 15 U.S.C. 78m(n)(5)(G), as added by Section 763(i) of the Dodd-Frank Act.

Commission (“Notification Requirement”), make available all data obtained by the SDR, including individual counterparty trade and position data, to certain domestic authorities and any other person that the Commission determines to be appropriate, including, but not limited to, foreign financial supervisors (including foreign futures authorities), foreign central banks, and foreign ministries. Section 13(n)(5)(H) of the Exchange Act¹⁸⁴⁷ and previously proposed Rule 13n-4(b)(10) further provide that before sharing information with any entity described in Section 13(n)(5)(G)¹⁸⁴⁸ or previously proposed Rule 13n-4(b)(9), respectively, an SDR must obtain a written agreement from the entity stating that the entity shall abide by the confidentiality requirements described in Section 24 of the Exchange Act,¹⁸⁴⁹ and the rules and regulations thereunder, relating to the information on security-based swap transactions that is provided; in addition, the entity shall agree to indemnify the SDR and the Commission for any expenses arising from litigation relating to the information provided under Section 24 of the Exchange Act¹⁸⁵⁰ and the rules and regulations thereunder (“Indemnification Requirement”).

(a) Benefits and Costs of Relevant Authorities’ Access to Security-Based Swap Data under the Dodd-Frank Act

As discussed above,¹⁸⁵¹ the Commission believes that Sections 13(n)(5)(G) and 13(n)(5)(H) of the Exchange Act¹⁸⁵² are intended to, among other things, obligate SDRs to make available security-based swap information to relevant authorities and maintain the confidentiality

¹⁸⁴⁷ 15 U.S.C. 78m(n)(5)(H), as added by Section 763(i) of the Dodd-Frank Act.

¹⁸⁴⁸ 15 U.S.C. 78m(n)(5)(G), as added by Section 763(i) of the Dodd-Frank Act.

¹⁸⁴⁹ 15 U.S.C. 78x.

¹⁸⁵⁰ Id.

¹⁸⁵¹ See Section VI.C., supra.

¹⁸⁵² 15 U.S.C. 78m(n)(5)(G) and (H), as added by Section 763(i) of the Dodd-Frank Act; see also proposed Rules 13n-4(b)(9) and (10) under the Exchange Act.

of such information. More broadly, the Dodd-Frank Act is intended to, among other things, promote the financial stability of the U.S. financial system by improving accountability and transparency in the financial system.¹⁸⁵³ To the extent that SDRs fulfill these statutory goals, the Commission preliminarily believes that certain benefits and costs will result.

i. Benefits of Relevant Authorities' Access to Security-Based Swap Data

As discussed below, the Commission preliminarily believes that there are a number of benefits associated with providing relevant authorities with access to security-based swap data maintained by SDRs registered with the Commission ("SDR Data").

First, the Commission preliminarily believes that providing relevant authorities with such access would increase transparency in the security-based swap market, thereby facilitating oversight of the security-based swap market. SDRs are expected to retain complete records of security-based swap transactions and maintain the integrity of those records.¹⁸⁵⁴ To the extent that SDRs provide relevant authorities with effective access to those records in line with the respective information needs arising out of the authorities' regulatory mandates and legal responsibilities, SDRs will play a key role in increasing transparency in the security-based swap market. In having such effective access, these authorities will likely be better positioned to prevent market manipulation, fraud, and other market abuses; monitor the financial responsibility and soundness of market participants; perform market surveillance and macroprudential

¹⁸⁵³ See Dodd-Frank Act, Pub. L. No. 111-203 at Preamble.

¹⁸⁵⁴ See SDR Proposing Release, 75 FR at 77307; see also Section 13(n)(5)(C) of the Exchange Act (requiring SDRs to maintain security-based swap data), as added by Section 763(i) of the Dodd-Frank Act, and proposed Rules 13n-5(b)(3) and (4) under the Exchange Act (requiring SDRs to establish, maintain, and enforce policies and procedures reasonably designed to ensure that transaction data and positions are accurate and to maintain the transaction data and positions for specified periods of time).

(systemic risk) supervision; resolve issues and positions after an institution fails; monitor compliance with relevant regulatory requirements; and respond to market turmoil.¹⁸⁵⁵

Second, the Commission preliminarily believes that providing relevant foreign authorities with access to SDR Data may minimize fragmentation of security-based swap data among trade repositories globally. If relevant foreign authorities are unable to access SDR Data, then they may establish trade repositories in their jurisdictions to ensure access to data that they need to perform their regulatory mandates and legal responsibilities.¹⁸⁵⁶ By minimizing such fragmentation, relevant authorities would likely be able to access, aggregate, and analyze relevant data more efficiently, which should, in turn, enhance regulatory effectiveness.

Third, the Commission preliminarily believes that providing relevant foreign authorities with access to SDR Data may reduce costs to market participants by reducing the potential for duplicative security-based swap transaction reporting requirements in multiple jurisdictions. The Commission anticipates that relevant foreign authorities will likely impose their own reporting requirements on market participants that fall within their jurisdiction; given the global nature of the security-based swap market and the large number of cross-border transactions, the Commission recognizes that it is likely that such transactions may be subject to the reporting

¹⁸⁵⁵ See, e.g., SDR Proposing Release, 75 FR at 77307, 77356, as corrected at 76 FR 79320 (“The data maintained by an SDR may also assist regulators in (i) preventing market manipulation, fraud, and other market abuses; (ii) performing market surveillance, prudential supervision, and macroprudential (systemic risk) supervision; and (iii) resolving issues and positions after an institution fails [I]ncreased transparency on where exposure to risk reside in financial markets . . . will allow regulators to monitor and act before the risks become systemically relevant. Therefore, SDRs will help achieve systemic risk monitoring.”).

¹⁸⁵⁶ Cf. Cleary Letter IV at 31 (The Indemnification Requirement “could be a significant impediment to effective regulatory coordination, since non-U.S. regulators may establish parallel requirements for U.S. regulators to access swap data reported in their jurisdictions.”).

requirements of at least two jurisdictions. The Commission preliminarily believes, however, that if relevant authorities are able to access security-based swap data in trade repositories outside their jurisdiction, such as SDRs registered with the Commission, as needed, then relevant authorities may be more inclined to permit market participants involved in such transactions to fulfill their reporting requirements by reporting the transactions to a single trade repository, rather than to separate trade repositories in each applicable jurisdiction, thereby potentially reducing market participants' compliance costs associated with establishing multiple reporting systems to multiple SDRs. Similarly, market participants would likely be able to access, aggregate, and analyze their data more efficiently in a single trade repository, than if they were required to report data to separate trade repositories in each applicable jurisdiction.

ii. Costs of Relevant Authorities' Access to Security-Based Swap Data

The Commission preliminarily believes that although there are benefits to SDRs providing access to relevant authorities to SDR Data, such access will likely involve certain costs, or more specifically, risks. For example, the Commission expects that SDRs will maintain data that is proprietary and highly sensitive¹⁸⁵⁷ and that is subject to strict confidentiality requirements.¹⁸⁵⁸ Section 13(n)(5)(G) of the Exchange Act, however, requires an SDR to make available data obtained by the SDR to authorities identified in Section 13(n)(5)(G) of the

¹⁸⁵⁷ As the Commission has noted in the SDR Proposing Release, such data could include information about a market participant's trades or its trading strategy; it may also include nonpublic personal information. See 75 FR at 77339.

¹⁸⁵⁸ See Section 13(n)(5)(F) of the Exchange Act, 15 U.S.C. 78m(n)(5)(F), as added by Section 763(i) of the Dodd-Frank Act, and proposed Rules 13n-4(b)(8) and 13n-9 under the Exchange Act.

Exchange Act.¹⁸⁵⁹ Extending access to SDR Data to anyone, including relevant authorities, increases the risk of the confidentiality of SDR Data not being preserved.¹⁸⁶⁰ A relevant authority's inability to maintain the confidentiality of SDR Data could erode market participants' confidence in the integrity of the security-based swap market, thereby leading to reduced liquidity in the security-based swap market, hindering price discovery, and impeding the capital formation process.¹⁸⁶¹

To help mitigate these risks, Sections 13(n)(5)(G) and (H) of the Exchange Act impose certain conditions on access to SDR Data by relevant authorities.¹⁸⁶² Specifically, Section 13(n)(5)(G) of the Exchange Act¹⁸⁶³ limits the authorities that may access SDR Data to an enumerated list of domestic authorities and any other persons, including foreign authorities, determined by the Commission to be appropriate and requires that an SDR notify the Commission when the SDR receives a request for SDR Data from an authority. Section 13(n)(5)(H) of the Exchange Act¹⁸⁶⁴ requires that, before an SDR shares security-based swap

¹⁸⁵⁹ 15 U.S.C. 78m(n)(5)(G), as added by Section 763(i) of the Dodd-Frank Act; see also proposed Rules 13n-4(b)(9) and (b)(10) under the Exchange Act.

¹⁸⁶⁰ See, e.g., ESMA Letter at 2 (noting that relevant authorities must ensure the confidentiality of security-based swap data provided to them).

¹⁸⁶¹ See SDR Proposing Release, 75 FR at 77307, 77334 (“Failure to maintain privacy of [SDR Data] could lead to market abuse and subsequent loss of liquidity.”).

¹⁸⁶² 15 U.S.C. 78m(n)(5)(G) and (H), as added by Section 763(i) of the Dodd-Frank Act; see also proposed Rules 13n-4(b)(9) and (b)(10) under the Exchange Act. In addition, Section 13(n)(5)(F) of the Exchange Act, 15 U.S.C. 78m(n)(5)(F), as added by Section 763(i) of the Dodd-Frank Act, and proposed Rules 13n-4(b)(8) and 13n-9 under the Exchange Act, require SDRs to maintain the privacy of SDR Data.

¹⁸⁶³ 15 U.S.C. 78m(n)(5)(G), as added by Section 763(i) of the Dodd-Frank Act; see also proposed Rule 13n-4(b)(9) under the Exchange Act.

¹⁸⁶⁴ 15 U.S.C. 78m(n)(5)(H), as added by Section 763(i) of the Dodd-Frank Act; see also proposed Rule 13n-4(b)(10) under the Exchange Act.

information with a relevant authority, the SDR must receive a written agreement from a relevant authority that it will abide by the confidentiality requirements described in Section 24 of the Exchange Act relating to the information provided by the SDR, and the relevant authority will agree to indemnify the SDR and the Commission for any expenses arising from litigation relating to the information provided under Section 24 of the Exchange Act.¹⁸⁶⁵

(b) Benefits and Costs of Proposed Guidance and Exemptive Rule

As discussed above, the Commission is (1) proposing interpretive guidance to specify how SDRs may comply with the Notification Requirement, (2) specifying how it proposes to determine whether a relevant authority is appropriate for purposes of receiving SDR Data, and (3) proposing the Indemnification Exemption.¹⁸⁶⁶ The Commission is proposing each of these to facilitate access to SDR Data by relevant authorities and to enable SDRs to fulfill their obligations under Sections 13(n)(5)(G) and 13(n)(5)(H) of the Exchange Act¹⁸⁶⁷ and previously proposed Rules 13n-4(b)(9) and 13n-4(b)(10) in a manner consistent with relevant authorities' need to have access to SDR Data that will enable them to carry out their regulatory mandates and legal responsibilities effectively and efficiently.¹⁸⁶⁸ The Commission preliminarily believes that our proposed guidance and the Indemnification Exemption would help realize the anticipated benefits of access to SDR Data by relevant authorities, as discussed above in Section XV.H.2(a)i, while at the same time mitigating the risks and other costs associated with such access, as discussed above in Section XV.H.2(a)ii. The Commission also preliminarily believes that, taken

¹⁸⁶⁵ 15 U.S.C. 78m(n)(5)(H), as added by Section 763(i) of the Dodd-Frank Act.

¹⁸⁶⁶ See Section VI.C.3, *supra*.

¹⁸⁶⁷ 15 U.S.C. 78m(n)(5)(G) and (H), as added by Section 763(i) of the Dodd-Frank Act.

¹⁸⁶⁸ See SDR Proposing Release, 75 FR at 77356.

together, our proposed guidance and the Indemnification Exemption will enable the Commission and SDRs to respond promptly and flexibly to the needs of relevant authorities.

i. Notification Requirement

The Commission preliminarily believes that an SDR can comply with the Notification Requirement in Section 13(n)(5)(G) of the Exchange Act¹⁸⁶⁹ and previously proposed Rule 13n-4(b)(9) thereunder by notifying the Commission, upon the initial request for security-based swap data by a relevant authority, that such relevant authority has made a request for security-based swap data from the SDR, and maintaining records of the initial request and all subsequent requests.¹⁸⁷⁰ Under this proposed interpretation, where an SDR complies with the above, the Commission will consider the notice provided and records maintained as satisfying the Notification Requirement.

In the Commission's preliminary view, SDRs would be less burdened under this interpretation of the Notification Requirement than under an interpretation that would require SDRs to provide the Commission with actual notice of all requests for SDR Data by relevant authorities because SDRs would have to actually notify the Commission only one time for each relevant authority. The Commission estimates that approximately 200 relevant authorities may make requests for SDR Data from SDRs.¹⁸⁷¹ Based on the Commission's experience in making

¹⁸⁶⁹ 15 U.S.C. 78m(n)(5)(G), as added by Section 763(i) of the Dodd-Frank Act.

¹⁸⁷⁰ See Section VI.C.3(a), *supra*.

¹⁸⁷¹ The Commission preliminarily believes that each of the entities in the United States that is specifically listed in Section 13(n)(5)(G) of the Exchange Act, 15 U.S.C. 78m(n)(5)(G), as added by Section 763(i) of the Dodd-Frank Act, may request SDR Data from SDRs. Section 13(n)(5)(G) specifically lists each appropriate prudential regulator (which includes the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Farm Credit Administration, and the Federal Housing Finance Agency), the Financial Stability

requests for security-based swap data from trade repositories, the Commission estimates that each relevant authority may make about 12 requests for SDR Data per year. An alternative interpretation that would require SDRs to provide the Commission with actual notice of all requests for SDR Data by relevant authorities would naturally increase the burden on SDRs to notify the Commission. Therefore, over the course of a year, under the Commission's proposed interpretation of the Notification Requirement, the Commission estimates that an SDR would provide the Commission with actual notice approximately 200 times, whereas under an interpretation that would require SDRs to provide the Commission with actual notice of all requests for SDR Data by relevant authorities, the Commission estimates that the SDR would provide the Commission with actual notice approximately 2400 times. Because SDRs would be required to provide actual notification to the Commission only upon the first request of a relevant authority, rather than upon every request, SDRs should be able to respond to requests for SDR Data by relevant authorities more promptly and at lower cost than requiring SDRs to notify the Commission of every request.

The Commission's proposed interpretation would also minimize an impediment to relevant authorities' direct access to SDR Data to fulfill their regulatory mandates and legal responsibilities because SDRs would not be required to provide the Commission with actual notice of every request prior to providing access to the requesting relevant authority. If SDRs

Oversight Council, the CFTC, and the Department of Justice. The Commission also preliminarily expects that certain SROs and registered futures associations may request SDR Data from SDRs. Therefore, the Commission estimates that approximately 10 relevant authorities in the United States may request SDR Data from SDRs. The Commission also estimates that each of the G20 countries will have no more than 10 relevant authorities that may request SDR Data from SDRs. Thus, the Commission estimates that there will be a total of no more than 200 relevant domestic and foreign authorities that may request SDR Data from SDRs.

had to actually notify the Commission every time that a relevant authority requested access to SDR Data (following the initial request), this could interfere with the ability of relevant authorities to obtain efficiently security-based swap data from SDRs to fulfill their own regulatory mandate or legal responsibilities. Such an impediment could be a factor in leading certain relevant authorities to seek to promote the establishment of trade repositories in their own jurisdictions, which would lead to fragmentation of security-based swap data and SDRs geographically. By reducing a potential barrier to relevant authorities' access to SDR Data and reducing the likelihood of fragmentation of data among trade repositories, the Commission's proposed interpretation of the Notification Requirement should enhance the ability of SDRs to perform their intended functions and thereby increase market transparency and regulatory effectiveness. Because SDRs would still be required to maintain records of relevant authorities' requests for SDR Data, the proposed interpretation would also allow the Commission to obtain this information as needed.

The Commission is aware that our proposed interpretation of the Notification Requirement will not provide the Commission with actual notice of all relevant authorities' requests for SDR Data prior to an SDR fulfilling such requests. The Commission preliminarily believes, however, that the benefits of receiving such notice does not justify the additional costs that SDRs would incur in providing such notice and the potential delay in relevant authorities receiving SDR Data that they need to fulfill their regulatory mandates and legal responsibilities.

ii. Determination of Appropriate Regulators

The Commission is proposing an approach to determining whether an authority, other than those expressly identified in Section 13(n)(5)(G) of the Exchange Act¹⁸⁷² and previously proposed Rule 13n-4(b)(9) thereunder, should be determined to be appropriate for purposes of requesting SDR Data. As described above, the Commission preliminarily envisions that this process will involve consideration of, among other things, the scope of the relevant authority's regulatory mandate and legal responsibilities, the authority's ability to provide the Commission with reciprocal assistance in securities matters within the Commission's jurisdiction, and a supervisory and enforcement MOU or other arrangement that would be designed to protect the confidentiality of any SDR Data provided to the authority.¹⁸⁷³

The Commission preliminarily believes that our proposed approach has the benefit of appropriately limiting access to SDR Data by relevant authorities in order to seek to protect the confidentiality of SDR Data.¹⁸⁷⁴ The Commission expects that relevant authorities from a wide range of jurisdictions may seek to obtain a determination by the Commission that they may appropriately have access to SDR Data. Each of these jurisdictions may have a distinct approach to supervision, regulation, or oversight of its financial markets or market participants and to the protection of proprietary and other confidential information. The Commission preliminarily believes that the process that it is contemplating has the benefit of enabling the Commission to determine whether an authority has a legitimate interest in the SDR Data, based on its regulatory

¹⁸⁷² 15 U.S.C. 78m(n)(5)(G) (permitting access to SDR Data by "any other person that the Commission determines to be appropriate"), as added by Section 763(i) of the Dodd-Frank Act.

¹⁸⁷³ See Section VI.C.3(b), *supra*.

¹⁸⁷⁴ See ESMA Letter at 2 (noting that relevant authorities must ensure the confidentiality of security-based swap data provided to them).

mandate or legal responsibilities, and whether the authority is capable of protecting the confidentiality of SDR Data provided to it. In addition, the Commission preliminarily believes that this process will allow the Commission to be able to revoke its determination in certain instances, including, for example, if a relevant authority fails to keep confidential data that an SDR provides to the authority.

The Commission also preliminarily believes that our proposed approach will reduce the potential for fragmentation of security-based swap data among trade repositories because it will reduce the risks of improper disclosure, misappropriation, or misuse of SDR Data. Concerns about these risks could prompt relevant authorities to promote the development and maintenance of SDRs in their own jurisdictions rather than entrusting data reported by persons within their jurisdictions to consolidated trade repositories. As described above, the Commission envisions that any determination order by the Commission will likely be conditioned on a relevant authority and the Commission entering into a supervisory and enforcement MOU or other arrangement, which will likely address the confidentiality of SDR Data obtained by the authority.¹⁸⁷⁵ Because the Commission's determination process will likely address confidentiality concerns, the Commission preliminarily believes that our proposed approach would increase relevant authorities' confidence in the preservation of the confidentiality of SDR Data shared with the authorities' counterparts in other jurisdictions, and, in conjunction with the Commission's approach to ensuring access to SDR Data by relevant authorities discussed above,¹⁸⁷⁶ may reduce incentives for relevant authorities to seek to promote the establishment and maintenance of SDRs in other jurisdictions. If concerns over confidentiality reduce relevant

¹⁸⁷⁵ See Section VI.C.3(b), supra.

¹⁸⁷⁶ See Section VI.C., supra.

authorities' incentives to promote the establishment and maintenance of SDRs in their own jurisdictions and market participants operating in those jurisdictions conclude that they may, under applicable foreign law, use SDRs registered with the Commission for reporting purposes and therefore do so, then the Commission preliminarily believes that this will improve market transparency and regulatory efficiency.

Furthermore, the Commission preliminarily believes that our proposal represents an efficient approach to the determination process that will promote the intended benefits of access by relevant authorities to SDR Data, as discussed above in Section XV.H.2(a)i. The Commission routinely negotiates MOUs or other arrangements with foreign authorities in order to secure mutual assistance or for other purposes, and the Commission preliminarily believes that the approach that it is proposing is generally consistent with this practice. As such, the Commission preliminarily believes that the burden of entering into supervisory and enforcement MOUs or other arrangements with relevant authorities during the Commission's determination process will be outweighed by the benefits to relevant authorities in gaining access to SDR Data to carry out their regulatory mandates or legal responsibilities.

iii. Exemptive Relief from the Indemnification Requirement

Finally, the Commission is proposing the Indemnification Exemption, which would provide SDRs registered with the Commission with the option of permitting relevant authorities to obtain SDR Data without agreeing to indemnify the SDR and the Commission, subject to three conditions. The first two conditions would limit the exemption to (1) requests by a relevant authority for security-based swap information made to fulfill a regulatory mandate and/or legal responsibility of the requesting authority, and (2) requests pertaining to a person or financial

product subject to the jurisdiction, supervision, or oversight of the requesting authority.¹⁸⁷⁷ The third condition would require the relevant authority to have entered into a supervisory and enforcement MOU or other arrangement with the Commission that addresses the confidentiality of the security-based swap information provided and any other matters as determined by the Commission.¹⁸⁷⁸ The Commission preliminarily believes that the benefits of the Indemnification Exemption would include the benefits associated with permitting relevant authorities to access SDR Data, as discussed in Section XV.H.2(a)i above.

As discussed above, the Commission preliminarily believes that a rigid application of the Indemnification Requirement could prevent some relevant domestic authorities and some relevant foreign authorities from obtaining security-based swap information from SDRs because they cannot provide an indemnification agreement.¹⁸⁷⁹ Effectively prohibiting access to SDR Data by authorities other than the Commission would greatly reduce the ability of an SDR to provide the market transparency and regulatory efficiency benefits intended under Title VII.¹⁸⁸⁰ Although relevant authorities could obtain SDR Data from the Commission,¹⁸⁸¹ it would likely be less efficient for relevant authorities to do so than obtaining access to SDR Data directly from SDRs, particularly in periods of market stress and particularly since SDRs are likely to have expertise in, and business incentives for, providing such data to relevant authorities efficiently.

¹⁸⁷⁷ See Section VI.C.3(c), supra.

¹⁸⁷⁸ See id.

¹⁸⁷⁹ See Section VI.C.3(c), supra.

¹⁸⁸⁰ See SDR Proposing Release, 75 FR at 77307 (describing expected benefits of SDRs, including the market transparency benefits of access by regulators); id. at 77356 (“The ability of the Commission and other regulators to monitor risk and detect fraudulent activity depends on having access to market data.”).

¹⁸⁸¹ See Section VI.C.1, supra; see also SDR Proposing Release, 75 FR at 77319.

The Commission also preliminarily believes that a rigid application of the Indemnification Requirement could reduce the amount of data held by SDRs registered with the Commission, thereby potentially reducing the usefulness of such SDRs to relevant authorities and market participants. To the extent that relevant foreign authorities are effectively limited in obtaining SDR Data, the relevant authorities may seek to promote the development and maintenance of SDRs in their own jurisdictions, which would likely lead to fragmentation of security-based swap data among trade repositories in multiple jurisdictions.¹⁸⁸² Such fragmentation could result in higher reporting costs for market participants,¹⁸⁸³ who may be subject to duplicative security-based swap transaction reporting requirements in multiple jurisdictions, and would likely increase other costs that both relevant authorities and market

¹⁸⁸² Cf. Cleary Letter IV at 31 (The Indemnification Requirement “could be a significant impediment to effective regulatory coordination, since non-U.S. regulators may establish parallel requirements for U.S. regulators to access swap data reported in their jurisdictions.”).

¹⁸⁸³ In the SDR Proposing Release, the Commission noted that multiple SDRs per asset class would allow for market competition to determine how data is collected. 75 FR at 77358. Although the Commission continues to recognize that multiple SDRs may in some circumstances increase competition and lower costs associated with reporting and other Title VII requirements, the Commission preliminarily believes that fragmentation of security-based swap data among trade repositories under the circumstances described here would not likely increase competition or reduce costs. In a jurisdictionally-fragmented global market, an increase in the number of trade repositories in one jurisdiction may not increase the number of alternative trade repositories in another jurisdiction to which a counterparty may report. In such a market, counterparties to security-based swap transactions occurring wholly within one jurisdiction would likely not be free to choose to report to a trade repository in another jurisdiction to satisfy applicable reporting requirements. Similarly, cross-border transactions subject to the reporting requirements of two or more jurisdictions would likely be required to be reported to trade repositories in each of the jurisdictions that require the transactions to be reported.

participants may incur, including, for example, their inability to aggregate data across multiple SDRs.¹⁸⁸⁴

The Commission preliminarily believes that, in addition to addressing the concerns raised by a rigid application of the Indemnification Requirement, the Indemnification Exemption is beneficial because it would mitigate the risks associated with permitting relevant authorities to obtain access to SDR Data, as discussed above in Section XV.H.2(a)ii. The Indemnification Exemption would be available only for requests that are consistent with each requesting authority's regulatory mandate or legal responsibilities and only for SDR Data pertaining to a person or financial product subject to the requesting authority's jurisdiction, supervision, or oversight. The Commission preliminarily believes that these conditions significantly reduce the confidentiality concerns relating to relevant authorities' access to SDR Data,¹⁸⁸⁵ as authorities are likely to be sensitive to the need for confidentiality of data, particularly if the data pertains to matters in which they have an interest, *i.e.*, data within their own regulatory mandates or legal responsibilities and to persons and financial products under their own jurisdiction, supervision, or oversight. Similarly, because the Indemnification Exemption is voluntary, the SDR may choose not to rely on the Indemnification Exemption, such as under circumstances where the risks associated with providing access to SDR Data may be unreasonably high – for example, where a relevant authority has a previous history of weak protections for preserving the confidentiality of SDR Data. Further, even where the SDR opts to rely on the Indemnification

¹⁸⁸⁴ See SDR Proposing Release, 75 FR at 77358. The costs associated with aggregating the data of multiple SDRs would likely be significantly higher under the circumstances described here, as different jurisdictions are likely to impose different requirements regarding how data is to be reported and maintained.

¹⁸⁸⁵ See, *e.g.*, ESMA Letter at 2 (noting that relevant authorities must ensure the confidentiality of security-based swap data provided to them).

Exemption, the Commission will have an opportunity to evaluate the confidentiality protections provided by the relevant authority in the context of negotiations of a supervisory and enforcement MOU or other arrangement.¹⁸⁸⁶

The Commission envisions that, to meet the first two conditions in the Indemnification Exemption, an SDR may incur costs in determining whether a relevant authority's request for data falls within its regulatory mandate or legal responsibilities and pertains to a person or financial product subject to the authority's jurisdiction, supervision, or oversight. The Commission preliminarily believes, however, that an SDR's costs for meeting the first two conditions in the Indemnification Exemption would be minimal, if any, in light of the burden already imposed by an SDR's statutory duty to maintain the privacy of security-based swap information that it receives.¹⁸⁸⁷ With respect to the third condition in the Indemnification

¹⁸⁸⁶ For the Indemnification Exemption to apply to the requests of a particular requesting authority, the Commission would be required to enter into a supervisory and enforcement MOU or other arrangement with such authority, which would enable the Commission to determine, prior to operation of the Indemnification Exemption, that the authority has a regulatory mandate or legal responsibilities to access SDR Data, that it agrees to protect the confidentiality of any security-based swap information provided to it, and that it will provide reciprocal assistance in securities matters within the Commission's jurisdiction. See Section VI.C.3(c), supra. In addition, if an SDR determines that it would prefer not to invoke the exemption, it would have the option to require an indemnification agreement from a relevant authority that seeks to access SDR Data. See Section VI.C.3(c), supra.

¹⁸⁸⁷ See Section 13(n)(5)(F) of the Exchange Act, 15 U.S.C. 78m(n)(5)(F), as added by Section 763(i) of the Dodd-Frank Act; see also proposed Rule 13n-4(b)(8) under the Exchange Act (requiring SDRs to maintain the privacy of any and all security-based swap transaction information that the SDR receives from a security-based swap dealer, counterparty, or certain registered entity) and proposed Rule 13n-9 under the Exchange Act (requiring an SDR to protect the privacy of security-based swap transaction information that the SDR receives by, among other things, establishing safeguards, policies, and procedures that are reasonably designed to protect such information and that address, without limitation, the SDR limiting access to confidential information, material, nonpublic information, and intellectual property). The Commission preliminarily believes that in order to comply with an SDR's statutory privacy duty, the SDR will most

Exemption, the Commission preliminarily believes that the costs for an SDR to confirm whether the Commission and a relevant authority have entered into a supervisory and enforcement MOU or other arrangement would be minimal because such information should generally be readily available.¹⁸⁸⁸

Even if all the conditions in the Indemnification Exemption are satisfied, SDRs would have the option to seek to obtain an indemnification agreement from a relevant authority. The Commission recognizes that the conditions in the Indemnification Exemption would not necessarily provide SDRs that invoke the exemption with the same level of protection that an

likely decide that it is reasonable to consider whether a relevant authority's request for security-based swap information is within its regulatory mandate or legal responsibilities and pertains to a person or financial product within the authority's jurisdiction, supervision, or oversight before the SDR provides the information. If so, then the Commission preliminarily believes that the SDR's costs for meeting the first two conditions in the Indemnification Exemption would be minimal, if any, because these conditions will most likely be already addressed in the SDR's policies and procedures required by previously proposed Rule 13n-9 under the Exchange Act. As discussed in the SDR Proposing Release, the Commission anticipated that the primary costs to SDRs for complying with proposed Rule 13n-9 would be derived from developing, maintaining, and ensuring compliance with the required policies and procedures. 75 FR at 77363. Based upon data from SIFMA's Management & Professional Earnings in the Securities Industry 2012 (modified by the SEC staff to account for an 1800-hour-work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead), the Commission now estimates that the average initial paperwork cost associated with proposed Rule 13n-9 would be 630 hours and \$60,000 in outside legal costs for each SDR. The Commission also estimates that the average ongoing paperwork cost would be 180 hours per year for each SDR and that assuming a maximum of ten SDRs, the aggregate one-time estimated dollar cost to comply with proposed Rule 13n-9 would be \$2,553,000, which is calculated as follows: (\$60,000 for outside legal services + (Compliance Attorney at \$310 per hour for 630 hours)) * 10 registrants = \$2,553,000. The Commission further estimates that the aggregate ongoing estimated dollar cost per year to comply with proposed Rule 13n-9 would be \$558,000, which is calculated as follows: (Compliance Attorney at \$310 per hour for 180 hours) * 10 registrants = \$558,000.

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As a general matter, the Commission provides a list of MOUs and other arrangements, which are available at the following link:
http://www.sec.gov/about/offices/oia/oia_cooparrangements.shtml.

indemnification agreement would provide (i.e., coverage for any expenses arising from litigation relating to information provided to a relevant authority) and thus, SDRs may decide to weigh the potential risks in not seeking an indemnification agreement from a relevant authority with the benefits of invoking the exemption.

The Commission preliminarily believes, however, that the conditions in the exemption would provide an additional layer of protection of the confidentiality of SDR Data—albeit different from the protection provided by an indemnification agreement—and that in cases where SDRs choose the exemption, such SDRs presumably believe that the benefits of the exemption, as discussed above, justify the costs of invoking the exemption. However, even in cases where the exemption is not chosen, the availability of the option is valuable to SDRs because the exemption would provide SDRs with an alternative to the Indemnification Requirement and an opportunity to choose the lower cost alternative.

(c) Alternatives to Proposed Guidance and Exemptive Relief

i. Notification Requirement

The Commission considered requiring SDRs to provide actual notice to the Commission of all requests for SDR Data by relevant authorities prior to SDRs fulfilling such requests. The Commission preliminarily believes, however, that the benefits of receiving actual notice for each and every request does not justify the additional costs imposed on SDRs to provide such notice and the potential delay in relevant authorities receiving SDR Data that they need to fulfill their regulatory mandates and legal responsibilities. The Commission also preliminarily believes that our proposed approach is the most efficient way to interpret the Notification Requirement and would allow the Commission access to the information needed.

ii. Determination of Appropriate Regulators

The Commission considered prescribing by rule a specific process to determine whether a relevant authority is appropriate for purposes of receiving security-based swap data directly from SDRs that would require, for example, a supervisory and enforcement MOU or other arrangement.¹⁸⁸⁹ The Commission preliminarily believes, however, that such a rule is not necessary because our process for determining an appropriate authority provides the Commission and relevant authorities greater flexibility to consult on appropriate terms of access to SDR Data, confidentiality commitments, and reciprocal access commitments on a case-by-case basis.

iii. Exemptive Relief from the Indemnification Requirement

The Commission considered whether to not propose any exemptive relief from the Indemnification Requirement. For the reasons discussed below, the Commission believes that the Indemnification Exemption is a better, and more appropriate, alternative to a rigid application of the Indemnification Requirement.¹⁸⁹⁰

The Commission preliminarily believes that a rigid application of the Indemnification Requirement may reduce the expected benefits associated with relevant authorities' access to SDR Data, as discussed in Section XV.H.2(a)i above. In particular, the Indemnification Requirement may prevent some relevant authorities from accessing SDR Data directly from

¹⁸⁸⁹ See, e.g., CFTC Rule 49.17(b), 17 CFR § 49.17(b) (requiring "Appropriate Foreign Regulators" to have an MOU or similar type of information sharing agreement, or as the CFTC determines on a case-by-case basis).

¹⁸⁹⁰ See also Section VI.C.3(c), *supra* (discussing how a rigid application of the Indemnification Requirement would frustrate the purposes of the Dodd-Frank Act).

SDRs registered with the Commission.¹⁸⁹¹ Although relevant authorities could obtain SDR Data from the Commission,¹⁸⁹² it would likely be less efficient for relevant authorities to do so than obtaining SDR Data access directly from SDRs, particularly in periods of market stress and particularly since SDRs are likely to have expertise in, and business incentives for, providing such data to relevant authorities efficiently.

Moreover, the inability of relevant foreign authorities to obtain direct access to SDR Data from SDRs registered with the Commission would likely increase the risk of data fragmentation among trade repositories, as many foreign authorities may require establishment and maintenance of trade repositories in their jurisdictions if such authorities determine that they are unable to satisfy the Indemnification Requirement; such fragmentation may lead to higher reporting costs for market participants and less transparency in the security-based swap market.¹⁸⁹³

The Commission also considered whether to prescribe additional conditions in or limitations to the Indemnification Exemption, but decided against it. Any additional conditions or limitations to the Indemnification Exemption would likely impose additional costs on SDRs that the Commission preliminarily believes are not warranted at this time. The Commission presently believes that the Indemnification Exemption strikes the right balance in furthering the goals of the Dodd-Frank Act by providing relevant authorities with access to SDR Data to fulfill

¹⁸⁹¹ See, e.g., DTCC Letter I at 3 (discussing how the Indemnification Requirement would result in the reduction of information accessible to regulators on a timely basis and would greatly diminish regulators' ability to carry out oversight functions).

¹⁸⁹² See Section VI.C.1, *supra*; see also SDR Proposing Release, 75 FR at 77319.

¹⁸⁹³ See, e.g., Cleary Letter IV at 31 (The Indemnification Requirement "could be a significant impediment to effective regulatory coordination, since non-U.S. regulators may establish parallel requirements for U.S. regulators to access swap data reported in their jurisdictions.").

their regulatory mandates and legal requirements while incorporating appropriate limitations to such access to guard against over-broad or unfettered access to all SDR Data as well as certain mechanisms to seek to preserve the confidentiality of the SDR Data.

Request for Comment

The Commission requests comments on all aspects of the economic analysis of our proposed interpretive guidance, Indemnification Exemption, and alternatives to our proposed approach. Interested persons are encouraged to provide supporting data and analysis and, when appropriate, suggest modifications to the Commission's proposed interpretive guidance and Indemnification Exemption. Responses that are supported by data and analysis provide great assistance to the Commission in considering the benefits and costs of proposed alternatives, as well as considering the practicality and effectiveness of the proposed alternatives. In addition, the Commission requests commenters' views on the following:

- Has the Commission appropriately considered the expected programmatic benefits and costs of our proposed interpretative guidance and Indemnification Exemption? If not, please explain why and provide information on how such benefits and costs should be assessed.
- Are the programmatic benefits and costs discussed above accurate? If not, why not and how can the Commission more accurately describe such benefits and costs?
- Are there quantifiable programmatic benefits or costs associated with the Commission's proposed interpretive guidance and Indemnification Exemption that are not discussed above, but that the Commission should consider? If so, please discuss, analyze, and supply relevant data, information, or statistics regarding any such benefits or costs. For example, how many relevant authorities will likely request

SDR Data from SDRs? What is the average number of requests for SDR Data that an SDR may receive from relevant authorities per year?

- Are there costs in fulfilling any of the conditions in the Indemnification Exemption that the Commission has not discussed above? If so, what?
- Do you agree that an SDR's costs for meeting the first two conditions in the Indemnification Exemption would be minimal, if any, because these conditions will most likely be already addressed in the SDR's policies and procedures required by previously proposed Rule 13n-9 under the Exchange Act? If not, please explain.
- Do SDRs have appropriate incentives to rely on the Indemnification Exemption? Are there circumstances in which an SDR may rely on an Indemnification Exemption when it is inappropriate to do so? Conversely, would SDRs have incentives to require indemnification despite the availability of the Indemnification Exemption? Please explain.
- What kinds of legal frameworks will relevant authorities operate under? Will some relevant authorities operate under legal frameworks that do not impose confidentiality restrictions on the use of data that are comparable to those governing SDRs and those applicable to the Commission?
- Do the benefits of the Commission's proposed interpretive guidance and Indemnification Exemption justify the costs? If not, why not?
- Has the Commission appropriately considered the benefits and costs of the alternative approaches to the Commission's interpretive guidance and Indemnification Exemption? If not, why not?

3. Economic Analysis of the Re-proposal of Regulation SBSR

As discussed above, although the Commission is re-proposing all of Regulation SBSR, the new elements of the re-proposal relate directly to cross-border issues, are conforming changes necessitated by those larger changes, or are technical changes designed to facilitate understanding of those other changes. However, since Regulation SBSR was proposed but has not yet been adopted, the discussion below will include costs and benefits of the initial proposal from a pre-statutory baseline and then consider the changes to the initial assessments of costs and benefits implied by the re-proposal.

Broadly, the Commission continues to believe, as described in the Regulation SBSR Proposing Release, that Regulation SBSR taken as a whole would result in improved market quality, improved risk management, greater efficiency, and improved Commission oversight.¹⁸⁹⁴ Today's re-proposal of Regulation SBSR is intended to further these goals while further limiting, to the extent practicable, the overall costs associated with security-based swap reporting and public dissemination in cross-border situations. As described in more detail below, the proposed revisions were suggested by many commenters to the initial proposal and are designed, among other things, to better align reporting duties with larger entities that have greater resources and capability to report¹⁸⁹⁵ and to reduce the potential for duplicative reporting.¹⁸⁹⁶ These revisions

¹⁸⁹⁴ See Regulation SBSR Proposing Release, 75 FR at 75261-62.

¹⁸⁹⁵ See, e.g., SIFMA AMG Letter at 2 (stating that, due to their commercial interests and technological expertise, non-U.S. security-based swap dealers and major security-based swap participants would be as likely as U.S. security-based swap dealers and major security-based swap participants to comply with the reporting obligations, or would be best positioned to develop at the lowest cost the necessary technological infrastructure or relationships with third party service providers); Vanguard Letter at 6 (stating that requiring U.S. end users to report security-based swaps would be costly and burdensome for end users, particularly for end users that enter into security-based swaps on an isolated basis); MarkitSERV Letter I at 9 (noting that, in light of end users' resources and

should help to maximize the benefits and minimize the potential costs of regulatory reporting and public dissemination of security-based swaps faced by market participants.

The Commission seeks public comment on the costs and benefits that re-proposed Regulation SBSR would entail. The Commission encourages commenters to identify, discuss, analyze, and supply relevant data, information, or statistics regarding any such costs or benefits. In particular, the Commission seeks comment on the following:

- Taken together, what are the costs and benefits of re-proposed Regulation SBSR?
- Would the revisions contained in re-proposed Regulation SBSR result in benefits or costs not identified by the Commission? If so, please describe.
- Has the Commission accurately identified and described all relevant benefits and costs associated with re-proposed Regulation SBSR?

the operational and technical challenges of security-based swap reporting, it will often be most efficient for a U.S. end user to delegate reporting to its non-U.S. security-based swap dealer or major security-based swap participant counterparty); DTCC Letter II at 27 (stating that the Commission's failure to encourage arrangements through which non-U.S. dealers could submit transaction reports for customers that are U.S. persons would impose significant burdens and costs on U.S. money managers, which likely would be passed to individual investors, pension funds, and state and local governments); Cleary Letter IV at 28 (stating that requiring U.S. end users to report security-based swaps entered into with non-U.S. security-based swap dealers would be unduly burdensome for end users and could negatively impact the competitiveness of affected U.S. markets); ISDA/SIFMA Letter I at 19 (the end-user reporting requirement could result in the inadvertent exclusion of non-U.S. security-based swap dealers, which could increase systemic risk by decreasing liquidity and further concentrating the U.S. security-based swap market); Cleary Letter II at 18 (end users and other unregistered counterparties might refuse to enter into security-based swaps with foreign security-based swap dealers or major security-based swap participants to avoid the costs of developing the necessary reporting systems, thereby potentially reducing price competition).

¹⁸⁹⁶ See notes 1136-1141, supra.

- Could re-proposed Regulation SBSR be further enhanced, consistent with the Dodd-Frank Act, to maximize aggregate benefits and minimize costs to the security-based swap market?

(a) Modifications to “Reporting Party” Rules and Jurisdictional Reach of Regulation SBSR – Re-proposed Rules 901(a) and 908(a)

i. Initial Proposal

Rule 901(a), as initially proposed, set forth three scenarios for assigning the duty to report a security-based swap transaction. Proposed Rule 901(a)(1) would provide that, where only one counterparty to a security-based swap is a U.S. person, the U.S. person would be the reporting party. Proposed Rule 901(a)(2) would assign reporting responsibilities as follows:

- With respect to a security-based swap in which only one counterparty is a security-based swap dealer or major security-based swap participant, the security-based swap dealer or major security-based swap participant would be the reporting party;
- With respect to a security-based swap in which one counterparty is a security-based swap dealer and the other counterparty is a major security-based swap participant, the security-based swap dealer would be the reporting party; and
- With respect to any other security-based swap not described in the first two cases, the counterparties to the security-based swap would select a counterparty to be the reporting party.

Proposed Rule 901(a)(3), as originally proposed, would provide that, if neither party is a U.S. person but the security-based swap is executed in the United States or through any means of interstate commerce, or is cleared through a clearing agency having its principal place of business in the United States, the counterparties to the security-based swap would be required to select a counterparty to be the reporting party.

Rule 908(a), as initially proposed, would delineate the scope of the security-based swap market that would be subject to regulatory reporting and public dissemination under Regulation SBSR. Proposed Rule 908(a) provided that a security-based swap would be subject to these requirements if the security-based swap: (1) has at least one counterparty that is a U.S. person; (2) is executed in the United States or through any means of interstate commerce; or (3) is cleared through a registered clearing agency having its principal place of business in the United States. If a security-based swap met any of the tests in proposed Rule 908(a), the counterparties would then look to proposed Rule 901(a) to determine which of them would be required to report the security-based swap. Rule 908(a), as initially proposed, would not impose reporting requirements in connection with a security-based swap solely because one of the counterparties is guaranteed by a U.S. person.

Rule 902, as initially proposed, would require the public dissemination of security-based swaps that met the scope requirements of proposed Rule 908(a). Proposed Rule 902(a) set out the core requirement that a registered SDR, immediately upon receiving a transaction report of a security-based swap, would be required to publicly disseminate information about that security-based swap consisting of all the information reported by the reporting party pursuant to proposed Rule 901(c), plus any indicator(s) contemplated by the registered SDR's policies and procedures that would be required by proposed Rule 907.¹⁸⁹⁷

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Block trades would be subject to special dissemination rules. Section 13(m)(1)(E) of the Exchange Act, 15 U.S.C. 78(m)(1)(E), provides that, with respect to cleared security-based swaps, the rule promulgated by the Commission related to public dissemination shall contain provisions that "specify the criteria for determining what constitutes a large notional security-based swap transaction (block trade) for particular market and contracts" and "specify the appropriate time delay for reporting large notional security-based swap transactions (block trades) to the public." The Commission in the Regulation SBSR Proposing Release did not propose how to define a "block trade." As noted in

a. Programmatic Benefits of Initial Proposal

The Regulation SBSR Proposing Release discussed various benefits that could result from proposed Rule 901.¹⁸⁹⁸ For example, the Commission anticipated that proposed Rule 901 would provide the Commission with a better understanding of the security-based swap market generally, including the size and scope of that market, as the Commission would have access to data held by SDRs.¹⁸⁹⁹ Such access is designed to promote more effective systemic regulation, and provide the Commission with better information to examine for improper market behavior and to take enforcement actions. Furthermore, specifying general types of information to be reported and publicly disseminated could increase the efficiency and level of standardization in the security-based swap market. Proposed Rule 901 also could facilitate the reports about the security-based swap marketplace that the Commission is required to provide to Congress.¹⁹⁰⁰

The Commission anticipated that proposed Rule 901 would likely require reporting parties to establish and maintain order management systems (“OMSs”) for capturing and transmitting data about their security-based swap transactions. Such systems would be necessary to report data within the timeframes set forth in proposed Rules 901(c) and 901(d), because it is unlikely that manual processes could capture and report in real time the numerous required data elements relating to a security-based swaps. There could be substantial benefits in the form of reduced operational risk in requiring all reporting parties to have such capability, as more timely

Regulation SBSR Proposing Release, the Commission intends to do so in a separate proposal. See Regulation SBSR Proposing Release, 75 FR at 75228.

¹⁸⁹⁸ See *id.* at 75262-64.

¹⁸⁹⁹ See, e.g., 15 U.S.C. 78m(n)(5)(D) (requiring SDRs to provide the Commission with direct electronic access to their data).

¹⁹⁰⁰ See Section 719 of the Dodd-Frank Act.

capture and storage at firm level of all security-based swap transaction information would support effective risk management. Counterparties, SDRs, clearing agencies (in some cases), and regulators would obtain accurate knowledge of new security-based swap transactions more quickly. Reporting parties that obtain such systems could see additional benefits in being able to process and manage risk or to exploit operational efficiency gains to expand their participation in the security-based swap market.

The information reported by reporting parties pursuant to proposed Rule 901(c) would be used by registered SDRs to publicly disseminate real-time reports of security-based swap transactions under proposed Rule 902. In the Regulation SBSR Proposing Release, the Commission highlighted numerous benefits of the public dissemination requirement in proposed Rule 902. Among other things, the Commission stated that “[b]y reducing information asymmetries, post-trade transparency has the potential to lower transaction costs, improve confidence in the market, encourage participation by a larger number of market participants, and increase liquidity in the security-based swap market.”¹⁹⁰¹ The Commission noted the opacity of the current security-based swap market and stated that “[m]arket participants, even dealers, lack an effective mechanism to learn the prices at which other market participants transact.”¹⁹⁰² Requiring prompt dissemination of last-sale information would provide all market participants with more extensive and more accurate information on which to make trading and valuation determinations. Moreover, the Commission noted that post-trade pricing and volume information “could allow valuation models to be adjusted to reflect how [security-based swap]

¹⁹⁰¹ See Regulation SBSR Proposing Release, 75 FR at 75267.

¹⁹⁰² Id.

counterparties have valued a [security-based swap] instrument at a specific moment in time”¹⁹⁰³ and that public, real-time dissemination of last-sale information “also could aid dealers in deriving better quotations, because they would know the prices at which other market participants have recently traded.”¹⁹⁰⁴ Post-trade transparency of security-based swap transactions also could improve market participants’ ability to value security-based swaps, especially in opaque markets or markets with low liquidity where recent quotations or last-sale prices may not exist or, if they do exist, may not be widely available. Better valuations could create a benefit in the form of more efficient capital allocation and ultimately could reduce systemic risks.¹⁹⁰⁵

b. Programmatic Costs of Initial Proposal

The proposed security-based swap reporting requirements would also impose initial and ongoing costs on reporting parties. In the Regulation SBSR Proposing Release, the Commission stated our preliminary belief that certain of these costs would be a function of the number of reportable events¹⁹⁰⁶ and the data elements required to be submitted for each reportable event. The Commission preliminarily estimated that security-based swap market participants would face three categories of costs to comply with proposed Rule 901. First, each reporting party would have to develop an internal OMS capable of capturing relevant security-based swap transaction information so that it could be reported. Second, each reporting party would have to

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Id.

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Id.

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See id. at 75268.

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A reportable event would include both an initial security-based swap transaction, required to be reported pursuant to proposed Rule 901(b) and the data elements of which would be set forth in proposed Rule 901(c), as well as a life cycle event, the reporting of which is governed by proposed Rule 901(e). See id. at 75264-66.

implement a reporting mechanism. Third, each reporting party would have to establish an appropriate compliance program and support for operating the OMS and reporting mechanism.¹⁹⁰⁷ The Commission preliminarily estimated that up to 1,000 entities could be reporting parties under proposed Rule 901(a) and that the first-year aggregate costs associated with proposed Rule 901 would be \$511,013 per reporting party, for a total of \$511,013,000 for all reporting parties.¹⁹⁰⁸ The Commission preliminarily estimated that the ongoing aggregate annualized costs associated with proposed Rule 901 would be \$316,116 per reporting party, for a total of \$316,116,000 for all reporting parties.¹⁹⁰⁹ These cost estimates all relied on the Commission's preliminary estimate of 1,000 reporting parties. In the Regulation SBSR Proposing Release, the Commission did not break down the costs of Rule 901 by each paragraph of Rule 901, but instead calculated costs arising from proposed Rule 901 as a whole.

The Commission noted that the costs associated with required reporting pursuant to proposed Regulation SBSR could represent a barrier to entry for new, smaller firms that might not have the ability to comply with the proposed reporting requirements or for whom the expected benefits of compliance might not justify the costs of compliance. To the extent that proposed Regulation SBSR might deter new firms from entering the security-based swap market, this would be a cost of the proposal and could negatively impact competition. Nevertheless, the Commission preliminarily believed that the proposed reporting requirements would not impose insurmountable barriers to entry, as firms that were reluctant to acquire and build reporting

¹⁹⁰⁷ See *id.* at 75264.

¹⁹⁰⁸ See *id.* at 75266.

¹⁹⁰⁹ See *id.*

infrastructure would be able to engage with third-party service providers that carry out any reporting duties that they incurred under Regulation SBSR.¹⁹¹⁰

In the Regulation SBSR Proposing Release, the Commission preliminarily estimated that the initial one-time aggregate costs for registered SDRs to develop and implement the systems needed to disseminate the required transaction information would be \$40,004,000, which corresponds to \$4,000,400 per SDR. Further, the Commission preliminarily estimated that aggregate annual costs on registered SDRs for systems and connectivity upgrades associated with real-time public dissemination would be \$24,002,400, which corresponds to \$2,400,240 per SDR. Overall, the initial aggregate costs associated with proposed Rule 901 for all SDRs were estimated to be \$64,006,400, which corresponds to \$6,400,640 per registered SDR.¹⁹¹¹

ii. Re-proposal

For the reasons discussed above, the Commission is now re-proposing certain provisions of Regulation SBSR that would extend the scope of security-based swaps that would be subject to regulatory reporting and public dissemination and, in some cases, to shift the duty to report to a different counterparty. This re-proposal is being made, in part, to reflect the Commission's preliminary belief that in many cases the reporting and public dissemination requirements of Regulation SBSR should extend to security-based swaps executed outside the United States but having a U.S. person as an indirect counterparty. The Commission also is revising our approach to assigning the duty to report to minimize consideration of the domicile of the counterparties, and to focus more on their registration status (i.e., whether or not a counterparty is a security-based swap dealer or major security-based swap participant).

¹⁹¹⁰ See id.

¹⁹¹¹ See id. at 75269.

To facilitate these revisions, the Commission is proposing to add certain new terms and definitions and to redefine other terms contained in Rule 900. First, the Commission is now proposing to redefine the term “counterparty” as “a direct or indirect counterparty of a security-based swap.” Re-proposed Rule 900 would define “direct counterparty” as “a person that enters directly with another person into a contract that constitutes a security-based swap” and “indirect counterparty” as “a person that guarantees the performance of a direct counterparty to a security-based swap or that otherwise provides recourse to the other side for the failure of the direct counterparty to perform any obligation under the security-based swap.” Second, re-proposed Rule 900 would eliminate the term “reporting party” and replace it with “reporting side,” and define “reporting side” as “the side of a security-based swap having the duty to report information in accordance with §§ 242.900-911 to a registered security-based swap data repository, or if there is no registered security-based swap data repository that would receive the information, to the Commission.” “Side” would be defined as “a direct counterparty and any indirect counterparty that guarantees its performance on the security-based swap.”

The Commission’s revisions would leave much of Rule 901, as initially proposed, substantially unchanged. Importantly, the Commission is not proposing to modify the basic duty to report security-based swap transactions to a registered SDR, as set forth in proposed Rule 901(b). Nor is the Commission proposing to add, delete, or substantively change any of the specific data elements set forth in proposed Rules 901(c) and 901(d) that reporting sides would be required to report.¹⁹¹² Rather, in this re-proposal, the Commission’s substantive revisions to Rule 901 occur only in paragraph (a), which governs who must report security-based swap

¹⁹¹² However, re-proposed Rules 901(c) and 901(d) under the Exchange Act include certain conforming changes due to the use of new and revised terms in re-proposed Rule 900 under the Exchange Act.

transactions. As described in more detail below, these changes are intended to better align reporting duties with larger entities that have greater resources and capability to report. Specifically, re-proposed Rule 901(a) would provide that a security-based swap dealer or major security-based swap participant that is not a U.S. person could incur the duty to report a security-based swap in various cases. Re-proposed Rule 901(a) would now provide as follows:

- If both sides of the security-based swap include a security-based swap dealer, the sides would be required to select the reporting side.
- If only one side of the security-based swap includes a security-based swap dealer, that side would be the reporting side.
- If both sides of the security-based swap include a major security-based swap participant, the sides would be required to select the reporting side.
- If one side of the security-based swap includes a major security-based swap participant and the other side includes neither a security-based swap dealer nor a major security-based swap participant, the side including the major security-based swap participant would be reporting side.
- If neither side of the security-based swap includes a security-based swap dealer or major security-based swap participant: (i) If both sides include a U.S. person or neither side includes a U.S. person, the sides would be required to select the reporting side; and (ii) If only one side includes a U.S. person, that side would be the reporting side.

In conjunction with the proposed changes to Rule 901(a), the Commission also is now proposing to modify Rule 908(a) to extend the reporting requirement to all security-based swaps that are guaranteed by a U.S. person and all security-based swaps of security-based swap dealers

and major security-based swap participants, regardless of whether or not they are U.S. persons.¹⁹¹³ To reflect these changes, re-proposed Rule 908(a)(1) would provide that a security-based swap is subject to regulatory reporting if:

- The security-based swap is a transaction conducted within the United States;
- There is a direct or indirect counterparty that is a U.S. person on either side of the transaction;
- There is a direct or indirect counterparty that is a security-based swap dealer or major security-based swap participant on either side of the transaction; or
- The security-based swap is cleared through a clearing agency having its principal place of business in the United States.

Re-proposed Rule 908(a)(2) would provide that a security-based swap shall be subject to public dissemination if:

- The transaction is conducted within the United States;
- There is a direct or indirect counterparty that is a U.S. person on each side of the transaction;
- At least one direct counterparty is a U.S. person (except in the case of a transaction conducted through a foreign branch);
- One side includes a U.S. person and the other side includes a non-U.S. person that is a security-based swap dealer; or
- The security-based swap is cleared through a clearing agency having its principal place of business in the United States.

¹⁹¹³ However, the Commission also preliminarily believes that certain of these security-based swaps need not be subject to public dissemination. See Section VIII.C.1, supra.

Taken together, these changes to Rule 901(a) and 908(a) would have the cumulative effect of substantially preserving the reporting hierarchy contemplated in Section 766 of the Dodd-Frank Act while also taking into account the existence of indirect counterparties that could affect how the reporting duty is allocated. Thus, the new approach set forth in re-proposed Rule 901(a) would focus more on the status of an entity (i.e., whether it is a security-based swap dealer or major security-based swap participant), and less on whether or not the counterparties are U.S. persons. Moreover, re-proposed Rule 908(a)(1) would extend the requirement for regulatory reporting to all security-based swaps that are guaranteed by a U.S. person or executed by security-based swap dealers and major security-based swap participants, regardless of whether or not they are U.S. persons.

As discussed above, the Commission is re-proposing Rule 902(a) to provide that certain security-based swaps would be subject to regulatory reporting but not publically disseminated. Therefore, the Commission is re-proposing Rule 902(a) to provide that a registered SDR would have no obligation to publicly disseminate a transaction report for any such security-based swap. The remainder of Rule 902 is substantively unchanged.¹⁹¹⁴ However, as result of the modifications to Rule 908(a)(2), certain transactions involving non-U.S. person security-based swap dealers, non-U.S. person major swap participants, and/or U.S. person indirect counterparties that would not have been subject to public dissemination under the initial proposal would be required to be publicly disseminated under re-proposed Regulation SBSR.

¹⁹¹⁴ However, re-proposed Rule 902 under the Exchange Act includes some conforming changes due to the use of new and revised terms in re-proposed Rule 900 under the Exchange Act.

a. Programmatic Benefits

Re-proposed Rule 901(a) would, relative to the initial proposal, change which counterparty to a security-based swap transaction would be required to report the transaction in some instances, as the Commission is refocusing the reporting duty primarily on the status of the counterparties, rather than on whether or not they are U.S. persons. The remainder of the rule (aside from technical and conforming changes) would remain unchanged from the original proposal. The Commission preliminarily believes that the benefits identified in the Regulation SBSR Proposing Release associated with proposed Rule 901 would continue to be applicable to re-proposed Rule 901. These include providing a means for the Commission to gain a better understanding of the security-based swap market; facilitating public dissemination of security-based swap transaction information, thus enabling market participants and regulatory authorities to know the current state of the security-based swap markets and track those markets over time; and improving risk management by security-based swap counterparties, which would need to capture and store their transactions in security-based swaps to facilitate reporting.

The Commission preliminarily believes that requiring reporting of security-based swap transactions that are guaranteed by U.S. persons would provide benefits beyond those under Rule 908(a), as originally proposed. As discussed above, the Commission's access to such additional information could facilitate more thorough and complete monitoring of individual security-based swap market participants and more accurate systemic risk monitoring across the security-based swap market. In addition, expanding the reach of the security-based swap reporting regime in this manner is designed to mitigate certain unintended consequences of the original proposal, such as market participants shifting business to other jurisdictions to avoid reporting obligations.

The Commission preliminarily believes that the benefits identified in the Regulation SBSR Proposing Release associated with proposed Rule 902 would continue to be applicable to re-proposed Rule 902. Specifically, the Commission continues to believe that post-trade transparency has the potential to lower transaction costs, improve confidence in the market, encourage participation by a larger number of market participants, and increase liquidity in the security-based swap market.¹⁹¹⁵ Furthermore, the Commission continues to believe that public, real-time dissemination of last-sale information could aid dealers in deriving better quotations, because they would know the prices at which other market participants have recently traded.¹⁹¹⁶ In addition, the Commission continues to believe that requiring prompt dissemination of last-sale information would provide all market participants with more extensive and more accurate information on which to make trading and valuation determinations and could allow valuation models to be adjusted to reflect how security-based swap counterparties have valued a security-based swap instrument at a specific moment in time.¹⁹¹⁷ Such information, when made publicly available, could enhance market participants' ability to value security-based swaps, especially in opaque markets or markets with low liquidity where recent quotations or last-sale prices may not exist or are not widely available. Better valuations could create a benefit in the form of more efficient capital allocation and ultimately could help reduce systemic risks.¹⁹¹⁸

¹⁹¹⁵ See Regulation SBSR Proposing Release, 75 FR at 75267.

¹⁹¹⁶ See *id.*

¹⁹¹⁷ See *id.*

¹⁹¹⁸ See *id.* at 75268.

b. Programmatic Costs

Because the majority of proposed Rule 901 is not being revised and the overall emphasis of the rule and the majority of its specific provisions would not change under the re-proposal, the Commission preliminarily believes that the infrastructure-related costs identified in the Regulation SBSR Proposing Release associated with proposed Rule 901, on a per-entity basis, would not change. These include the costs for each reporting party: (i) to develop an OMS capable of capturing relevant security-based swap transaction information so that it can be reported; (ii) to implement a reporting mechanism; and (iii) to establish an appropriate compliance program and support for the operation of the OMS and reporting mechanism.¹⁹¹⁹ The bulk of the costs resulting from Regulation SBSR derive from the infrastructure-related costs of complying with reporting obligations, which include establishing and maintaining the systems necessary to capture, store, and report transaction information; the establishment and maintenance of appropriate policies and procedures; and employing and training the necessary compliance personnel.¹⁹²⁰ The Commission preliminarily estimated and continues to believe that the marginal burden of reporting additional transactions once a respondent's reporting infrastructure and compliance systems are in place would be de minimis when compared to the costs of putting those systems in place. This is because the only additional costs of reporting an individual transaction would be entering the required data elements into the firm's OMS, which could subsequently deliver the required transaction information to a registered SDR. In many cases, particularly with standardized instruments and instruments traded electronically,

¹⁹¹⁹ The Commission's complete assessment of the costs associated with proposed Rule 901 of Regulation SBSR is included in Section XIV.B of the Regulation SBSR Proposing Release. See id. at 75264-66.

¹⁹²⁰ See id. at 75261-80.

transaction information could be generated and maintained in electronic form, which could then be provided to a registered SDR through wholly automated processes.

Re-proposed Rule 901(a) is designed to reduce the number of instances where a counterparty that is not a security-based swap dealer or major security-based swap participant would bear the responsibility to report a security-based swap transaction under Regulation SBSR. In other words, re-proposed Rule 901(a) is designed to assign the reporting duty to the larger counterparties that have greater resources and operational capability to carry out the reporting function. Consequently, re-proposed Rule 901(a) could result in each reporting counterparty being required to report, on average, more security-based swap transactions than envisioned under the original proposal, although smaller unregistered counterparties that previously would have been required to report a small number of security-based swap transactions under the original proposal would, under re-proposed Rule 901(a), be less likely to have to incur reporting duties under Regulation SBSR, and thus less likely to have to incur the initial infrastructure-related costs of reporting.¹⁹²¹ The counterparties that would continue to have the reporting duty under re-proposed Rule 901(a)—primarily security-based swap dealers and major security-based swap participants—would have the reporting duty for nearly all security-based swap transactions. Security-based swap dealers and major security-based swap participants, whether or not they are U.S. persons, typically have greater resources and operational capability than non-registered U.S. counterparties and are likely to already have the reporting infrastructure, policies and procedures, and staff that could be adapted to carry out the

¹⁹²¹ The Commission notes, however, that non-reporting sides would be required to provide certain information about a reportable transaction on a non-real-time basis. See Rule 906(a), as originally proposed (requiring reporting, if applicable, of participant ID, broker ID, desk ID, and trader ID). See also Regulation SBSR Proposing Release, 75 FR at 75221 (discussing rationale for proposed Rule 906(a)).

reporting obligations under Regulation SBSR. The Commission preliminarily agrees with certain commenters¹⁹²² that basing the reporting duty primarily on status as a security-based swap dealer or major security-based swap participant rather than on whether or not the entity is a U.S. person would, in the aggregate, reduce costs to the security-based swap market, as discussed in more detail below.

In addition, in re-proposing Rule 901(a), the Commission is proposing to revise the term “reporting party” to “reporting side.” Under the re-proposal, a reporting side could consist of multiple entities: the direct counterparty to the transaction and any guarantor of the direct counterparty. Although this has the potential to increase the number of counterparties that could incur a duty to report—by placing such duty on both the direct counterparty and any indirect counterparty—the Commission preliminarily believes that this would not be the result. The Commission preliminarily believes instead that, in practice, large groups that engage in security-based swaps transactions would likely centralize the reporting function for all entities within the group into a single operational unit. Thus, even if two counterparties on the reporting side each incurred the legal duty under re-proposed Rule 901(a) to report a security-based swap transaction, only one entity (either one of the counterparties itself or one of its affiliates) would in fact carry out the reporting function.

Although the Commission preliminarily estimated that there would be 1,000 reporting entities,¹⁹²³ the Commission is now revising that estimate to 300.¹⁹²⁴ In the original proposal, the

¹⁹²² See, e.g., DTCC I at 8; ICI Letter at 5; Multiple Firms Letter at 31. See also Vanguard Letter at 6; Multiple Firms Letter at 28 (stating that requiring U.S. end users to report security-based swaps entered into with non-U.S. person security-based swap dealers would be unduly burdensome for end users and could negatively impact the competitiveness of affected U.S. markets).

¹⁹²³ See Regulation SBSR Proposing Release, 75 FR at 75247.

Commission preliminarily estimated that the initial, aggregate annualized costs associated with proposed Rule 901 would be \$511,013 per reporting party, and that the ongoing aggregate annualized costs associated with proposed Rule 901 would be \$316,116 per reporting party.¹⁹²⁵ The Commission continues to preliminarily believe that these per-respondent costs are appropriate. Given the same per-respondent costs—but adjusting for the decreased estimate of the number of respondents—the Commission now preliminarily believes that the total one-time costs of re-proposed Rule 901 would be \$153,303,900,¹⁹²⁶ and the annual ongoing costs would be \$94,834,800.¹⁹²⁷ The Commission seeks comment on and data to quantify these estimated costs.

It is possible that certain smaller market participants that are currently active in the security-based swap market could reduce their trading activity or exit the market completely, if they believed the compliance costs of re-proposed Regulation SBSR to be too high. This could result in adverse impacts on competition if there were fewer participants competing in the market. However, the Commission preliminarily believes that this outcome would be unlikely, given that the re-proposal is designed to further limit the instances where non-registered U.S. persons would be required to incur the infrastructure-related costs of reporting. The Commission preliminarily believes instead that, by focusing the reporting duty more on the status and away from whether or not entities are U.S. persons, re-proposed Rule 901(a) would lower the incentive

¹⁹²⁴ See Section XIV.F.2(d)(ii), *supra*.

¹⁹²⁵ See Regulation SBSR Proposing Release, 75 FR at 75266.

¹⁹²⁶ The Commission estimates: (300 reporting counterparties) * \$511,013 = \$153,303,900.

¹⁹²⁷ The Commission estimates: (300 reporting counterparties) * \$316,116 = \$94,834,800.

of non-registered U.S. persons to reduce their participation in the market out of fear of incurring the infrastructure-related costs of complying with Regulation SBSR.

Furthermore, although the Commission is now proposing to extend the reach of the security-based swap reporting requirements, as described in re-proposed Rule 908(a), to all transactions guaranteed by a U.S. person, the Commission preliminarily believes that this would not result in a significant increase in the number of entities that incur reporting duties. The Commission preliminarily believes that organizations that operate through foreign subsidiaries that are guaranteed by a U.S. parent are likely to be large financial institutions that already were included in the Commission's estimate of reporting parties in the Regulation SBSR Proposing Release. Furthermore, these organizations are the most likely to have robust risk management systems that extend across business units and across geographic boundaries, and likely already have a presence in the United States and currently are engaging in transactions that they are reporting (on a voluntary basis) to the DTCC-TIW. Thus, such entities were included in the Commission's initial estimate of reporting parties in the Regulation SBSR Proposing Release. Re-proposing Rule 908(a) to require non-U.S. person security-based swap dealers and major security-based swap participants to report all of their transactions to a registered SDR would likely not impose any additional infrastructure-related costs beyond those that were already assessed in the Regulation SBSR Proposing Release. However, this aspect of the re-proposal could impose small additional costs on a per-reporting entity basis in the form of having to report additional transactions using that existing infrastructure.

The Commission notes that there may be a small number of entities that are in the business, or contemplate entering the business, of guaranteeing security-based swaps. Such entities may not have been included in the Commission's original analysis of potential reporting

parties, because as indirect counterparties they may not have appeared in the TIW's records as counterparties. Under re-proposed Rule 908, any U.S. person that guarantees a security-based swap could incur the duty to report under re-proposed Regulation SBSR. However, based on consultation with market participants, the Commission preliminarily believes that the net effect on the number of reporting sides would be de minimis and would not impact the Commission's revised estimate of 300 reporting counterparties, discussed above. To the extent that there could be entities that act only as an indirect counterparty to security-based swap transactions and would not otherwise have been required to report their security-based swap transactions, the Commission preliminarily believes that our estimate takes these entities into account.

In addition, the Commission preliminarily believes that there may be a slight increase in costs for those reporting counterparties that continue to incur the reporting duty, as each such reporting counterparty would be required to report, on average, a larger percentage of the total number of reportable events than under the initial proposal. Under re-proposed Rule 901(a), smaller unregistered counterparties that previously would have been required to report a small number of security-based swap transactions under the original proposal would, under the re-proposal, be less likely to incur the reporting duty under re-proposed Rule 901(a). Under re-proposed Rules 901(a) and 908(a)(1)(iii), non-U.S. person security-based swap dealers and major security-based swap participants, rather than unregistered U.S. persons, would have the reporting duty for most of these transactions. Nonetheless, under the re-proposal, the per-transaction reporting cost should not change from what was originally proposed. Moreover, the Commission preliminarily believes that the additional cost for non-U.S. person security-based swap dealers and major security-based swap participants absorbing the costs of reporting these additional transactions should be de minimis, since these larger market participants have likely

already taken significant steps to establish and maintain the systems, processes and procedures, and staff resources to report security-based swap transactions to existing data repositories.

In the Regulation SBSR Proposing Release, the Commission preliminarily estimated that 1,000 reporting parties would be required to report approximately 15.5 million security-based swap transactions at a total cost, exclusive of the infrastructure-related costs, of approximately \$5,400,000.¹⁹²⁸ The Commission preliminarily believes that nothing in the re-proposal would affect the initial estimate of the cost of an individual reportable event. However, the Commission now is revising our assumptions about the number of reportable events covered by re-proposed Regulation SBSR. Since issuing the Regulation SBSR Proposing Release, the Commission has obtained additional and more granular data regarding participation in the security-based swap market from DTCC-TIW. These historical data suggest that the Commission overestimated the number of security-based swap transactions that would be subject to regulatory reporting in the future. As a result, the Commission now estimates that 300 reporting counterparties would be required to report approximately 5 million security-based swap transactions per year.¹⁹²⁹

As discussed in the PRA section above, the Commission now preliminarily estimates that each reporting side would incur, on average, a burden of 83.3 hours per year—not including any

¹⁹²⁸ See Regulation SBSR Proposing Release, 75 FR at 75265.

¹⁹²⁹ Data provided by the DTCC-TIW indicate that there were approximately 4,000,000 transactions in single-name CDS in 2012. The Commission believes that the single-name CDS data are sufficiently representative of the security-based swap market. See Section XV.B.2 and note 1301 and accompanying text, *supra*. The Commission believes that single-name CDS transactions account for 82% of the security-based swap market. As a result, the Commission preliminarily estimates that there were 4.88 million (i.e., 4,000,000/0.82) security-based swap transactions in 2012, and is basing its estimate of the future number of transactions on recent historical activity.

infrastructure-related costs—to report individual security-based swap transactions to a registered SDR.¹⁹³⁰ In the Regulation SBSR Proposing Release, the Commission estimated that each reporting party would spend \$5,400 to report specific security-based swap transactions to a registered SDR as required by proposed Rule 901.¹⁹³¹ Given the Commission's revised estimate of the number of reportable events per year, the Commission also now preliminarily estimates that each reporting side would, on average, incur costs of \$5,630 to report specific security-based swap transactions and life cycle events to a registered SDR.¹⁹³²

The Commission further notes two factors that could serve to limit the per-transaction costs across all affected entities. First, to the extent that security-based swap instruments become more standardized and trade more frequently on electronic platforms (rather than manually), the act of reporting transactions to a registered SDR should become less costly. Together, these trends are likely to reduce the number of transactions that would necessitate the manual capture of bespoke data elements, which is likely to take more time and be more expensive than electronic capture. Second, the larger entities that would incur additional reporting duties under re-proposed Rules 901(a) and 908(a)(1)(iii)—*i.e.*, non-U.S. person security-based swap dealers

¹⁹³⁰ The Commission estimates: $(5 \text{ million} * 0.005) / (300 \text{ reporting sides}) = 83.3$ burden hours per reporting counterparty, or 25,000 total burden hours for all reporting counterparties.

¹⁹³¹ See Regulation SBSR Proposing Release, 75 FR at 75265. In arriving at this figure, the Commission preliminarily estimated that 1,000 reporting parties would be responsible for reporting 15,458,824 security-based swap transactions at a total cost of approximately \$5,400,000. The Commission is not revising its initial estimate of the average cost of reporting an individual security-based swap transactions. However, the Commission now estimates that approximately 300 reporting sides will have the duty to report approximately 5 million security-based swap transactions per year.

¹⁹³² The Commission estimates: $((\text{Compliance Clerk } (41.7 \text{ hours}) \text{ at } \$59 \text{ per hour}) + (\text{Sr. Computer Operator } (41.7 \text{ hours}) \text{ at } \$76 \text{ per hour})) * 300 \text{ reporting sides} = \$1,688,850$ for all reporting sides, or \$5,630 per reporting side. See also note 1270, *supra*.

and major security-based swap participants—can benefit from certain economies of scale in carrying out reporting duties might elude smaller, unregistered counterparties. The Commission preliminarily believes that, all other things being equal, a larger reporting counterparty is likely to handle a greater number of reportable events, including those requiring manual data capture, than a smaller counterparty and thus would develop greater expertise and greater speed in reporting transactions. Moreover, a larger reporting counterparty is likely to have greater incentive and ability to develop systems that support the reporting function, and the fixed cost of this infrastructure can be spread across the larger number of transactions handled by the larger counterparty. The extent of these effects, however, is difficult to quantify. The Commission seeks comments on the extent of these effects and their impact on average per-transaction reporting costs.

The Commission preliminarily believes that re-proposed Rule 901(a) would not increase the previously estimated costs for registered SDRs. The Commission preliminarily believes, rather, that the estimated costs for registered SDRs might be less than the original estimate, for two reasons. First, given that the Commission now estimates that there would be fewer entities incurring the duty to report (300 rather than the original estimate of 1,000), there would be fewer entities that would have to establish linkages to a registered SDR and thus fewer relationships for a registered SDR to manage. Second, given the Commission's reduced estimates of the number of reportable events, the Commission preliminarily believes that registered SDRs could face slightly lower costs because they would have fewer transactions to process than originally estimated. The extent of these effects, however, is difficult to quantify. The Commission seeks comments on the extent of these effects and their impact on average per-transaction costs. Finally, the Commission has no reason to believe and sees no reason to expect that re-proposed

Rules 901(a) and 908(a)(1)(iii) would result in the registration of additional SDRs. Thus, given any fixed costs than any entity registering as a registered SDR might incur under re-proposed Regulation SBSR, the Commission is not increasing our cost estimates to account for a larger number of entities anticipated to incur those per-entity costs.

Furthermore, the Commission preliminarily believes that extending the scope of transactions that would be subject to public dissemination, as reflected in re-proposed Rules 908(a)(2) and 902(a), would not significantly increase or decrease the previously estimated costs for registered SDRs identified in the Regulation SBSR Proposing Release. The Commission preliminarily believes that these revisions would not result in the registration of additional SDRs or require them to bear the costs of connecting to additional reporting sides. Even if there would be a slight increase in the percentage of security-based swap transactions subject to public dissemination as a result of the applicability of the re-proposed Regulation SBSR to a larger universe of transactions involving non-U.S. entities and/or U.S. indirect counterparties, given the Commission's reduced estimates of the overall number of reportable events,¹⁹³³ the Commission now estimates that registered SDRs would be required to publicly disseminate fewer transactions than estimated in the Regulation SBSR Proposing Release. The Commission further notes that our original estimate of the costs of public dissemination was not calculated on a per-transaction basis, but represented instead the one-time aggregate estimated costs associated with development and implementation of the necessary infrastructure, as well as the aggregate annual estimated costs for supporting and upgrading that infrastructure as necessary.¹⁹³⁴

¹⁹³³ See notes 1267 - 1268, *supra*.

¹⁹³⁴ See Regulation SBSR Proposing Release, 75 FR at 75269.

The Commission continues to believe that the preliminary estimates contained in the Regulation SBSR Proposing Release are valid, and that implementing and complying with the real-time public dissemination requirement of Rule 902 would add 20% to the start-up and ongoing operational expenses that would otherwise be required of a registered SDR.¹⁹³⁵ In particular, the Commission continues to estimate that the initial one-time aggregate costs for development and implementation of the systems needed to disseminate the required transaction information would be \$40,004,000, which corresponds to \$4,000,400 per registered SDR. Further, the Commission continues to estimate that aggregate annual costs for systems and connectivity upgrades associated with real-time public dissemination would be \$24,002,400, which corresponds to \$2,400,240 per registered SDR. Thus the initial aggregate costs associated with proposed Rule 902 are estimated to be \$64,006,400, which corresponds to \$6,400,640 per registered SDR.

Request for Comment

The Commission requests comment on the costs and benefits of re-proposed Rules 901, 902, and 908(a) discussed above, as well as any costs and benefits not already described that could result. The Commission also requests data to quantify any potential costs or benefits. In addition, the Commission requests comment on the following:

- How can the Commission more accurately assess the costs and benefits of re-proposed Rule 901?
- How many entities would be affected by re-proposed Rule 901? How many transactions would be subject to re-proposed Rule 901?

¹⁹³⁵ See SDR Proposing Release, 75 FR 77354-64. See also Regulation SBSR Proposing Release, 75 FR at 75269.

- Are there additional costs involved in complying with re-proposed Rule 901 that have not been identified? What are the types and amounts of those costs?
- Do the reporting requirements in re-proposed Rule 901(a), by potentially placing the duty to report upon a security-based swap dealer or major security-based swap participant that is not a U.S. person, mitigate any barrier to entry that Rule 901, as originally proposed, might have created? How can this benefit or reduction in potential cost be tabulated?
- How should the Commission assess the benefits and costs associated with re-proposed Rule 901(a), if any, compared to the anticipated benefits from increased transparency to the security-based swap market from the re-proposal?
- Would there be additional benefits or costs of re-proposed Rule 901, 902, and 908(a) that have not been identified?
- Are there methods to minimize the costs associated with re-proposed Rule 908(a)?
- Would re-proposed Rule 908(a) create any additional costs not discussed here? If so, please identify and quantify these costs.
- Is the Commission's revised estimate of the number of transactions subject to Regulation SBSR accurate? If not, how many transactions would be impacted by re-proposed Regulation SBSR? Please provide detailed information on the number and types of transactions impacted.
- Would re-proposed Rule 902 result in benefits or costs that the Commission has not considered? Are the Commission's estimates of the costs and benefits of re-proposed Rule 902 accurate? If not, please provide detailed information identifying and quantifies the costs and benefits of re-proposed Rule 902.

(b) Proposed Modification of the Definition of “U.S. Person”

Regulation SBSR, as originally proposed, would have defined a “U.S. person” as “a natural person that is a U.S. citizen or U.S. resident or a legal person that is organized under the corporate laws of any part of the United States or has its principal place of business in the United States.” In this re-proposal, the Commission is proposing a new definition of “U.S. person” that is consistent with usage in our other Title VII proposals.¹⁹³⁶ The Commission preliminarily believes that these Title VII rules would benefit from having the same terms throughout and could, therefore, reduce assessment costs for market participants that might be subject to the proposed rules. Furthermore, the Commission preliminarily believes that the revised definition of “U.S. person” is intended to clarify application of Regulation SBSR and would not significantly change the number of entities that would be subject to Regulation SBSR. The Commission preliminarily believes that the revised definition of “U.S. person” would not entail any material costs to market participants, nor would it intrinsically impose any obligation or duty on market participants. Therefore, the Commission preliminarily believes that the new definition would not increase the aggregate compliance costs of re-proposed Regulation SBSR.

Request for Comment

The Commission requests comment on the costs and benefits of the re-proposed definition of “U.S. person” as used in re-proposed Regulation SBSR, and data to support those comments. In particular, the Commission requests comment on the following:

- Would the re-proposed definition of “U.S. person” as used in Regulation SBSR result in any costs or benefits not discussed here? Please distinguish any costs and benefits

¹⁹³⁶ Specifically, the re-proposed definition provides that the term “U.S. person” would have the same meaning as set forth in proposed Rule 3a71-3(a)(7) under the Exchange Act.

stemming from the re-proposed definition itself, rather than any costs or benefits attributable to other provisions of Regulation SBSR in which the term appears, such as re-proposed Rules 901, 902, and 908(a).

(c) Revisions to Proposed Rule 908(b)

i. Initial Proposal

Rule 908(b), as initially proposed, attempted to clarify when reporting duties would be imposed on counterparties of security-based swaps that are not U.S. persons when some connections to the United States might be present. Proposed Rule 908(b) provided that no duties would be imposed on a counterparty unless one of the following conditions were true:

- the counterparty is a U.S. person;
- the security-based swap is executed in the United States or through any means of interstate commerce; or
- the security-based swap is cleared through a clearing agency having its principal place of business in the United States.

ii. Re-proposal

As described above, the Commission now believes, in light of other revisions being made to Regulation SBSR, that certain conforming revisions to Rule 908(b) are appropriate. Specifically, Rule 908(b) is being re-proposed to account for the possibility that a non-U.S. person security-based swap dealer or major security-based swap participant could incur a duty to report. In addition, the “interstate commerce clause” is being replaced with the new concept of a “transaction conducted within the United States.”

a. Programmatic Benefits

The Commission now preliminarily believes that there are benefits to requiring all security-based swap dealers and major security-based swap participants, whether or not they are U.S. persons, to report their security-based swap transactions pursuant to re-proposed Regulation SBSR. Having access to security-based swaps of all such entities through data reported to a registered SDR would give the Commission greater ability to supervise such entities and assess the overall security-based swap market. Furthermore, requiring all such entities to report security-based swap information would help provide the Commission and other regulators with detailed, up-to-date information both about positions of particular entities and financial groups, as well as positions held by multiple market participants in particular instruments.

b. Programmatic Costs

The Commission preliminarily believes that the revisions to Rule 908(b) would not result in any significant increase in the overall cost of compliance for affected entities. The Commission preliminarily believes, rather, that many unregistered U.S. persons that participate in the security-based swap market would face lower costs, as they could be more likely to avoid entirely having to incur the infrastructure-related costs of reporting security-based swap transactions. Furthermore, to the extent that non-U.S. person security-based swap dealers and major security-based swap participants would be required to report security-based swap transactions, such entities were already included in the estimate of 1,000 reporting parties used in the Regulation SBSR Proposing Release and are also included in the new estimate of 300 reporting sides becoming subject to re-proposed Regulation SBSR. Although the number of security-based swap transactions that these reporting sides would be required to report would

increase, the Commission preliminarily does not believe that they would be required to expand their systems capabilities to account for the additional transaction volume.

Request for Comment

The Commission requests comment on the costs and benefits of re-proposed Rule 908(b) and data to assess any potential costs or benefits. In addition, the Commission requests comment on the following:

- Would re-proposed Rule 908(b) result in any benefits or costs that the Commission has not considered?
- Are there methods to minimize the costs associated with re-proposed Rule 908(b)?
- Would re-proposed Rule 908(b) create any additional costs not discussed here? If so, please identify and quantify these costs.

(d) Other Technical Revisions in Re-proposed Regulation SBSR

In addition to the revisions described above, the Commission is re-proposing certain technical or conforming changes to other rules contained in Regulation SBSR. Specifically, certain changes are required to re-proposed Rules 901(c) and 901(d), which address the data elements to be reported to a registered SDR, to reflect the re-proposal's approach that certain security-based swaps may be subject to regulatory reporting but not public dissemination. The introductory language to Rule 901(c) is being re-proposed as follows: "For any security-based swap that must be publicly disseminated pursuant to §§ 242.902 and 242.908 and for which it is the reporting side, the reporting side shall report the following information in real time. If a security-based swap is required by §§ 242.901 and 242.908 to be reported but not publicly disseminated, the reporting side shall report the following information no later than the time that the reporting side is required to comply with paragraph (d) of this section." Re-proposed Rule

901(c) would be retitled “Primary trade information”—since not all information reported pursuant to Rule 901(c) would be required to be provided in real time—and re-proposed Rule 901(d) would be retitled “Secondary trade information.” The Commission also is re-proposing Rule 901(c)(10) as follows: “If both sides of the security-based swap include a security-based swap dealer, an indication to that effect.” The re-proposed rule clarifies that a security-based swap dealer might be a direct or indirect counterparty to a security-based swap. Rule 901(d)(1)(ii) is also being re-proposed to require reporting of the broker ID, desk ID, and trader ID, as applicable, only of the direct counterparty on the reporting side. Rule 901(d)(1)(iii) is being re-proposed to require reporting of a description of the terms and contingencies of the payment streams only of each direct counterparty to the other. The word “direct” is necessary to avoid extending Rule 901(d)(1)(iii) to indirect counterparty relationships, where payments might not (except in unusual circumstances) flow to or from an indirect counterparty.

Additional technical or conforming revisions include changes to Rule 901(e), which sets forth provisions for reporting life cycle events of a security-based swap. The Commission is re-proposing Rule 901(e) to provide that the duty to report would switch to the other side only if the new side did not include a U.S. person (as in the originally proposed rule) or a security-based swap dealer or major security-based swap participant (references to which are being added to Rule 901(e)). Re-proposed Rule 908 contemplates situations where a security-based swap would be required to be reported to a registered SDR but not publicly disseminated. Therefore, the Commission is re-proposing Rule 902(a) to provide that a registered SDR would have no obligation to publicly disseminate a transaction report for any such security-based swap.

Re-proposed Rules 903, 905, 906, 907, 910, and 911 are each conformed to incorporate the use of the term “side,” while re-proposed Rules 904, 905, 906, and 907 each replace “§§ 242.900 through 242.911” with “§§ 242.900-911.”

Rule 905(b)(2) is being re-proposed to clarify that, if a registered SDR receives corrected information relating to a previously submitted transaction report, it would be required to publicly disseminate a corrected transaction report only if the initial security-based swap was subject to public dissemination.

As originally proposed, Rule 907(a)(6) would require a registered SDR to establish and maintain written policies and procedures “[f]or periodically obtaining from each participant information that identifies the participant’s ultimate parent(s) and any other participant(s) which the counterparty is affiliated, using ultimate parent IDs and participant IDs.” The Commission now is re-proposing Rule 907(a)(6) with the word “participant” in place of the word “counterparty.”

Rule 910(b)(4), as originally proposed, would provide that, in Phase 4 of the Regulation SBSR compliance schedule, “[a]ll security-based swaps reported to the registered security-based swap data repository shall be subject to real-time public dissemination as specified in § 242.902.” As noted above, certain security-based swaps would be subject to regulatory reporting but not public dissemination. Therefore, the Commission is re-proposing Rule 910(b)(4) to provide that, “All security-based swaps received by the registered security-based swap data repository shall be handled consistent with §§ 242.902, 242.905, and 242.908.”

Because the changes discussed above are technical in nature, the Commission preliminarily believes that they would not have any significant impact, negative or positive, on re-proposed Regulation SBSR. Nonetheless, the Commission preliminarily believes that, to the

extent these changes clarify the application of certain aspects of Regulation SBSR, they could enhance consistency, reduce potential uncertainties related to the interpretation and application of Regulation SBSR, and thus reduce assessment costs. The Commission solicits comment on that preliminary view.

(e) Aggregate Total Quantifiable Costs

Based on the foregoing, the Commission preliminarily estimates that re-proposed Regulation SBSR would impose an estimated total first-year cost of approximately \$511,243¹⁹³⁷ per reporting counterparty for a total first-year cost of \$153,372,900.¹⁹³⁸ The Commission preliminarily estimates that re-proposed Regulation SBSR would impose ongoing annualized aggregate costs of approximately \$316,346¹⁹³⁹ per reporting side, for a total aggregate annualized cost of \$94,903,800.¹⁹⁴⁰

As noted above, the Commission preliminarily believes that re-proposed Regulation SBSR would not significantly change the costs of registered SDRs, as estimated in the Regulation SBSR Proposing Release. The Commission preliminarily believes that the revisions contained in re-proposed Rules 901, 902, and 908(a) would not result in the registration of

¹⁹³⁷ The Commission derived its estimate from the following: (\$511,013 (per entity total first-year cost of Regulation SBSR) - (\$5,400 (entity transaction reporting cost of Regulation SBSR) - \$5,630 (revised reporting side transaction reporting cost))) = \$511,243. See notes 1908, 1931, and 1932 and accompanying text, supra.

¹⁹³⁸ The Commission derived its estimate from the following: (\$511,243 * 300 reporting sides) = \$153,372,900.

¹⁹³⁹ The Commission derived its estimate from the following: (\$316,116 (per entity annualized cost of Regulation SBSR) - (\$5,400 (entity transaction reporting cost of Regulation SBSR) - \$5,630 (revised reporting side transaction reporting cost))) = \$316,346. See notes 1909, 1931, and 1932 and accompanying text, supra.

¹⁹⁴⁰ The Commission derived its estimate from the following: (\$316,346 * 300 reporting sides) = \$94,903,800.

additional SDRs or require them to bear the costs of connecting to additional reporting sides. To the extent that the re-proposal would assign reporting responsibilities to fewer respondents, registered SDRs could face lower costs to support their connectivity.

In total, the Commission preliminarily estimates the total first-year cost of re-proposed Regulation SBSR to be \$681,307,400.¹⁹⁴¹ The Commission preliminarily estimates the total ongoing annual cost of re-proposed Regulation SBSR to be \$481,935,340.¹⁹⁴² The compliance costs attributable to re-proposed Regulation SBSR could be significantly reduced to the extent that foreign jurisdictions are deemed comparable in a substituted compliance order, which would enable market participants to comply with the foreign jurisdiction's rules relating to regulatory reporting and public dissemination and thus would relieve them of their primary obligations—and the associated costs—under Regulation SBSR.

I. Economic Analysis of Substituted Compliance

The Commission is proposing a policy and procedural framework that would allow for the possibility of substituted compliance with respect to four categories of rules in recognition of the potential, in a market as global as the security-based swap market, for security-based swap market participants to be subject to conflicting or duplicative compliance obligations. These four categories are: (i) requirements applicable to registered security-based swap dealers in Section 15F of the Exchange Act and the rules and regulations thereunder; (ii) requirements relating to

¹⁹⁴¹ The Commission derived its estimate from the following: (\$1,038,947,500 (total first-year cost of Regulation SBSR) - \$511,013,000 (Regulation SBSR Rule 901 first-year costs on reporting parties) + \$153,372,900 (re-proposed Regulation SBSR Rule 901 first-year costs on reporting sides)) = \$681,372,900.

¹⁹⁴² The Commission derived its estimate from the following: (\$703,147,540 (total ongoing annualized cost of Regulation SBSR) - \$316,116,000 (Regulation SBSR Rule 901 annual ongoing costs on reporting sides) + \$94,903,800 (re-proposed Regulation SBSR Rule 901 annual ongoing costs on reporting sides)) = \$481,935,340.

regulatory reporting and public dissemination of security-based swaps; (iii) requirements relating to clearing for security-based swaps; and (iv) requirements relating to trade execution for security-based swaps.¹⁹⁴³ Specifically, the Commission is proposing rules and interpretative guidance in this release to provide that: (i) the Commission may, conditionally or unconditionally, by order, make a substituted compliance determination with respect to a foreign regulatory system that compliance with specific requirements under such foreign regulatory system by a registered foreign security-based swap dealer (or class thereof) may satisfy the corresponding requirements in Section 15F of the Exchange Act,¹⁹⁴⁴ and the rules and regulations thereunder, that would otherwise apply to such foreign security-based swap dealer (or class thereof);¹⁹⁴⁵ (ii) the Commission may, conditionally or unconditionally, by order, make a substituted compliance determination regarding regulatory reporting and public dissemination of security-based swaps in a foreign jurisdiction if such foreign jurisdiction's requirements for the regulatory reporting and public dissemination of security-based swaps are comparable to otherwise applicable requirements under Section 13A(a)(1) of the Exchange Act,¹⁹⁴⁶ Section 13(m)(1)(G) of the Exchange Act¹⁹⁴⁷ and Section 13(m)(1)(C) of the Exchange Act,¹⁹⁴⁸ and the rules and regulations thereunder;¹⁹⁴⁹ (iii) the Commission may exempt persons from the

¹⁹⁴³ See Section XI, supra (providing detailed discussions of substituted compliance).

¹⁹⁴⁴ 15 U.S.C. 78o-10.

¹⁹⁴⁵ See proposed Rule 3a71-5 under the Exchange Act, as discussed in Section XI.C, supra.

¹⁹⁴⁶ 15 U.S.C. 78m-1(a)(1).

¹⁹⁴⁷ 15 U.S.C. 78m(m)(1)(G).

¹⁹⁴⁸ 15 U.S.C. 78m(m)(1)(C).

¹⁹⁴⁹ See proposed Rule 908(c)(2) under the Exchange Act, as discussed in Section XI.D, supra.

mandatory clearing requirement in Section 3C(a)(1) of the Exchange Act¹⁹⁵⁰ if the relevant security-based swap transaction is submitted to a foreign clearing agency that is the subject of a substituted compliance determination by Commission order;¹⁹⁵¹ and (iv) the Commission may, conditionally or unconditionally, by order, make a substituted compliance determination with respect to a foreign jurisdiction to permit a person subject to the mandatory trade execution requirement in Section 3C(h) of the Exchange Act to execute such transaction, or have such transaction executed on their behalf, on a security-based swap market (or class of markets) that is neither registered under the Exchange Act nor exempt from registration under the Exchange Act if the Commission determines that such security-based swap market (or class of markets) is subject to comparable, comprehensive supervision and regulation by a foreign financial regulatory authority or authorities in such foreign jurisdiction.¹⁹⁵²

1. Programmatic Benefits and Costs

The Commission recognizes that the programmatic costs and benefits of substituted compliance may vary depending on the specific nature of a particular substituted compliance determination. If the Commission imposes conditions on a substituted compliance determination, such conditions may have effects on the programmatic costs and benefits. The proposed rules and interpretive guidance regarding substituted compliance described above provide that the Commission would only make a determination that substituted compliance is permitted if the foreign regulatory system in a particular area, taking into consideration any relevant principles, regulations, or rules in other areas of the foreign regulatory system to the

¹⁹⁵⁰ 15 U.S.C 78c-3(a)(1).

¹⁹⁵¹ See Section XI.E, *supra*.

¹⁹⁵² See proposed Rule 3Ch-2(b)(1) under the Exchange Act, as discussed in Section XI.F, *supra*.

extent they are relevant to the analysis, achieves the regulatory outcomes that are comparable to the regulatory outcomes of the relevant provisions of the Exchange Act.

The Commission preliminarily believes that substituted compliance would not substantially change the programmatic benefits intended by the requirements in Section 15F of the Exchange Act, the programmatic benefits intended by the regulatory reporting and public dissemination requirements in Section 13(m)(1)(G), Section 13(m)(1)(C), and Section 13A(a)(1) of the Exchange Act, the programmatic benefits intended by the mandatory clearing requirement in Sections 3C(a)(1) of the Exchange Act, or the programmatic benefits intended by the mandatory trade execution requirement set forth in Section 3C(h) of the Exchange Act. To the extent that substituted compliance eliminates duplicative compliance costs, registered foreign security-based swap dealers or market participants entering into security-based swap transactions that are eligible for substituted compliance may incur lower programmatic costs associated with implementation or compliance with the specified Title VII requirements than they would otherwise incur without the option of substituted compliance available, either because such registered foreign security-based swap dealers may have implemented or begun to implement the foreign regulatory requirements that are determined comparable by the Commission, or because parties to a security-based swap transaction eligible for substituted compliance determination do not need to duplicate compliance with two sets of comparable requirements.

In the case of a substituted compliance determination made with Commission-imposed conditions in order to achieve comparable programmatic benefits intended by the applicable Title VII requirements, we cannot preclude the possibility that substituted compliance may increase programmatic costs because market participants would be required to incur costs to satisfy those conditions. On the other hand, substituted compliance also may enable certain foreign market

participants subject to comparable foreign regulation to enter or stay in the U.S. security-based swap market. These are participants that would, due to conflicting local laws, otherwise not be able to participate under Title VII regulation in the absence of substituted compliance. In such cases, substituted compliance may either increase the number of market participants in the U.S. security-based swap market or prevent certain existing market participants from exiting the market, thereby contributing to the programmatic benefits and costs that flow from Title VII requirements.

The decision to request substituted compliance is purely voluntary. Market participants would choose to make a request for a substituted compliance determination only if, in their own assessment, compliance with applicable requirements under a foreign regulatory system were less costly than compliance with both the foreign regulatory regime and the relevant Title VII requirement. Even after a substituted compliance determination is made, market participants would only choose substituted compliance if the private benefits they expect to receive from participating in U.S. markets exceeds the private costs they expect to bear, including any conditions the Commission may attach to the substituted compliance determination. Therefore, the proposed rules regarding substituted compliance are based on the consideration that the net programmatic benefits associated with specific Title VII requirements could be increased by the Commission making the substituted compliance option available. Where substituted compliance increases the number of market participants in the U.S. security-based swap market or prevents existing participants from leaving the U.S. security-based swap market, there may be contributions to both programmatic benefits and costs associated with the applicable Title VII requirements.

2. Alternatives

The Commission could have proposed that substituted compliance determinations with respect to regulatory reporting, public dissemination and mandatory trade execution apply to all cross-border transactions involving at least one foreign counterparty or foreign branch of a U.S. bank. However, we propose in Rule 908(c)(2), the interpretive guidance regarding substituted compliance with the mandatory clearing requirement, and Rule 3Ch-2(b)(1) that substituted compliance would not be available to a security-based swap transaction that involves persons within the United States in executing, soliciting or negotiating the terms of such transaction on both sides of a transaction, even though at least one counterparty to the transaction is a non-U.S. person or foreign branch.¹⁹⁵³ In other words, if both counterparties to a security-based swap transaction conduct such transaction within the United States, it is a transaction in the United States. One of the primary objectives of making substituted compliance available to cross-border security-based swap transactions is to accommodate the global nature of the security-based swap market and cross-border security-based swap activity. In circumstances where both parties to a security-based swap are transacting in the United States, either from a U.S. office or U.S. branch, or using an affiliate or agent, to conduct the security-based swap, we do not believe that substituted compliance would be necessary or appropriate. Both parties (or their respective agents) to the transaction are conducting a transaction in the United States and should be able to satisfy the applicable Title VII requirements by reporting the transaction to a registered SDR or executing the transaction on a registered exchange of SB SEF in the United States without the need to rely on substituted compliance. In addition, because both parties (or their respective

¹⁹⁵³ See proposed Rule 908(c)(2) under the Exchange Act, interpretive guidance regarding substituted compliance with the mandatory clearing requirement, and proposed Rule 3Ch-2(b)(1) under the Exchange Act, as discussed in Section XI.D – XI.F, supra.

agents) are conducting a transaction in the United States, there is a strong public interest to subject such transaction to the Title VII mandatory execution, regulatory reporting, and public dissemination requirements. Therefore, the Commission does not believe that it would be appropriate to provide substitute compliance with respect to a transaction where both parties (or their agents) conduct the transaction within the United States.

3. Assessment Costs

The assessment costs associated with the proposed rules regarding substituted compliance would, in part, flow from the assessment of whether a registered security-based swap dealer is a foreign security-based swap dealer and whether a transaction counterparty is a non-U.S. person or a foreign branch and whether a transaction involves a person within the United States in soliciting, negotiating, or execution. The status of a foreign security-based swap dealer would be determined by analyzing the U.S. person definition, which may be done by an in-house counsel reviewing readily ascertainable information, such as the foreign security-based swap dealer's certificate of incorporation or formation or other internal documents evidencing residence, place of incorporation, or principal business location. The Commission preliminarily believes that the cost involved in making such assessment should not exceed one hour of in-house counsel's time or \$379.¹⁹⁵⁴

The assessment costs associated with proposed Rule 908(c), proposed interpretive guidance with respect to substituted compliance with the mandatory clearing requirement, and proposed Rule 3Ch-2(c)(2)(ii) would involve costs of determining a transaction counterparty's

¹⁹⁵⁴ Based upon data from SIFMA's Management & Professional Earnings in the Securities Industry 2012 (modified by the SEC staff to account for an 1800-hour-work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead), the staff estimates that the average national hourly rate for an in-house attorney is \$379.

U.S. person status, as well as determining whether counterparty conducts the security-based swap in the United States or involves any persons in the United States to solicit, negotiate or execute a security-based swap transaction.

The Commission preliminarily believes that market participants would likely incur costs arising from the need to identify and maintain records concerning the U.S.-person status of their counterparties and the location of their transactions. We anticipate that potential applicants for substituted compliance are likely to request representations from their transaction counterparties to determine the counterparties' U.S.-person status and whether the transaction was conducted within the United States. Therefore, the Commission preliminarily believes that the assessment costs associated with determining the status of counterparties and the location of transactions should be primarily one-time costs of establishing a practice or compliance procedure of requesting and collecting representations from trading counterparties and maintaining the representations collected as part of the recordkeeping procedures and limited ongoing costs associated with requesting and collecting representations. Consistent with the analysis of the assessment costs associated with the de minimis exception relating to the security-based swap dealer definition that involves determining the status of counterparties and the location of transactions,¹⁹⁵⁵ the Commission preliminarily believes that such one-time costs would be approximately \$15,160.¹⁹⁵⁶ The Commission preliminarily believes that requesting and

¹⁹⁵⁵ See Section XV.D.2(a), supra.

¹⁹⁵⁶ This estimate is based on estimated 40 hours of in-house legal or compliance staff's time to establish a procedure of requesting and collecting representations from trading counterparties, taking into account that such representation may be built into form of standardized trading documentation. Based upon data from SIFMA's Management & Professional Earnings in the Securities Industry 2012 (modified by the SEC staff to account for an 1800-hour-work-year and multiplied by 5.35 to account for bonuses, firm

collecting representations would be part of the standardized transaction process reflected in the policies and procedures regarding security-based swap sales and trading practices and should not result in separate assessment costs.¹⁹⁵⁷ To the extent that market participants have incurred costs relating to similar or same assessments with respect to the counterparty status and location of the transactions for other Title VII requirements, their assessment costs with respect to substituted compliance may be less.

In addition, a registered security-based swap dealer or a security-based swap transaction eligible for a substituted compliance determination would incur costs in submitting a request to the Commission for a substituted compliance determination. The Commission preliminarily estimates the costs of submitting such request pursuant to proposed Rule 3a71-5(c), proposed Rule 908(c), proposed interpretive guidance with respect to substituted compliance with the mandatory clearing requirement, or proposed Rule 3Ch-2(c)(2)(ii) would be approximately \$110,320.¹⁹⁵⁸ Once such request is made, however, other market participants that seek to

size, employee benefits, and overhead), the staff estimates that the average national hourly rate for an in-house attorney is \$379.

¹⁹⁵⁷ There will be ongoing costs associated with processing representations received from counterparties, including additional due diligence and verification to the extent that a counterparty's representation is contrary to or inconsistent with the knowledge of the collecting party. The Commission believes that these would be compliance costs encompassed within the programmatic costs associated with substituted compliance.

¹⁹⁵⁸ This estimate is based on information indicating that the average costs associated with preparing and submitting an application to the Commission for a Commission order for exemptive relief under Section 36 of the Exchange Act in accordance with the procedures set forth in 17 CFR § 240.0-12. The Commission recognizes that a substituted compliance determination request made pursuant to proposed Rule 3a71-5(c), proposed Rule 908(c), proposed interpretive guidance with respect to substituted compliance with the mandatory clearing requirement, and proposed Rule 3Ch-2(c)(2)(ii) would be made under proposed Rule 0-13 under the Exchange Act, which establishes procedures similar to those used by the Commission in considering exemptive order applications under Section 36 of the Exchange Act. The staff estimates that costs associated with a request

request a substituted compliance determination with respect to the same area of a foreign regulatory system relevant to the requirements in Section 15F or regulatory reporting and public dissemination, the same foreign clearing agency, or the same foreign regulatory regime that a foreign exchange or SB SEF is subject to, would be able to rely on the Commission's substituted compliance determination. Accordingly, the assessment costs would only need to be incurred once with respect to the same area of a foreign regulatory system or the same foreign clearing agency.

Request for Comment

The Commission seeks comment on the costs and benefits associated with substituted compliance in all aspects. Responses that are supported by data and analysis provide great assistance to the Commission in considering the benefits and costs of the substituted compliance policy framework. In addition, the Commission seeks comment on the following specific questions:

pursuant to these proposed rules would be approximately \$110,320. The Commission estimates that preparation of the request would require approximately 80 hours of in-house counsel time and 200 hours of outside counsel time. Such estimate takes into account the time required to prepare supporting documents necessary for the Commission to make a substituted compliance determination, including, without limitation, information regarding applicable requirements established by the foreign financial regulatory authority or authorities, as well as the methods used by the foreign financial regulatory authority or authorities to monitor compliance with these rules. Based upon data from SIFMA's Management & Professional Earnings in the Securities Industry 2012 (modified by the SEC staff to account for an 1800-hour-work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead), the staff estimates that the average national hourly rate for an in-house attorney is \$379. The Commission estimates the costs for outside legal services to be \$400 per hour. Accordingly, the Commission estimates the cost to be \$110,320 (\$30,320 (based on 80 hours of in-house counsel time * \$379) + \$80,000 (based on 200 hours of outside counsel time * \$400)) to submit a request for a substituted compliance determination.

- Would substituted compliance reduce costs associated with the applicable Title VII requirements? Would the analysis of the benefits and costs of substituted compliance differ between the case of regulatory duplication or overlap and the case of regulatory conflict?
- Does a substituted compliance determination based on comparability achieve the same benefits intended by Title VII? Could there be significant economic consequences if the Commission permitted substituted compliance in cases in which the foreign requirements are not identical, but, as contemplated, only comparable to the applicable Title VII requirements? What would those effects be? In cases where substituted compliance were granted but where requirements were comparable and not identical, are there certain differences, or types of differences, in regulation that would have more significant economic effects than others? Are there particular areas of Title VII regulation in which the effects of differences between comparable and identical standards would be more pronounced than in others?
- Could there be significant economic consequences, including effects on competition, if a substituted compliance determination is made conditionally? What would those effects be?
- Could market participants be prompted to restructure in anticipation of substituted compliance determinations? What effects on market structure and competition might result? Are there other potential spillovers from strategic restructuring related to substituted compliance determinations?
- Do commenters agree with the preliminary estimates of the assessment costs and the costs to request a substituted compliance determination discussed above? Are there

any other assessment costs not considered here? Specifically, the Commission requests comment on (i) the assessment costs of determining whether a market participant or a transaction is eligible for substituted compliance, and (ii) the costs of preparing and submitting a request for a substituted compliance determination.

J. General Request for Comments

In responding to the specific requests above for comment on the economic effects of our proposed rules, interested persons are encouraged to provide supporting data and analysis and, when appropriate, identify alternative models for assessing the costs and benefits of our proposed rules, as well as their expected effect on efficiency, competition and capital formation. Responses that are supported by data and analysis provide great assistance to the Commission in considering the economic effects of proposed new requirements, including the associated benefits and costs.

In addition to the specific requests for comment set forth above, the Commission also seeks comment on the expected economic effects of the interplay between our rules and those [adopted/proposed] by the CFTC. In particular, to the extent that the Commission's proposed rules and interpretations take a different approach from the CFTC's approach to the application of Title VII requirements in the cross-border context, what would be the economic impact, including the costs and benefits, of these differences on market participants and the U.S. security-based swap market as a whole? What effect would such differences have on efficiency, competition and capital formation in the U.S. security-based swap market? Commenters should provide analysis and empirical data to support their views on the costs, benefits and other economic effects associated with the differences between the Commission's proposed approach and the CFTC's approach.

The Commission also seeks comment on the relevant economic considerations for the Commission if we modify our proposed approach to conform to the CFTC's [proposed/final] guidance. Similarly, what would the economic considerations be for the Commission to adopt any cross-border interpretations proposed by the CFTC, but not proposed by the Commission?

XVI. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”)¹⁹⁵⁹ the Commission must advise the OMB whether the proposed regulation constitutes a “major” rule. Under SBREFA, a rule is considered “major” where, if adopted, it results or is likely to result in: (1) an annual effect on the economy of \$100 million or more (either in the form of an increase or a decrease); (2) a major increase in costs or prices for consumers or individual industries; or (3) significant adverse effect on competition, investment or innovation. If a rule is “major,” its effectiveness will generally be delayed for 60 days pending Congressional review.

The Commission requests comment on the potential impact of these proposed rules on the economy on an annual basis, on the costs or prices for consumers or individual industries, and on competition, investment, or innovation. Commenters are requested to provide empirical data and other factual support for their view to the extent possible.

¹⁹⁵⁹ Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

XVII. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act ("RFA")¹⁹⁶⁰ requires Federal agencies, in promulgating rules, to consider the impact of those rules on small entities. Section 603(a) of the Administrative Procedure Act,¹⁹⁶¹ as amended by the RFA, generally requires the Commission to undertake a regulatory flexibility analysis of all proposed rules, or proposed rule amendments, to determine the impact of such rulemaking on "small entities."¹⁹⁶² Section 605(b) of the RFA¹⁹⁶³ provides that this requirement shall not apply to any proposed rule or proposed rule amendment which, if adopted, would not have a significant economic impact on a substantial number of small entities.

For purposes of Commission rulemaking in connection with the RFA, a small entity includes: (1) when used with reference to an "issuer" or a "person," other than an investment company, an "issuer" or "person" that, on the last day of its most recent fiscal year, had total assets of \$5 million or less;¹⁹⁶⁴ or (2) a broker-dealer with total capital (net worth plus subordinated liabilities) of less than \$500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to Rule 17a-5(d) under the Exchange

¹⁹⁶⁰ 5 U.S.C. 601 et seq.

¹⁹⁶¹ 5 U.S.C. 603(a).

¹⁹⁶² Although Section 601(b) of the RFA defines the term "small entity," the statute permits agencies to formulate their own definitions. The Commission has adopted definitions for the term "small entity" for the purposes of Commission rulemaking in accordance with the RFA. Those definitions, as relevant to this proposed rulemaking, are set forth in Rule 0-10 under the Exchange Act, 17 CFR § 240.0-10. See Exchange Act Release No. 18451 (Jan, 28, 1982), 47 FR 5215 (Feb, 4, 1982) (File No. AS-305).

¹⁹⁶³ 5 U.S.C. 605(b).

¹⁹⁶⁴ See 17 CFR § 240.0-10(a).

Act,¹⁹⁶⁵ or, if not required to file such statements, a broker-dealer with total capital (net worth plus subordinated liabilities) of less than \$500,000 on the last day of the preceding fiscal year (or in the time that it has been in business, if shorter); and is not affiliated with any person (other than a natural person) that is not a small business or small organization.¹⁹⁶⁶ Under the standards adopted by the Small Business Administration, small entities in the finance and insurance industry include the following: (i) for entities engaged in credit intermediation and related activities, entities with \$175 million or less in assets;¹⁹⁶⁷ (ii) for entities engaged in non-depository credit intermediation and certain other activities, entities with \$7 million or less in annual receipts;¹⁹⁶⁸ (iii) for entities engaged in financial investments and related activities, entities with \$7 million or less in annual receipts;¹⁹⁶⁹ (iv) for insurance carriers and entities engaged in related activities, entities with \$7 million or less in annual receipts;¹⁹⁷⁰ and (v) for funds, trusts, and other financial vehicles, entities with \$7 million or less in annual receipts.¹⁹⁷¹

Based on feedback from industry participants and our own information about the security-based swap markets, the Commission preliminarily believes that non-U.S. entities that would be required to register and be regulated as security-based swap dealers and major security-based swap participants exceed the thresholds defining “small entities” set out above. Thus, the Commission preliminarily believes it is unlikely that the proposed rules regarding registration of

¹⁹⁶⁵ 17 CFR § 240.17a-5(d).

¹⁹⁶⁶ See 17 CFR § 240.0-10(c).

¹⁹⁶⁷ See 13 CFR § 121.201 (Subsector 522).

¹⁹⁶⁸ See id. at Subsector 522.

¹⁹⁶⁹ See id. at Subsector 523.

¹⁹⁷⁰ See id. at Subsector 524.

¹⁹⁷¹ See id. at Subsector 525.

security-based swap dealers and major security-based swap market participants would have a significant economic impact any small entity.

In addition, based on the Commission's own information about the cross-border security-based swap market, the Commission believes that only persons or entities with assets significantly in excess of \$5 million participate in the security-based swap market, and such persons or entities would thus not qualify as "small entities." Therefore, the Commission preliminarily believes that the application of the mandatory clearing requirement to cross-border security-based swap transactions is unlikely to impact any small entities. Moreover, the Commission preliminarily believes that the entities likely to register as a security-based swap clearing agency located outside the United States are not likely to qualify as a "small entity" as defined above. Thus, the Commission preliminarily believes it is unlikely that the proposed rules regarding registration of security-based swap clearing agencies located outside the United States would have a significant economic impact any small entity.

In addition, as discussed in the Regulation SBSR Proposing Release, the Commission believes that the number of security based swap transactions involving a "small entity" is de minimis. Therefore, the Commission preliminarily believes that the application of the mandatory trade reporting requirement to cross-border security-based swap transactions is unlikely to impact any small entities. Moreover, the Commission preliminarily believes that the entities likely to register as a SDR located outside the United States are not likely to qualify as a "small entity" as defined above. Thus, the Commission preliminarily believes it is unlikely that the proposed rules regarding registration of SDRs located outside the United States would have a significant economic impact any small entity.

In addition, based on the Commission's own information about the cross-border security-based swap market, the Commission preliminarily believes that the proposed application of the mandatory trade execution requirement to cross-border security-based swap transactions is not likely to impact any small entities. Moreover, as discussed in the SB SEF Proposing Release, based on our understanding of the market and conversations with industry sources, the Commission preliminarily believes that approximately 20 SB SEFs could be subject to the requirements of proposed Regulation SB SEF. Based on the Commission's existing information about the security-based swap market and the entities likely to register as SB SEFs, the Commission preliminarily believes that the entities likely to register as SB SEFs would not be considered small entities. The Commission preliminarily believes that most, if not all, of the SB SEFs would be large business entities or subsidiaries of large business entities, and that all SB SEFs would have assets in excess of \$5 million and annual receipts in excess of \$7,000,000. Therefore, the Commission preliminarily believes that none of the potential SB SEFs would be considered small entities.

For the foregoing reasons, the Commission certifies that the proposed rules would not have a significant economic impact on a substantial number of small entities for purposes of the RFA. The Commission encourages written comments regarding this certification. In particular, the Commission encourages written comments regarding the Commission's preliminary belief that the proposed application of the mandatory clearing requirement and the mandatory trade reporting requirement to cross-border security-based swap transactions is unlikely to impact any small entities. The Commission requests that commenters describe the nature of any impact on small entities and provide empirical data to illustrate the extent of the impact.

Statutory Basis and Text of Proposed Rules

Pursuant to the Exchange Act, 15 U.S.C. § 78a *et seq.*, and particularly, Section 3(b), Section 15(d)(1), Section 23(a)(1), Section 30(c) thereof, Sections 712(a)(2), (6), and 761(b) of the Dodd-Frank Act, the SEC is proposing to adopt rules 0-13, 3a67-10, 3a71-3, 3a71-4, 3a71-5, 3Ca-3, 3Ch-1, 3Ch-2, 13n-4(d), 13n-12, 18a-4, and 900 through 911, and Forms SBSE, SBSE-A, and SBSE-BD, under the Exchange Act.

List of Subjects in 17 CFR Part 240

Brokers, Confidential business information, Fraud, Reporting and recordkeeping requirements, Securities.

List of Subjects in 17 CFR Part 242

Brokers, Fraud, Reporting and recordkeeping requirements, Securities.

List of Subjects in 17 CFR Part 249

Brokers, Reporting and recordkeeping requirements, Securities.

Text of Proposed rules

For the reasons stated in the preamble, the SEC is proposing to amend Title 17, Chapter II of the Code of the Federal Regulations as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for part 240 is amended by adding the following citation in numerical order to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78c-5, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78n-1, 78o, 78o-4, 78o-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29,

80a-37, 80b-3, 80b-4, 80b-11, and 7201 et seq., 12 U.S.C. 5221(e)(3), 15 U.S.C. 8302, and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

Sections 3a67-10, 3a71-3, 3a71-4, and 3a71-5 are also issued under Pub. L. 111-203, §§ 712, 761(b), 124 Stat. 1754 (2010).

2. Add § 240.0-13 to read as follows:

§ 240.0-13—Commission procedures for filing applications to request a substituted compliance order under the Exchange Act.

(a) The application shall be in writing in the form of a letter, must include any supporting documents necessary to make the application complete, and otherwise must comply with § 240.0-3. All applications must be submitted to the Office of the Secretary of the Commission. Requestors may seek confidential treatment of their applications to the extent provided under § 200.81 of this chapter. If an application is incomplete, the Commission, through the Division of Trading and Markets, may request that the application be withdrawn unless the applicant can justify, based on all the facts and circumstances, why supporting materials have not been submitted and undertakes to submit the omitted materials promptly.

(b) An applicant may submit a request electronically. The electronic mailbox to use for these applications is described on the Commission's website at www.sec.gov in the "Exchange Act Substituted Compliance Applications" section. In the event electronic mailboxes are revised in the future, applicants can find the appropriate mailbox by accessing the "Electronic Mailboxes at the Commission" section.

(c) All filings and submissions filed pursuant to this rule must be in the English language. If a filing or submission filed pursuant to this rule requires the inclusion of a

document that is in a foreign language, a party must submit instead a fair and accurate English translation of the entire foreign language document. A party may submit a copy of the unabridged foreign language document when including an English translation of a foreign language document in a filing or submission filed pursuant to this rule. A party must provide a copy of any foreign language document upon the request of Commission staff.

(d) An applicant also may submit a request in paper format. Five copies of every paper application and every amendment to such an application must be submitted to the Office of the Secretary at 100 F Street, NE, Washington, DC 20549-1090. Applications must be on white paper no larger than 8½ by 11 inches in size. The left margin of applications must be at least 1½ inches wide, and if the application is bound, it must be bound on the left side. All typewritten or printed material must be set forth in black ink so as to permit photocopying.

(e) Every application (electronic or paper) must contain the name, address, telephone number, and email address of each applicant and the name, address, telephone number, and email address of a person to whom any questions regarding the application should be directed. The Commission will not consider hypothetical or anonymous requests for a substituted compliance order. Each applicant shall provide the Commission with any supporting documentation it believes necessary for the Commission to make such determination, including information regarding applicable requirements established by the foreign financial regulatory authority or authorities, as well as the methods used by the foreign financial regulatory authority or authorities to monitor compliance with such rules. Applicants should also cite to and discuss applicable precedent.

(f) Amendments to the application should be prepared and submitted as set forth in these procedures and should be marked to show what changes have been made.

(g) After the filing is complete, the Division of Trading and Markets will review the application. Once all questions and issues have been answered to the satisfaction of the Division of Trading and Markets, the staff will make an appropriate recommendation to the Commission. After consideration of the recommendation by the Commission, the Commission's Office of the Secretary will issue an appropriate response and will notify the applicant.

(h) The Commission, in its sole discretion, may choose to publish in the Federal Register a notice that the application has been submitted. The notice would provide that any person may, within the period specified therein, submit to the Commission any information that relates to the Commission action requested in the application. The notice also would indicate the earliest date on which the Commission would take final action on the application, but in no event would such action be taken earlier than 25 days following publication of the notice in the Federal Register.

(i) The Commission may, in its sole discretion, schedule a hearing on the matter addressed by the application.

3. Add §§ 240-3a67-10, 240.3a71-3, 240.3a71-4, and 240.3a71-5 to read as follows:

Security-Based Swap Dealer and Participant Definitions

Sec.

- | | |
|----------|---|
| 240.3a67 | 1— Definition of “major security-based swap participant.” |
| 240.3a67 | 2— Categories of security-based swaps. |

- 240.3a67 3— Definition of “substantial position.”
- 240.3a67 4— Definition of “hedging or mitigating commercial risk.”
- 240.3a67 5— Definition of “substantial counterparty exposure.”
- 240.3a67 6— Definition of “financial entity.”
- 240.3a67 7— Definition of “highly leveraged.”
- 240.3a67 8— Timing requirements, reevaluation period and termination of status.
- 240.3a67 9— Calculation of major participant status by certain persons.
- 240.3a67 10— Foreign major security-based swap participants.
- 240.3a71 1— Definition of “security-based swap dealer.”
- 240.3a71 2— De minimis exception.
- 240.3a71 3— Cross-border security-based swap dealing activity.
- 240.3a71 4— Exception from aggregation for affiliated groups with registered security-based swap dealers.
- 240.3a71 5— Substituted compliance for foreign security-based swap dealers.

* * * * *

§ 240.3a67-10—Foreign major security-based swap participants.

(a) Definitions. As used in this rule, the following terms shall have the meanings indicated:

(1) Foreign major security-based swap participant means a major security-based swap participant, as defined in section 3(a)(67) of the Act (15 U.S.C. 78c(a)(67)), and the rules and regulations thereunder, that is not a U.S. person.

(2) U.S. person has the meaning set forth in 17 CFR § 240.3a71-3(a)(7).

(b) Application of customer protection requirements. A registered foreign major security-based swap participant shall not be subject, with respect to its security-based swap transactions with counterparties that are not U.S. persons, to the requirements relating to business conduct standards described in section 15F(h) of the Act (15 U.S.C. 78o-10(h)), and the rules and regulations thereunder, other than rules and regulations prescribed by the Commission pursuant to section 15F(h)(1)(B) of the Act (15 U.S.C. 78o-10(h)(1)(B)).

(c) Application of major security-based swap participant tests in the cross-border context.

For purposes of calculating a person’s status as a major security-based swap participant as

defined in section 3(a)(67) of the Act (15 U.S.C. 78c(a)(67)), and the rules and regulations thereunder, a person shall include the following security-based swap transactions:

(1) If such person is a U.S. person, all security-based swap transactions entered into by such person; or

(2) If such person is a non-U.S. person, all security-based swap transactions entered into by such person with U.S. persons.

§ 240.3a71-3—Cross-border security-based swap dealing activity.

(a) Definitions. As used in this rule, the following terms shall have the meanings indicated:

(1) Foreign branch means any branch of a U.S. bank if:

(i) The branch is located outside the United States;

(ii) The branch operates for valid business reasons; and

(iii) The branch is engaged in the business of banking and is subject to substantive banking regulation in the jurisdiction where located.

(2) Foreign business means security-based swap transactions that are entered into, or offered to be entered into, by or on behalf of, a foreign security-based swap dealer or a U.S. security-based swap dealer, other than the U.S. Business of such person.

(3) Foreign security-based swap dealer means a security-based swap dealer, as defined in section 3(a)(71) of the Act (15 U.S.C. 78c(a)(71)), and the rules and regulations thereunder, that is not a U.S. person.

(4) Transaction conducted through a foreign branch.

(i) Definition. Transaction conducted through a foreign branch means a security-based swap transaction that is solicited, negotiated, or executed by a U.S. person through a foreign branch of such U.S. person if:

(A) The foreign branch is the counterparty to such security-based swap transaction; and

(B) The security-based swap transaction is not solicited, negotiated, or executed by a person within the United States on behalf of the foreign branch or its counterparty.

(ii) Representations. A person shall not be required to consider its counterparty's activity in connection with paragraph (a)(4)(i)(B) of this section in determining whether a security-based swap transaction is a transaction conducted through a foreign branch if such person receives a representation from its counterparty that no person within the United States is directly involved in soliciting, negotiating, or executing the security-based swap transaction on behalf of such counterparty, unless such person knows that the representation is not accurate.

(5) Transaction conducted within the United States.

(i) Definition. Transaction conducted within the United States means a security-based swap transaction that is solicited, negotiated, executed, or booked within the United States, by or on behalf of either counterparty to the transaction, regardless of the location, domicile, or residence status of either counterparty to the transaction.

(ii) Foreign branch exception. Notwithstanding paragraph (a)(5)(i) of this section, a transaction conducted within the United States shall not include a transaction conducted through a foreign branch.

(iii) Representations. A person shall not be required to consider its counterparty's activity in connection with a transaction in determining whether such transaction is conducted within the United States if such person receives a representation from its counterparty that the

transaction is not solicited, negotiated, executed, or booked within the United States by or on behalf of such counterparty, unless such person knows that the representation is not accurate.

(6) U.S. business means:

(i) With respect to a foreign security-based swap dealer:

(A) Any transaction entered into, or offered to be entered into, by or on behalf of such foreign security-based swap dealer, with a U.S. person (other than with a foreign branch); or

(B) Any transaction conducted within the United States; and

(ii) With respect to a U.S. security-based swap dealer, any transaction by or on behalf of such U.S. security-based swap dealer, wherever entered into or offered to be entered into, other than a transaction conducted through a foreign branch with a non-U.S. person or another foreign branch.

(7) U.S. person.

(i) Except as provided in paragraph (a)(7)(ii) of this section, U.S. person means:

(A) Any natural person resident in the United States;

(B) Any partnership, corporation, trust, or other legal person organized or incorporated under the laws of the United States or having its principal place of business in the United States; and

(C) Any account (whether discretionary or non-discretionary) of a U.S. person.

(ii) The term U.S. person does not include the International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, and their agencies and pension plans, and any other similar international organizations, their agencies and pension plans.

(8) U.S. security-based swap dealer means a security-based swap dealer, as defined in section 3(a)(71) of the Act (15 U.S.C. 78c(a)(71)), and the rules and regulations thereunder, that is a U.S. person.

(9) United States means the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.

(b) Application of de minimis exception to cross-border dealing activity. For purposes of calculating the amount of security-based swap positions connected with dealing activity under § 240.3a71-2(a)(1), a person shall include the following security-based swap transactions:

(1)(i) If such person is a U.S. person, all security-based swap transactions connected with the dealing activity in which such person engages, including transactions conducted through a foreign branch; or

(ii) If such person is a non-U.S. person, security-based swap transactions connected with the dealing activity in which such person engages that are entered into with a U.S. person (other than with a foreign branch) or that are transactions conducted within the United States; and

(2) If such person engages in transactions described in paragraph (b)(1)(i) or (ii) of this section,

(i) All security-based swap transactions connected with the dealing activity in which any U.S. person controlling, controlled by, or under common control with such person engages, including transactions conducted through a foreign branch; and

(ii) All security-based swap transactions connected with the dealing activity in which any non-U.S. person controlling, controlled by, or under common control with such person engages that are entered into with U.S. persons (other than with a foreign branch) or that are transactions conducted within the United States.

(c) Application of customer protection requirements. A registered foreign security-based swap dealer and a registered U.S. security-based swap dealer, with respect to their Foreign Business, shall not be subject to the requirements relating to business conduct standards described in section 15F(h) of the Act (15 U.S.C. 78o-10(h)), and the rules and regulations thereunder, other than the rules and regulations prescribed by the Commission pursuant to section 15F(h)(1)(B) of the Act (15 U.S.C. 78o-10(h)(1)(B)).

§ 240.3a71-4—Exception from aggregation for affiliated groups with registered security-based swap dealers.

Notwithstanding §§ 240.3a71-2(a)(1) and 240.3a71-3(b)(2), a person shall not include the security-based swap transactions of another person controlling, controlled by, or under common control with such person where such other person is registered with the Commission as a security-based swap dealer, provided that the security-based swap dealing activity of such person is operationally independent of the security-based swap dealing activity of such registered security-based swap dealer.

§ 240.3a71-5—Substituted compliance for foreign security-based swap dealers.

(a) Determinations.

(1) In general. Subject to paragraph (a)(2) of this section and except as provided in paragraph (a)(3) of this section, the Commission may, conditionally or unconditionally, by order, make a determination with respect to a foreign financial regulatory system that compliance with specified requirements under such foreign financial regulatory system by a registered foreign security-based swap dealer (or class thereof) may satisfy the corresponding requirements in section 15F of the Act (15 U.S.C. 78o-10), and the rules and regulations thereunder, that would otherwise apply to such foreign security-based swap dealer (or class thereof).

(2) Standard. The Commission shall not make a substituted compliance determination under paragraph (a)(1) of this section unless the Commission:

(i) Determines that the requirements of such foreign financial regulatory system applicable to such foreign security-based swap dealer (or class thereof) are comparable to otherwise applicable requirements, after taking into account such factors as the Commission determines are appropriate, such as the scope and objectives of the relevant foreign regulatory requirements, as well as the effectiveness of the supervisory compliance program administered, and the enforcement authority exercised, by a foreign financial regulatory authority or authorities in such system to support its oversight of such foreign security-based swap dealer (or class thereof); and

(ii) Has entered into a supervisory and enforcement memorandum of understanding or other arrangement with the relevant foreign financial regulatory authority or authorities under such foreign financial regulatory system addressing oversight and supervision of applicable security-based swap dealers under the substituted compliance determination.

(3) Limitation. The Commission will not make a substituted compliance determination under paragraph (a)(1) of this section with respect to the requirements relating to the registration process described in sections 15F(a) through (d) of the Act (15 U.S.C. 78o-10(a) through (d)) and the rules and regulations thereunder.

(4) Withdrawal or modification. The Commission may, on its own initiative, by order, modify or withdraw a substituted compliance determination under paragraph (a)(1) of this section, after appropriate notice and opportunity for comment.

(b) Reliance by foreign security-based swap dealers. A registered foreign security-based swap dealer may satisfy requirements in section 15F of the Act (15 U.S.C. 78o-10), and the rules

and regulations thereunder, by complying with corresponding legislative requirements and rules and regulations under a foreign financial regulatory system, provided:

(1) The Commission has made a substituted compliance determination pursuant to paragraph (a)(1) of this section regarding such foreign financial regulatory system providing that compliance with specified requirements under such foreign financial regulatory system by such registered foreign security-based swap dealer (or a class of registered foreign security-based swap dealers that includes such registered foreign security-based swap dealer) may satisfy the corresponding requirements in section 15F of the Act (15 U.S.C. 78o-10) and the rules and regulations thereunder; and

(2) Such registered foreign security-based swap dealer satisfies any conditions set forth in a substituted compliance determination made by the Commission pursuant to paragraph (a)(1) of this section.

(c) Requests for determinations.

(1) A foreign security-based swap dealer or group of foreign security-based swap dealers of the same class may file an application, pursuant to the procedures set forth in § 240.0-13, requesting that the Commission make a substituted compliance determination pursuant to paragraph (a)(1) of this section, with respect to one or more requirements in section 15F of the Act (15 U.S.C. 78o-10), and the rules and regulations thereunder, and provide the reasons therefor and such other supporting documentation as the Commission may request.

(2) A foreign security-based swap dealer or group of foreign security-based swap dealers may make a request under paragraph (a)(1) of this section only if the foreign security-based swap dealer(s):

(i) Is directly supervised by the foreign financial regulatory authority or authorities under the system with respect to the foreign regulatory requirements relating to the applicable requirements in section 15F of the Act (15 U.S.C. 78o-10) and the rules and regulations thereunder; and

(ii) Provides the certification and opinion of counsel as described in § 240.15Fb2-4(c).

4. Add § 240.3Ca-3 to read as follows:

§ 240.3Ca-3—Application of the mandatory clearing requirement to cross-border security-based swap transactions.

(a) Application. Subject to paragraph (b) of this section, the clearing requirement in section 3C(a)(1) of the Act (15 U.S.C. 78c-3(a)(1)), and the rules and regulations thereunder, shall apply to a person that engages in a security-based swap transaction if:

(1) A counterparty to the transaction is:

(i) A U.S. person; or

(ii) A non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person; or

(2) Such transaction is a transaction conducted within the United States.

(b) Exceptions. The clearing requirement in section 3C(a)(1) of the Act (15 U.S.C. 78c-3(a)(1)), and the rules and regulations thereunder, shall not apply to a transaction described in paragraph (a) of this section if:

(1) With respect to a security-based swap transaction that is not a transaction conducted within the United States,

(i) One counterparty to the transaction is:

(A) A foreign branch; or

(B) A non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person; and

(ii) The other counterparty to the transaction is a non-U.S. person:

(A) Whose performance under the security-based swap is not guaranteed by a U.S. person; and

(B) Who is not a foreign security-based swap dealer; or

(2) With respect to a security-based swap transaction that is a transaction conducted within the United States,

(i) Neither counterparty to the transaction is a U.S. person;

(ii) Neither counterparty's performance under the security-based swap is guaranteed by a U.S. person; and

(iii) Neither counterparty to the transaction is a foreign security-based swap dealer.

(c) For purposes of this rule, the terms foreign branch, foreign security-based swap dealer, transaction conducted within the United States, and U.S. person shall have the meanings set forth in § 240.3a71-3(a).

5. Add an undesignated center heading following § 240.3Ca-2 and §§ 240.3Ch-1 and 240.3Ch-2 to read as follows:

Trade Execution of Security-Based Swaps

* * * * *

Sec.

240.3Ch-1 Application of the mandatory trade execution requirement to cross-border security-based swap transactions.

240.3Ch-2 Substituted compliance for mandatory trade execution.

§ 240.3Ch-1—Application of the mandatory trade execution requirement to cross-border security-based swap transactions.

(a) Application. Subject to paragraph (b) of this section, the mandatory trade execution requirement in section 3C(h) of the Act (15 U.S.C. 78c-3(h)), and the rules and regulations thereunder, shall apply to a person that engages in a security-based swap transaction if:

(1) A counterparty to the transaction is:

(i) A U.S. person; or

(ii) A non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person; or

(2) Such transaction is a transaction conducted within the United States.

(b) Exceptions. The mandatory trade execution requirement in section 3C(h) of the Act (15 U.S.C. 78c-3(h)), and the rules and regulations thereunder, shall not apply to a transaction described in paragraph (a) of this section if:

(1) With respect to a security-based swap transaction that is not a transaction conducted within the United States,

(i) One counterparty to the transaction is:

(A) A foreign branch; or

(B) A non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person; and

(ii) The other counterparty to the transaction is a non-U.S. person:

(A) Whose performance under the security-based swap is not guaranteed by a U.S. person; and

(B) Who is not a foreign security-based swap dealer; or

(2) With respect to a security-based swap transaction that is a transaction conducted within the United States,

(i) Neither counterparty to the transaction is a U.S. person;

(ii) Neither counterparty's performances under the security-based swap is guaranteed by a U.S. person; and

(iii) Neither counterparty to the transaction is a foreign security-based swap dealer.

(c) For purposes of this rule, the terms foreign branch, foreign security-based swap dealer, and transaction conducted within the United States, and U.S. person shall have the meanings set forth in § 240.3a71-3(a).

§ 240.3Ch-2—Substituted compliance for mandatory trade execution.

(a) A person that is subject to the mandatory trade execution requirement in section 3C(h) of the Act (15 U.S.C. 78c-3(h)), and the rules and regulations thereunder, with respect to a security-based swap transaction may execute such transaction, or have such transaction executed on its behalf, on a security-based swap market that is neither registered under the Act nor exempt from registration under the Act if such security-based swap market is covered by, or is in a class of markets that is covered by, a Commission order described in paragraph (b) of this section, provided that with respect to at least one of the counterparties to the transaction:

(1) Such counterparty is either a non-U.S. person or a foreign branch; and

(2) The security-based swap transaction is not solicited, negotiated, or executed by a person within the United States on behalf of such counterparty.

(b) (1) The Commission may, conditionally or unconditionally, by order, make a substituted compliance determination with respect to a foreign jurisdiction to permit a person subject to the mandatory trade execution requirement in section 3C(h) of the Act (15 U.S.C. 78c-

3(h)), and the rules and regulations thereunder, with respect to a security-based swap transaction to execute such transaction, or have such transaction executed on its behalf, on a security-based swap market (or class of markets) if it determines that such security-based swap market (or class of markets) is subject to comparable, comprehensive supervision and regulation by the relevant foreign financial regulatory authority or authorities in such foreign jurisdiction.

(2) In making a determination under paragraph (b)(1) of this section, the Commission shall take into account such factors as the Commission determines are appropriate, such as the scope and objectives of the relevant foreign regulatory requirements, as well as the effectiveness of the supervisory compliance program administered, and the enforcement authority exercised, by the relevant foreign financial regulatory authority or authorities in the foreign jurisdiction to support the oversight of the security-based swap market (or class of markets).

(3) Before issuing a substituted compliance order pursuant to paragraph (b)(1) of this section, the Commission shall have entered into a supervisory and enforcement memorandum of understanding or other arrangement with the relevant foreign regulatory authority or authorities in the foreign jurisdiction addressing the oversight and supervision of the security-based swap market (or class of markets).

(4) The Commission may, on its own initiative, modify or withdraw such order at any time, after appropriate notice and opportunity for comment.

(c) One or more security-based swap markets in a foreign jurisdiction may file an application, in writing, pursuant to the procedures set forth in § 240.0-13, requesting that the Commission make a substituted compliance determination with respect to such foreign jurisdiction pursuant to paragraph (b)(1) of this section. Such application must include the reasons therefor and such other documentation as the Commission may request.

(d) For purposes of this rule, the terms foreign branch and U.S. person shall have the meanings set forth in § 240.3a71-3(a).

6. Add paragraph (d) to § 240.13n-4 as previously proposed at 75 FR 77367, Dec. 10, 2010, to read as follows:

§ 240.13n-4—Duties and core principles of security-based swap data repository.

* * * * *

(d) Exemption from the indemnification requirement. A registered security-based swap data repository is not required to comply with the indemnification requirement set forth in Section 13(n)(5)(H)(ii) of the Act (15 U.S.C. 78m(n)(5)(H)(ii)) and paragraph (b)(10) of this section with respect to disclosure of security-based swap information by the security-based swap data repository if:

(1) An entity described in paragraph (b)(9) of this section requests security-based swap information from the security-based swap data repository to fulfill a regulatory mandate and/or legal responsibility of the entity;

(2) The request of such entity pertains to a person or financial product subject to the jurisdiction, supervision, or oversight of the entity; and

(3) Such entity has entered into a supervisory and enforcement memorandum of understanding or other arrangement with the Commission that addresses the confidentiality of the security-based swap information provided and any other matters as determined by the Commission.

7. Add § 240.13n-12 following § 240.13n-11 as previously proposed at 75 FR 77366, Dec. 10, 2010, to read as follows:

Sec.

- 240.13n-1 Registration of security-based swap data repository.
- 240.13n-2 Withdrawal from registration.
- 240.13n-3 Registration of successor to registered security-based swap data repository.
- 240.13n-4 Duties and core principles of security-based swap data repository.
- 240.13n-5 Data collection and maintenance.
- 240.13n-6 Automated systems.
- 240.13n-7 Recordkeeping of security-based swap data repository.
- 240.13n-8 Reports to be provided to the Commission.
- 240.13n-9 Privacy requirements of security-based swap data repository.
- 240.13n-10 Disclosure requirements of security-based swap data repository.
- 240.13n-11 Designation of chief compliance officer of security-based swap data repository.
- 240.13n-12 Exemption from requirements governing security-based swap data repositories for certain non-U.S. persons.

* * * * *

§ 240.13n-12—Exemption from requirements governing security-based swap data repositories for certain non-U.S. persons.

(a) Definitions. For purposes of this section—

- (1) Non-U.S. person means a person that is not a U.S. person.
- (2) U.S. person shall have the same meaning as set forth in § 240.3a71-3(a)(7).

(b) A non-U.S. person that performs the functions of a security-based swap data repository within the United States shall be exempt from the registration and other requirements set forth in Section 13(n) of the Act (15 U.S.C. 78m(n)), and the rules and regulations thereunder, provided that each regulator with supervisory authority over such non-U.S. person has entered into a supervisory and enforcement memorandum of understanding or other arrangement with the Commission that addresses the confidentiality of data collected and maintained by such non-U.S. person, access by the Commission to such data, and any other matters determined by the Commission.

8. Add paragraphs (e) and (f) to § 240.18a-4 as previously proposed at 77 FR 70350, Nov. 23, 2012, to read as follows:

§ 240.18a-4—Segregation requirements for security-based swap dealers and major security-based swap participants

* * * * *

(e) Segregation requirements for foreign security-based swap dealers.

(1) Non-cleared security-based swaps.

(i) A registered foreign security-based swap dealer (as defined in § 240.3a71-3(a)(3)) that is a registered broker-dealer shall be subject to the requirements relating to segregation of assets held as collateral set forth in section 3E of the Act (15 U.S.C. 78c-5) and paragraphs (a) through (d) of this section, with respect to any assets received from, for, or on behalf of a counterparty to margin, guarantee, or secure a non-cleared security-based swap (including money, securities, or property accruing to such counterparty as the result of such a security-based swap transaction).

(ii) A registered foreign security-based swap dealer (as defined in § 240.3a71-3(a)(3)) that is not a registered broker-dealer shall be subject to the requirements relating to segregation of assets held as collateral set forth in section 3E of the Act (15 U.S.C. 78c-5) and paragraphs (a) through (d) of this section, with respect to non-cleared security-based swap transactions, solely with respect to any assets received from, for, or on behalf of a counterparty that is a U.S. person (as defined in § 240.3a71-3(a)(7)) to margin, guarantee, or secure a non-cleared security-based swap (including money, securities, or property accruing to such U.S. person counterparty as the result of such a security-based swap transaction).

(2) Cleared security-based swaps.

(i) A registered foreign security-based swap dealer (as defined in § 240.3a71-3(a)(3)) that is a registered broker-dealer shall be subject to the requirements relating to segregation of assets held as collateral set forth in section 3E of the Act (15 U.S.C. 78c-5) and paragraphs (a) through

(d) of this section, with respect to any assets received from, for, or on behalf of a counterparty to margin, guarantee, or secure a cleared security-based swap (including money, securities, or property accruing to such counterparty as the result of such a security-based swap transaction).

(ii) A registered foreign security-based swap dealer (as defined in § 240.3a71-3(a)(3)) that is not a registered broker-dealer and is not a person described in 11 U.S.C. §109(b)(3) shall be subject to the requirements relating to segregation of assets held as collateral set forth in section 3E of the Act (15 U.S.C. 78c-5) and paragraphs (a) through (d) of this section, with respect to cleared security-based swap transactions with any counterparty if such registered foreign security-based swap dealer accepts any assets from, for, or on behalf of a counterparty that is a U.S. person (as defined in § 240.3a71-3(a)(7)) to margin, guarantee, or secure a security-based swap (including money, securities, or property accruing to such U.S. person counterparty as the result of such a security-based swap).

(iii) A registered foreign security-based swap dealer (as defined in § 240.3a71-3(a)(3)) that is a person described in 11 U.S.C. §109(b)(3) shall be subject to the requirements relating to segregation of assets held as collateral set forth in section 3E of the Act (15 U.S.C. 78c-5) and paragraphs (a) through (d) of this section, with respect to cleared security-based swap transactions, solely with respect to any assets received from, for, or on behalf of a counterparty who is a U.S. person (as defined in 17 CFR § 240.3a71-3(a)(7)) to margin, guarantee, or secure a security-based swap cleared by or through a clearing agency (including money, securities, or property accruing to such U.S. person counterparty as the result of such a security-based swap transaction). The special account maintained by a registered foreign security-based swap dealer that is a person described in 11 U.S.C. §109(b)(3) in accordance with paragraph (c) of this

section shall be designated for the exclusive benefit of U.S. person security-based swap customers.

(3) Disclosures. A registered foreign security-based swap dealer (as defined in § 240.3a71-3(a)(3)) must disclose to its counterparty that is a U.S. person, prior to accepting any assets from, for, or on behalf of such counterparty to margin, guarantee, or secure a security-based swap, the potential treatment of the assets segregated by such registered foreign security-based swap dealer pursuant to section 3E of the Act (15 U.S.C. 78c-5), and the rules and regulations thereunder, in insolvency proceedings under U.S. bankruptcy law and any applicable foreign insolvency laws. Such disclosure shall include whether the foreign security-based swap dealer is subject to the segregation requirement set forth in Section 3E of the Act, and the rules and regulations thereunder, with respect to the assets collected from the U.S. person counterparty who will receive the disclosure, whether the foreign security-based swap dealer could be subject to the stockbroker liquidation provisions in the U.S. Bankruptcy Code, whether the segregated assets could be afforded customer property treatment under the U.S. bankruptcy law, and any other relevant considerations that may affect the treatment of the assets segregated under Section 3E of the Act in insolvency proceedings of the foreign security-based swap dealer.

(f) Segregation requirements for foreign major security-based swap participants. A registered foreign major security-based swap participant (as defined in § 240.3a67-10(a)(1)) that is not a registered broker-dealer shall not be subject to the requirements relating to segregation of assets held as collateral set forth in section 3E(f) of the Act (15 U.S.C. 78c-5(f)) and paragraph (d) of this section, with respect to non-cleared security-based swap transactions, solely with respect to any assets received from, for, or on behalf of a counterparty that is a not a U.S. person (as defined in § 240.3a71-3(a)(7)) to margin, guarantee, or secure a non-cleared security-based

swap (including money, securities, or property accruing to such non-U.S. person counterparty as the result of such a security-based swap transaction).

PART 242 — REGULATIONS M, SHO, ATS, AC, NMS, AND SBSR AND CUSTOMER MARGIN REQUIREMENTS FOR SECURITY FUTURES

9. The authority citation for part 242 continues to read as follows:

Authority: 15 U.S.C. 77g, 77q(a), 77s(a), 78b, 78c, 78g(c)(2), 78i(a), 78j, 78k-1(c), 78l, 78m, 78n, 78o(b), 78o(c), 78o(g), 78q(a), 78q(b), 78q(h), 78w(a), 78dd-1, 78mm, 80a-23, 80a-29, and 80a-37.

10. Add and undesignated center heading and §§ 242.900 through 242.911 as previously proposed at 75 FR 75283, Dec. 2, 2010, to read as follows:

Regulation SBSR—Regulatory Reporting and Public Dissemination of Security-Based Swap Information

- § 242.900 Definitions
- § 242.901 Reporting obligations.
- § 242.902 Public dissemination of transaction reports.
- § 242.903 Coded information.
- § 242.904 Operating hours of registered security-based swap data repositories.
- § 242.905 Correction of errors in security-based swap information.
- § 242.906 Other duties of participants.
- § 242.907 Policies and procedures of registered security-based swap data repositories.
- § 242.908 Cross-border matters.
- § 242.909 Registration of security-based swap data repository as a securities information processor.
- § 242.910 Implementation of security-based swap reporting and dissemination.
- § 242.911 Prohibition during phase-in period.

* * * * *

§ 242.900 Definitions.

Terms used in §§ 242.900 through 242.911 that appear in Section 3 of the Exchange Act (15 U.S.C. § 78c) have the same meaning as in Section 3 of the Exchange Act and the rules or

regulations thereunder. In addition, for purposes of Regulation SBSR, the following definitions shall apply:

(a) Affiliate means any person that, directly or indirectly, controls, is controlled by, or is under common control with, a person.

(b) Asset class means those security-based swaps in a particular broad category, including, but not limited to, credit derivatives, equity derivatives, and loan-based derivatives.

(c) Block trade means a large notional security-based swap transaction that meets the criteria set forth in § 242.907(b).

(d) Broker ID means the UIC assigned to a person acting as a broker for a participant.

(e) Confirm means the production of a confirmation that is agreed to by the parties to be definitive and complete and that has been manually, electronically, or, by some other legally equivalent means, signed.

(f) Control means, for purposes of §§ 242.900 through 242.911, the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise. A person is presumed to control another person if the person:

(1) Is a director, general partner or officer exercising executive responsibility (or having similar status or functions);

(2) Directly or indirectly has the right to vote 25 percent or more of a class of voting securities or has the power to sell or direct the sale of 25 percent or more of a class of voting securities; or

(3) In the case of a partnership, has the right to receive, upon dissolution, or has contributed, 25 percent or more of the capital.

(g) Counterparty means a person that is a direct counterparty or indirect counterparty of a security-based swap.

(h) Derivatives clearing organization means the same as provided under the Commodity Exchange Act.

(i) Desk ID means the UIC assigned to the trading desk of a participant or of a broker of a participant.

(j) Direct counterparty means a person that is a primary obligor on a security-based swap.

(k) Direct electronic access has the same meaning as in § 240.13n-4(a)(5) of this chapter.

(l) Effective reporting date, with respect to a registered security-based swap data repository, means the date six months after the registration date.

(m) Exchange Act means the Securities Exchange Act of 1934 (15 U.S.C. § 78a, et seq.), as amended.

(n) Foreign branch has the same meaning as in § 240.3a71-3(a)(1) of this chapter.

(o) Indirect counterparty means a guarantor of a direct counterparty's performance of any obligation under a security-based swap.

(p) Life cycle event means, with respect to a security-based swap, any event that would result in a change in the information reported to a registered security-based swap data repository under § 242.901, including a counterparty change resulting from an assignment or novation; a partial or full termination of the security-based swap; a change in the cash flows originally reported; for a security-based swap that is not cleared, any change to the collateral agreement; or a corporate action affecting a security or securities on which the security-based swap is based (e.g., a merger, dividend, stock split, or bankruptcy). Notwithstanding the above, a life cycle event shall not include the scheduled expiration of the security-based swap, a previously

described and anticipated interest rate adjustment (such as a quarterly interest rate adjustment), or other event that does not result in any change to the contractual terms of the security-based swap.

(q) Non-U.S. person means a person that is not a U.S. person.

(r) Parent means a legal person that controls a participant.

(s) Participant means a person that is a counterparty to a security-based swap that meets the criteria of § 242.908(b).

(t) Participant ID means the UIC assigned to a participant.

(u) Phase-in period means the period immediately after a security-based swap data repository has registered with the Commission during which it is not required to disseminate security-based swap data pursuant to an implementation schedule, as provided in § 242.910.

(v) Pre-enactment security-based swap means any security-based swap executed before July 21, 2010 (the date of enactment of the Dodd-Frank Act (Pub. L. No. 111-203, H.R. 4173)), the terms of which had not expired as of that date.

(w) Price means the price of a security-based swap transaction, expressed in terms of the commercial conventions used in that asset class.

(x) Product ID means the UIC assigned to a security-based swap instrument.

(y) Publicly disseminate means to make available through the Internet or other electronic data feed that is widely accessible and in machine-readable electronic format.

(z) Real time means, with respect to the reporting of security-based swap information, as soon as technologically practicable, but in no event later than 15 minutes after the time of execution of the security-based swap transaction.

(aa) Registered security-based swap data repository means a person that is registered with the Commission as a security-based swap data repository pursuant to section 13(n) of the Exchange Act (15 U.S.C. 78m(n)) and any rules or regulations thereunder.

(bb) Registration date, with respect to a security-based swap data repository, means the date on which the Commission registers the security-based swap data repository, or, if the Commission registers the security-based swap data repository before the effective date of §§ 242.900 through 242.911, the effective date of §§ 242.900 through 242.911.

(cc) Reporting side means the side of a security-based swap having the duty to report information in accordance with §§ 242.900 through 242.911 to a registered security-based swap data repository, or if there is no registered security-based swap data repository that would receive the information, to the Commission.

(dd) Security-based swap instrument means each security-based swap in the same asset class, with the same underlying reference asset, reference issuer, or reference index.

(ee) Side means a direct counterparty and any indirect counterparty that guarantees the direct counterparty's performance of any obligation under a security-based swap.

(ff) Time of execution means the point at which the counterparties to a security-based swap become irrevocably bound under applicable law.

(gg) Trader ID means the UIC assigned to a natural person who executes security-based swaps.

(hh) Transaction conducted through a foreign branch has the same meaning as in § 240.3a71-3(a)(4) of this chapter.

(ii) Transaction conducted within the United States has the same meaning as in § 240.3a71-3(a)(5) of this chapter.

(jj) Transaction ID means the unique identification code assigned by a registered security-based swap data repository to a specific security-based swap.

(kk) Transitional security-based swap means a security-based swap executed on or after July 21, 2010, and before the effective reporting date.

(ll) Ultimate parent means a legal person that controls a participant and that itself has no parent.

(mm) Ultimate parent ID means the UIC assigned to an ultimate parent of a participant.

(nn) Unique Identification Code or UIC means the unique identification code assigned to a person, unit of a person, or product by or on behalf of an internationally recognized standards-setting body that imposes fees and usage restrictions that are fair and reasonable and not unreasonably discriminatory. If no standards-setting body meets these criteria, a registered security-based swap data repository shall assign all necessary UICs using its own methodology. If a standards-setting body meets these criteria but has not assigned a UIC to a particular person, unit of a person, or product, a registered security-based swap data repository shall assign a UIC to that person, unit of a person, or product using its own methodology.

(oo) United States has the same meaning as in § 240.3a71-3(a)(9) of this chapter.

(pp) U.S. person has the same meaning as in § 240.3a71-3(a)(7) of this chapter.

§ 242.901 Reporting obligations.

(a) Reporting side. The reporting side for a security-based swap shall be as follows:

(1) If both sides of the security-based swap include a security-based swap dealer, the sides shall select the reporting side.

(2) If only one side of the security-based swap includes a security-based swap dealer, that side shall be the reporting side.

(3) If both sides of the security-based swap include a major security-based swap participant, the sides shall select the reporting side.

(4) If one side of the security-based swap includes a major security-based swap participant and the other side includes neither a security-based swap dealer nor a major security-based swap participant, the side including the major security-based swap participant shall be the reporting side.

(5) If neither side of the security-based swap includes a security-based swap dealer or major security-based swap participant:

(i) If both sides include a U.S. person or neither side includes a U.S. person, the sides shall select the reporting side.

(ii) If only one side includes a U.S. person, that side shall be the reporting side.

(b) Recipient of security-based swap information. For each security-based swap for which it is the reporting side, the reporting side shall provide the information required by §§ 242.900 through 242.911 to a registered security-based swap data repository or, if there is no registered security-based swap data repository that would accept the information, to the Commission.

(c) Primary trade information. For any security-based swap that must be publicly disseminated pursuant to §§ 242.902 and 242.908 and for which it is the reporting side, the reporting side shall report the following information in real time. If a security-based swap is required by §§ 242.901 and 242.908 to be reported but not publicly disseminated, the reporting side shall report the following information no later than the time that the reporting side is required to comply with paragraph (d) of this section:

(1) The asset class of the security-based swap and, if the security-based swap is an equity derivative, whether it is a total return swap or is otherwise designed to offer risks and returns proportional to a position in the equity security or securities on which the security-based swap is based;

(2) Information that identifies the security-based swap instrument and the specific asset(s) or issuer(s) of any security on which the security-based swap is based;

(3) The notional amount(s), and the currenc(ies) in which the notional amount(s) is expressed;

(4) The date and time, to the second, of execution, expressed using Coordinated Universal Time (UTC);

(5) The effective date;

(6) The scheduled termination date;

(7) The price;

(8) The terms of any fixed or floating rate payments, and the frequency of any payments;

(9) Whether or not the security-based swap will be cleared by a clearing agency;

(10) If both sides of the security-based swap include a security-based swap dealer, an indication to that effect;

(11) If applicable, an indication that the transaction does not accurately reflect the market; and

(12) If the security-based swap is customized to the extent that the information provided in paragraphs (c)(1) through (11) of this section does not provide all of the material information necessary to identify such customized security-based swap or does not contain the data elements necessary to calculate the price, an indication to that effect.

(d) Secondary trade information. (1) In addition to the information required under paragraph (c) of this section, for each security-based swap for which it is the reporting side, the reporting side shall report:

(i) The participant ID of each counterparty;

(ii) As applicable, the broker ID, desk ID, and trader ID of the direct counterparty on the reporting side;

(iii) The amount(s) and currenc(ies) of any up-front payment(s) and a description of the terms and contingencies of the payment streams of each direct counterparty to the other;

(iv) The title of any master agreement, or any other agreement governing the transaction (including the title of any document governing the satisfaction of margin obligations), incorporated by reference and the date of any such agreement;

(v) The data elements necessary for a person to determine the market value of the transaction;

(vi) If the security-based swap will be cleared, the name of the clearing agency;

(vii) If the security-based swap is not cleared, whether the exception in Section 3C(g) of the Exchange Act (15 U.S.C. 78c-3(g)) was invoked;

(viii) If the security-based swap is not cleared, a description of the settlement terms, including whether the security-based swap is cash-settled or physically settled, and the method for determining the settlement value; and

(ix) The venue where the security-based swap was executed.

(2) Any information required to be reported pursuant to paragraph (d)(1) of this section must be reported promptly, but in no event later than:

(i) Fifteen minutes after the time of execution for a security-based swap that is executed and confirmed electronically;

(ii) Thirty minutes after the time of execution for a security-based swap that is confirmed electronically but not executed electronically; or

(iii) Twenty-four hours after the time of execution for a security-based swap that is not executed or confirmed electronically.

(e) Duty to report any life cycle event of a security-based swap. For any life cycle event, and any adjustment due to a life cycle event, that results in a change to information previously reported pursuant to paragraph (c), (d), or (i) of this section, the reporting side shall promptly provide updated information reflecting such change to the entity to which it reported the original transaction, using the transaction ID, subject to the following exceptions:

(1) If a reporting side ceases to be a counterparty to a security-based swap due to an assignment or novation, the new side shall be the reporting side following such assignment or novation, if the new side includes a U.S. person, a security-based swap dealer, or a major security-based swap participant.

(2) If, following an assignment or novation, the new side does not include a U.S. person, a security-based swap dealer, or a major security-based swap participant, the other side shall be the reporting side following such assignment or novation.

(f) Time stamping incoming information. A registered security-based swap data repository shall time stamp, to the second, its receipt of any information submitted to it pursuant to paragraph (c), (d), (e), or (i) of this section.

(g) Assigning transaction ID. A registered security-based swap data repository shall assign a transaction ID to each security-based swap.

(h) Format of reported information. The reporting side shall electronically transmit the information required under this section in a format required by the registered security-based swap data repository, and in accordance with any applicable policies and procedures of the registered security-based swap data repository.

(i) Reporting of pre-enactment and transitional security-based swaps. With respect to any pre-enactment security-based swap or transitional security-based swap, the reporting side shall report all of the information required by paragraphs (c) and (d) of this section, to the extent such information is available.

§ 242.902 Public dissemination of transaction reports.

(a) General. Unless a security-based swap is a block trade or a cross-border security-based swap that is required to be reported but not publicly disseminated, a registered security-based swap data repository shall publicly disseminate a transaction report of the security-based swap immediately upon receipt of information about the security-based swap, or upon re-opening following a period when the registered security-based swap data repository was closed. The transaction report shall consist of all the information reported pursuant to § 242.901, plus any indicator or indicators contemplated by the registered security-based swap data repository's policies and procedures that are required by § 242.907.

(b) Dissemination of block trades. A registered security-based swap data repository shall publicly disseminate a transaction report of a security-based swap that constitutes a block trade immediately upon receipt of information about the block trade from the reporting side. The transaction report shall consist of all the information reported by the reporting side pursuant to § 242.901(c), except for the notional size, plus the transaction ID and an indicator that the report represents a block trade. The registered security-based swap data repository shall publicly

disseminate a complete transaction report for such block trade (including the transaction ID and the full notional size) as follows:

(1) If the security-based swap was executed on or after 05:00 UTC and before 23:00 UTC of the same day, the transaction report (including the transaction ID and the full notional size) shall be disseminated at 07:00 UTC of the following day.

(2) If the security-based swap was executed on or after 23:00 UTC and up to 05:00 UTC of the following day, the transaction report (including the transaction ID and the full notional size) shall be disseminated at 13:00 UTC of that following day.

(3) Notwithstanding the foregoing, if a registered security-based swap data repository is in normal closing hours or special closing hours at a time when it would be required to disseminate information about a block trade pursuant to this section, the registered security-based swap data repository shall instead disseminate information about the block trade immediately upon re-opening.

(c) Non-disseminated information. A registered security-based swap data repository shall not disseminate:

(1) The identity of either counterparty to a security-based swap;

(2) With respect to a security-based swap that is not cleared at a registered clearing agency and that is reported to the registered security-based swap data repository, any information disclosing the business transactions and market positions of any person; or

(3) Any information regarding a security-based swap reported pursuant to § 242.901(i).

(d) Temporary restriction on other market data sources. No person other than a registered security-based swap data repository shall make available to one or more persons (other than a counterparty) transaction information relating to a security-based swap before the earlier of 15

minutes after the time of execution of the security-based swap; or the time that a registered security-based swap data repository publicly disseminates a report of that security-based swap.

§ 242.903 Coded information.

The reporting side may provide information to a registered security-based swap data repository pursuant to § 242.901 and a registered security-based swap data repository may publicly disseminate information pursuant to § 242.902 using codes in place of certain data elements, provided that the information necessary to interpret such codes is widely available on a non-fee basis.

§ 242.904 Operating hours of security-based swap data repositories.

A registered security-based swap data repository shall have systems in place to continuously receive and disseminate information regarding security-based swaps pursuant to §§ 242.900 through 242.911, subject to the following exceptions:

(a) A registered security-based swap data repository may establish normal closing hours during periods when, in its estimation, the U.S. market and major foreign markets are inactive. A registered security-based swap data repository shall provide reasonable advance notice to participants and to the public of its normal closing hours.

(b) A registered security-based swap data repository may declare, on an ad hoc basis, special closing hours to perform system maintenance that cannot wait until normal closing hours. A registered security-based swap data repository shall, to the extent reasonably possible under the circumstances, avoid scheduling special closing hours during periods when, in its estimation, the U.S. market and major foreign markets are most active; and provide reasonable advance notice of its special closing hours to participants and to the public.

(c) During normal closing hours, and to the extent reasonably practicable during special closing hours, a registered security-based swap data repository shall have the capability to receive and hold in queue information regarding security-based swaps that has been reported pursuant to §§ 242.900 through 242.911.

(d) When a registered security-based swap data repository re-opens following normal closing hours or special closing hours, it shall disseminate transaction reports of security-based swaps held in queue, in accordance with the requirements of § 242.902.

(e) If a registered security-based swap data repository could not receive and hold in queue transaction information that was required to be reported pursuant to §§ 242.900 through 242.911, it must immediately upon re-opening send a message to all participants that it has resumed normal operations. Thereafter, any participant that had an obligation to report information to the registered security-based swap data repository pursuant to §§ 242.900 through 242.911, but could not do so because of the registered security-based swap data repository's inability to receive and hold in queue data, must immediately report the information to the registered security-based swap data repository.

§ 242.905 Correction of errors in security-based swap information.

(a) Duty of counterparties to correct. Any counterparty to a security-based swap that discovers an error in information previously reported pursuant to §§ 242.900 through 242.911 shall correct such error in accordance with the following procedures:

(1) If a side that was not the reporting side for a security-based swap transaction discovers an error in the information reported with respect to such security-based swap, the counterparty shall promptly notify the reporting side of the error; and

(2) If the reporting side for a security-based swap transaction discovers an error in the information reported with respect to a security-based swap, or receives notification from its counterparty of an error, the reporting side shall promptly submit to the entity to which the security-based swap was originally reported an amended report pertaining to the original transaction report. If the reporting side reported the initial transaction to a registered security-based swap data repository, the reporting side shall submit an amended report to the registered security-based swap data repository in a manner consistent with the policies and procedures contemplated by § 242.907(a)(3).

(b) Duty of security-based swap data repository to correct. A registered security-based swap data repository shall:

(1) Upon discovery of the error or receipt of a notice of the error from the reporting side, verify the accuracy of the terms of the security-based swap and, following such verification, promptly correct the erroneous information regarding such security-based swap contained in its system; and

(2) If such erroneous information relates to a security-based swap that the registered security-based swap data repository previously disseminated and falls into any of the categories of information enumerated in § 242.901(c), publicly disseminate a corrected transaction report of the security-based swap promptly following verification of the trade by the counterparties to the security-based swap, with an indication that the report relates to a previously disseminated transaction.

§ 242.906 Other duties of participants and guarantors.

(a) Reporting by non-reporting-side. A registered security-based swap data repository shall identify any security-based swap reported to it for which the registered security-based swap

data repository does not have the participant ID and (if applicable) the broker ID, desk ID, and trader ID of each direct counterparty. Once a day, the registered security-based swap data repository shall send a report to each participant identifying, for each security-based swap to which that participant is a counterparty, the security-based swap(s) for which the registered security-based swap data repository lacks participant ID and (if applicable) broker ID, desk ID, and trader ID. A participant that receives such a report shall provide the missing information to the registered security-based swap data repository within 24 hours.

(b) Duty to provide ultimate parent and affiliate information. Each participant of a registered security-based swap data repository shall provide to the registered security-based swap data repository information sufficient to identify its ultimate parent(s) and any affiliate(s) of the participant that also are participants of the registered security-based swap data repository, using ultimate parent IDs and participant IDs. A participant shall promptly notify the registered security-based swap data repository of any changes to that information.

(c) Policies and procedures of security-based swap dealers and major security-based swap participants. Each participant that is a security-based swap dealer or major security-based swap participant shall establish, maintain, and enforce written policies and procedures that are reasonably designed to ensure that it complies with any obligations to report information to a registered security-based swap data repository in a manner consistent with §§ 242.900 through 242.911 and the registered security-based swap data repository's applicable policies and procedures. Each such participant shall review and update its policies and procedures at least annually.

§ 242.907 Policies and procedures of registered security-based swap data repositories.

(a) General policies and procedures. With respect to the receipt, reporting, and dissemination of data pursuant to §§ 242.900 through 242.911, a registered security-based swap data repository shall establish and maintain written policies and procedures:

(1) That enumerate the specific data elements of a security-based swap or a life cycle event that the reporting side must report, which shall include, at a minimum, the data elements specified in §§ 242.901(c) and (d);

(2) That specify one or more acceptable data formats (each of which must be an open-source structured data format that is widely used by participants), connectivity requirements, and other protocols for submitting information;

(3) For specifying how reporting sides are to report corrections to previously submitted information, making corrections to information in its records that is subsequently discovered to be erroneous, and applying an appropriate indicator to any transaction report required to be disseminated by § 242.905(b)(2) that the report relates to a previously disseminated transaction;

(4) Describing how reporting sides shall report and, consistent with the enhancement of price discovery, how the registered security-based swap data repository shall publicly disseminate, reports of, and adjustments due to, life cycle events; security-based swap transactions that do not involve an opportunity to negotiate any material terms, other than the counterparty; and any other security-based swap transactions that, in the estimation of the registered security-based swap data repository, do not accurately reflect the market;

(5) For assigning:

(i) A transaction ID to each security-based swap that is reported to it; and

(ii) UICs established by or on behalf of an internationally recognized standards-setting body that imposes fees and usage restrictions that are fair and reasonable and not unreasonably

discriminatory (or, if no standards-setting body meets these criteria or a standards-setting body meets these criteria but has not assigned a UIC to a particular person, unit of a person, or product, using its own methodology); and

(6) For periodically obtaining from each participant information that identifies the participant's ultimate parent(s) and any participant(s) with which the participant is affiliated, using ultimate parent IDs and participant IDs.

(b) Policies and procedures regarding block trades. (1) A registered security-based swap data repository shall establish and maintain written policies and procedures for calculating and publicizing block trade thresholds for all security-based swap instruments reported to the registered security-based swap data repository, in accordance with the criteria and formula for determining block size as specified by the Commission.

(2) Exceptions. Notwithstanding the above, a registered security-based swap data repository shall not designate as a block trade any security-based swap:

(i) That is an equity total return swap or is otherwise designed to offer risks and returns proportional to a position in the equity security or securities on which the security-based swap is based; or

(ii) Contemplated by Section 13(m)(1)(C)(iv) of the Exchange Act ((15 U.S.C. § 78m(m)(1)(C)(iv)).

(c) Public availability of policies and procedures. A registered security-based swap data repository shall make the policies and procedures required by §§ 242.900 through 242.911 publicly available on its website.

(d) Updating of policies and procedures. A registered security-based swap data repository shall review, and update as necessary, the policies and procedures required by §§

242.900 through 242.911 at least annually. Such policies and procedures shall indicate the date on which they were last reviewed.

(e) A registered security-based swap data repository shall have the capacity to provide to the Commission, upon request, information or reports related to the timeliness, accuracy, and completeness of data reported to it pursuant to §§ 242.900 through 242.911 and the registered security-based swap data repository's policies and procedures thereunder.

§ 242.908 Cross-border matters.

(a) Application of Regulation SBSR to cross-border transactions.

(1) Regulatory reporting. A reporting side shall report a security-based swap if:

(i) The security-based swap is a transaction conducted within the United States;

(ii) There is a direct or indirect counterparty that is a U.S. person on either side of the transaction;

(iii) There is a direct or indirect counterparty that is a security-based swap dealer or major security-based swap participant on either side of the transaction; or

(iv) The security-based swap is cleared through a clearing agency having its principal place of business in the United States.

(2) Public dissemination. A security-based swap shall be subject to public dissemination if:

(i) The security-based swap is a transaction conducted within the United States;

(ii) There is a direct or indirect counterparty that is a U.S. person on each side of the transaction;

(iii) At least one direct counterparty is a U.S. person (except in the case of a transaction conducted through a foreign branch);

(iv) One side includes a U.S. person and the other side includes a non-U.S. person that is a security-based swap dealer; or

(v) The security-based swap is cleared through a clearing agency having its principal place of business in the United States.

(b) Limitation on counterparty duties. Notwithstanding any other provision of §§ 242.900 through 242.911, a counterparty to a security-based swap shall not incur any obligation under §§ 242.900 through 242.911 unless it is:

(1) A U.S. person;

(2) A security-based swap dealer or major security-based swap participant; or

(3) A counterparty to a transaction conducted within the United States.

(c) Substituted compliance.

(1) General. Compliance with the regulatory reporting and public dissemination requirements in sections 13(m) and 13A of the Act (15 U.S.C. 78m(m) and 78m-1), and the rules and regulations thereunder, may be satisfied by compliance with the rules of a foreign jurisdiction that is the subject of a Commission order described in paragraph (c)(2) of this section, provided that with respect to at least one of the direct counterparties to the security-based swap:

(i) Such counterparty is either a non-U.S. person or a foreign branch; and

(ii) The security-based swap transaction is not solicited, negotiated, or executed by a person within the United States on behalf of such counterparty.

(2) Procedure. (i) The Commission may, conditionally or unconditionally, by order, make a substituted compliance determination regarding regulatory reporting and public dissemination of security-based swaps with respect to a foreign jurisdiction if that jurisdiction's

requirements for the regulatory reporting and public dissemination of security-based swaps are comparable to otherwise applicable requirements.

(ii) Any person that executes security-based swaps that would, in the absence of a substituted compliance order, be required to be reported pursuant to §§ 242.900 through 242.911 may file an application, pursuant to the procedures set forth in § 240.0-13 of this chapter, requesting that the Commission make a substituted compliance determination regarding regulatory reporting and public dissemination with respect to a foreign jurisdiction the rules of which also would require reporting and public dissemination of those security-based swaps. Such application shall include the reasons therefor and such other information as the Commission may request.

(iii) In making such a substituted compliance determination, the Commission shall take into account such factors as the Commission determines are appropriate, such as the scope and objectives of the relevant foreign regulatory requirements, as well as the effectiveness of the supervisory compliance program administered, and the enforcement authority exercised, by the foreign financial regulatory authority to support oversight of its regulatory reporting and public dissemination system for security-based swaps. The Commission shall not make such a substituted compliance determination unless it finds that:

(A) The data elements that are required to be reported pursuant to the rules of the foreign jurisdiction are comparable to those required to be reported pursuant to § 242.901;

(B) The rules of the foreign jurisdiction require the security-based swap to be reported and publicly disseminated in a manner and a timeframe comparable to those required by §§ 242.900 through 242.911;

(C) The Commission has direct electronic access to the security-based swap data held by a trade repository or foreign regulatory authority to which security-based swaps are reported pursuant to the rules of that foreign jurisdiction; and

(D) Any trade repository or foreign regulatory authority in the foreign jurisdiction that receives and maintains required transaction reports of security-based swaps pursuant to the laws of that foreign jurisdiction is subject to requirements regarding data collection and maintenance; systems capacity, resiliency, and security; and recordkeeping that are comparable to the requirements imposed on security-based swap data repositories by §§ 240.13n-5 through 240.13n-7 of this chapter.

(iv) Before issuing a substituted compliance order pursuant to this section, the Commission shall have entered into a supervisory and enforcement memorandum of understanding or other arrangement with the relevant foreign financial regulatory authority or authorities under such foreign financial regulatory system addressing oversight and supervision of the applicable security-based swap market under the substitute compliance determination.

(v) The Commission may, on its own initiative, modify or withdraw such order at any time, after appropriate notice and opportunity for comment.

§ 242.909 Registration of security-based swap data repository as a securities information processor.

A registered security-based swap data repository shall also register with the Commission as a securities information processor on Form SIP (§ 249.1001 of this chapter).

§ 242.910 Implementation of security-based swap reporting and dissemination.

(a) Reporting of pre-enactment security-based swaps. The reporting side shall report to a registered security-based swap data repository any pre-enactment security-based swaps no later

than January 12, 2012 (180 days after the effective date of the Dodd-Frank Act (Pub. L. No. 111-203, H.R. 4173)).

(b) Phase-in of compliance dates. A registered security-based swap data repository and its participants shall be subject to the following phased-in compliance schedule:

(1) Phase 1, six months after the registration date (i.e., the effective reporting date):

(i) Reporting sides shall report to the registered security-based swap data repository any transitional security-based swaps.

(ii) With respect to any security-based swap executed on or after the effective reporting date, reporting sides shall comply with § 242.901.

(iii) Participants and the registered security-based swap data repository shall comply with § 242.905 (except with respect to public dissemination) and § 242.906(a) and (b).

(iv) Participants that are security-based swap dealers or major security-based swap participants shall comply with § 242.906(c).

(2) Phase 2, nine months after the registration date: Wave 1 of public dissemination – The registered security-based swap data repository shall comply with §§ 242.902 and 242.905 (with respect to public dissemination of corrected transaction reports) for 50 security-based swap instruments.

(3) Phase 3, 12 months after the registration date: Wave 2 of public dissemination – The registered security-based swap data repository shall comply with §§ 242.902 and 242.905 (with respect to public dissemination of corrected transaction reports) for an additional 200 security-based swap instruments.

(4) Phase 4, 18 months after the registration date: Wave 3 of public dissemination – All security-based swaps received by the registered security-based swap data repository shall be treated in a manner consistent with §§ 242.902, 242.905, and 242.908.

§ 242.911 Prohibition during phase-in period.

A reporting side shall not report a security-based swap to a registered security-based swap data repository in a phase-in period described in § 242.910 during which the registered security-based swap data repository is not yet required or able to publicly disseminate transaction reports for that security-based swap instrument unless:

(a) The security-based swap is also reported to a registered security-based swap data repository that is disseminating transaction reports for that security-based swap instrument consistent with § 242.902; or

(b) No other registered security-based swap data repository is able to receive, hold, and publicly disseminate transaction reports regarding that security-based swap instrument.

PART 249 – FORMS, SECURITIES EXCHANGE ACT OF 1934

11. The authority citation for Part 249 continues to read, in part, as follows:

Authority: 15 U.S.C. 78a et seq. and 7201 et seq.; 12 U.S.C. 5461 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

12. § 249.1600, § 249.1600a, and § 249.1600b as previously proposed to be added at 76 FR 65824, Oct. 24, 2011, are further revised to read as follows:

Subpart Q - Registration of security-based swap dealers and major security-based swap participants.

Sec.

- 249.1600 Form SBSE, for application for registration as a security-based swap dealer or major security-based swap participant or to amend such an application for registration.
- 249.1600a Form SBSE-A, for application for registration as a security-based swap dealer or major security-based swap participant or to amend such an application for registration by firms registered or registering with the Commodity Futures Trading Commission as a swap dealer or major swap participant that are not also registered or registering with the Commission as a broker or dealer.
- 249.1600b Form SBSE-BD, for application for registration as a security-based swap dealer or major security-based swap participant or to amend such an application for registration by firms registered or registering with the Commission as a broker or dealer.

§ 249.1600 Form SBSE, for application for registration as a security-based swap dealer or major security-based swap participant or to amend such an application for registration.

This form shall be used for application for registration as a security-based swap dealer or major security-based swap participant by firms that are not registered with the Commission as a broker or dealer and that are not registered or registering with the Commodity Futures Trading Commission as a swap dealer or major swap participant, pursuant to Section 15F(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78o-10(b)) and to amend such an application for registration.

§ 249.1600a Form SBSE-A, for application for registration as a security-based swap dealer or major security-based swap participant or to amend such an application for registration by firms registered or registering with the Commodity Futures Trading Commission as a

swap dealer or major swap participant that are not also registered or registering with the Commission as a broker or dealer.

This form shall be used instead of Form SBSE (§249.1600) to apply for registration as a security-based swap dealer or major security-based swap participant by firms that are not registered or registering with the Commission as a broker or dealer but that are registered or registering with the Commodity Futures Trading Commission as a swap dealer or major swap participant, pursuant to Section 15F(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78o-10(b)) and to amend such an application for registration. An entity that is registered or registering with the Commission as a broker or dealer and is also registered or registering with the Commodity Futures Trading Commission as a swap dealer or major swap participant shall apply for registration as a security-based swap dealer or major security-based swap participant on Form SBSE-BD (§249.1600b) and not on this Form SBSE-A.

§ 249.1600b Form SBSE-BD, for application for registration as a security-based swap dealer or major security-based swap participant or to amend such an application for registration by firms registered or registering with the Commission as a broker or dealer.

This form shall be used instead of either Form SBSE (§249.1600) or SBSE-A (§249.1600a) to apply for registration as a security-based swap dealer or major security-based swap participant solely by firms registered or registering with the Commission as a broker or dealer, pursuant to Section 15F(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78o-10(b)) and to amend such an application for registration. An entity that is registered or registering with the Commission as a broker or dealer and is also registered or registering with the Commodity Futures Trading Commission as a swap dealer or major swap participant, the entity shall apply for registration as

a security-based swap dealer or major security-based swap participant on this Form SBSE-BD and not on Form SBSE-A.

Note: The Appendices will not appear in the Code of Federal Regulations.

Appendix A: Application of Subtitle B of Title VII in the Cross-Border Context

The following tables summarize the Commission's proposed approach to applying requirements in Subtitle B of Title VII of the Dodd-Frank Act in the cross-border context.¹⁹⁷² Specifically, as explained more fully in the main body of the release, the tables show how the entity-level requirements in Title VII apply to various dealing entities (identified in row 1 of each of the tables).¹⁹⁷³ The tables also show how various transaction-level requirements in Title VII apply to transactions between such dealing entities and various transaction counterparties (identified in row 8 of each of the tables), depending on the location of the dealer or the dealer's agent (identified in row 7). For the sake of completeness, these tables may include transaction scenarios that are unlikely to occur in practice.

Guide to Reading the Title VII Tables

The following provides a guide to reading the tables below.

- "Yes"—Indicates that the Commission is proposing to apply a particular transaction-level requirement in Title VII to a security-based swap transaction between the dealing entity identified in row 1 and the transaction counterparty identified in row 8, or that the Commission is proposing to apply a particular entity-level requirement in Title VII to the dealing entity identified in row 1, and that substituted compliance would not be permitted.

¹⁹⁷² The tables in this appendix are only a summary of the rules and interpretations proposed in this release and are provided for ease of reference. They do not supersede, and should be read in conjunction with, the proposed rules and interpretations discussed in the release. All defined terms used in the tables have the same meaning as set forth in the release, unless otherwise indicated.

¹⁹⁷³ Tables III and V also apply to non-U.S. dealers and other non-U.S. market participants.

- “No”—Indicates that the Commission is not proposing to apply the particular Title VII requirement.
- “N/A”—Indicates that the Title VII requirement is not applicable because it applies only to registered security-based swap dealers.
- “Substituted Compliance” (or “Sub Comp”)—Indicates that the Commission is proposing to apply the Title VII requirement, but that we also are proposing to establish a policy and procedural framework under which we would consider permitting compliance with comparable regulatory requirements in a foreign jurisdiction to substitute for compliance with requirements of the Exchange Act, and the rules and regulations thereunder, relating to security-based swaps.
- “Location of Dealer/Agent”—Refers to the location of the dealing entity booking the transaction or its agent.
 - Table I describes the application of Title VII to registered U.S. security-based swap dealers and is divided between security-based swap transactions that are conducted:
 - Other than through a U.S. bank’s foreign branch (columns 2 through 6); or
 - Through a U.S. bank’s foreign branch (columns 7 through 11).¹⁹⁷⁴
 - Tables II – V are divided between transactions in which the dealing entity or its agent is:

¹⁹⁷⁴ The transactions identified in columns 7 and 8 of Table I are transactions in which a foreign branch of a U.S. bank is the counterparty to the transaction, but such transactions would not fall within the definition of “transaction conducted through a foreign branch” in proposed Rule 3a71-3(a)(4) under the Exchange Act.

- “Within the U.S.”—Indicates that a person within the United States, acting on behalf of such non-U.S. dealer has solicited, negotiated, executed, or booked the transaction within the United States; or
 - “Outside the U.S.”—Indicates that such non-U.S. dealer has solicited, negotiated, executed, and booked the transaction, without involving any person within the United States acting on its behalf.¹⁹⁷⁵
- “Transaction counterparty”—Refers to the counterparty with which the dealing entity (identified in row 1) enters into a transaction and whose counterparty credit risk the dealing entity ultimately bears. Therefore, the transaction counterparty is the booking location or booking entity of the trading counterparty with which the dealing entity transacts. A transaction counterparty may use personnel or an agent in a different location than the booking location or booking entity to negotiate the transaction with the dealing entity. The five transaction counterparties identified in the tables are as follows:
 - “U.S. Person (other than Foreign Branch)”—Indicates the transaction counterparty of the dealing entity (identified in row 1) is a U.S. person (other than a foreign branch of a U.S. bank);
 - “Non-U.S. Person Within the U.S.”—Indicates the transaction counterparty of the dealing entity (identified in row 1) is a non-U.S. person and the security-based swap transaction is conducted (i.e., solicited, negotiated, executed, or

¹⁹⁷⁵ A transaction in which the non-U.S. dealing entity and its agent are outside the United States may still be a “transaction conducted within the United States,” as defined in proposed Rule 3a71-3(a)(5) under the Exchange Act. For example, the non-U.S. dealing entity may direct its solicitation activity to a U.S. or non-U.S. person counterparty located within the United States.

booked) by or on behalf of the non-U.S. person transaction counterparty within the United States. This includes a non-U.S. person counterparty that uses its own personnel in its U.S. branch or office to conduct the transaction or that uses a U.S. affiliate or third party acting as its agent to conduct the transaction on its behalf;¹⁹⁷⁶

- “Foreign Branch of U.S. Bank”—Indicates the transaction counterparty of the dealing entity (identified in row 1) is a foreign branch of a U.S. bank and the security-based swap transaction is conducted (i.e., solicited, negotiated, executed, and booked) by or on behalf of such foreign branch without involving any person within the United States acting on behalf of the foreign branch;
- “Non-U.S. Person w/ U.S. Guarantee Outside the U.S.”—Indicates the transaction counterparty of the dealing entity (identified in row 1) is a non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person (the “U.S. Guarantor”) such that its counterparty has direct recourse to the U.S. Guarantor for performance of obligations owed by such non-U.S. person (i.e., the guaranteed entity) under the security-based swap, and the security-based swap transaction is conducted (i.e., solicited, negotiated, executed, and booked) by or on behalf of such non-U.S. person

¹⁹⁷⁶

If the non-U.S. person transaction counterparty is a registered security-based swap dealer, see Table II or IV for application of other transaction-level requirements. If the non-U.S. person transaction counterparty is an unregistered dealer or market participant that receives a U.S. guarantee, see Table II or III for application of other transaction-level requirements.

counterparty without involving any person within the United States acting on behalf of such non-U.S. person; and

- “Non-U.S. Person w/o U.S. Guarantee Outside the U.S.”—Indicates the transaction counterparty of the dealing entity (identified in row 1) is a non-U.S. person whose performance under the security-based swap is not guaranteed by a U.S. person, and the security-based swap transaction is conducted (i.e., solicited, negotiated, executed, and booked), by or on behalf of such non-U.S. person counterparty, without involving any person within the United States acting on behalf of such non-U.S. person.¹⁹⁷⁷

¹⁹⁷⁷ If the non-U.S. person counterparty is a registered security-based swap dealer, see Table IV for application of other transaction-level requirements.

Table I—Registered U.S. Security-Based Swap Dealers

Registered U.S. Security-Based Swap Dealer										
<i>Entity-Level Requirements</i>										
Capital	SEC or Prudential Regulator									
Margin	SEC or Prudential Regulator									
Other	SEC									
<i>Transaction-Level Requirements</i>										
Location of Dealer /Agent	Other Than Through a U.S. Bank's Foreign Branch					Through a U.S. Bank's Foreign Branch				
Transaction Counter-Party	U.S. Person (other than Foreign Branch)	Non-U.S. Person Within the U.S.	Foreign Branch of U.S. Bank	Non-U.S. Person w/ U.S. Guarantee Outside the U.S.	Non-U.S. Person w/o U.S. Guarantee Outside the U.S.	U.S. Person (other than Foreign Branch)	Non-U.S. Person Within the U.S.	Foreign Branch of U.S. Bank	Non-U.S. Person w/ U.S. Guarantee Outside the U.S.	Non-U.S. Person w/o U.S. Guarantee Outside the U.S.
<i>Transaction-Level Requirements Applicable to Security-Based Swap Dealers</i>										
External Business Conduct	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No
Segregation (Cleared SBS)	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Segregation (Uncleared SBS)	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<i>Other Transaction-Level Requirements</i>										
Regulatory Reporting	Yes	Yes	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp
Public Reporting	Yes	Yes	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	No
Clearing	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	No
Trade Execution	Yes	Yes	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	No

Table II—Registered Non-U.S. Security-Based Swap Dealer with U.S. Guarantee

Registered Non-U.S. Security-Based Swap Dealer with U.S. Guarantee										
<i>Entity-Level Requirements</i>										
Capital	SEC (Substituted Compliance) or Prudential Regulator									
Margin	SEC (Substituted Compliance) or Prudential Regulator									
Other	SEC (Substituted Compliance)									
<i>Transaction-Level Requirements</i>										
Location of Dealer /Agent	Within the U.S.					Outside the U.S.				
Transaction Counter-Party	U.S. Person (other than Foreign Branch)	Non-U.S. Person Within the U.S.	Foreign Branch of U.S. Bank	Non-U.S. Person w/ U.S. Guarantee Outside the U.S.	Non-U.S. Person w/o U.S. Guarantee Outside the U.S.	U.S. Person (other than Foreign Branch)	Non-U.S. Person Within the U.S.	Foreign Branch of U.S. Bank	Non-U.S. Person w/ U.S. Guarantee Outside the U.S.	Non-U.S. Person w/o U.S. Guarantee Outside the U.S.
<i>Transaction-Level Requirements Applicable to Security-Based Swap Dealers</i>										
External Business Conduct	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	No	No	No
Segregation (Cleared SBS)	Yes	See Release	Yes	See Release	See Release	Yes	See Release	Yes	See Release	See Release
Segregation (Uncleared SBS)	Yes	See Release	Yes	See Release	See Release	Yes	See Release	Yes	See Release	See Release
<i>Other Transaction-Level Requirements</i>										
Regulatory Reporting	Yes	Yes	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp
Public Reporting	Yes	Yes	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	No
Clearing	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	No
Trade Execution	Yes	Yes	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	No

Table III—Unregistered Non-U.S. Dealer (or Market Participant) with U.S. Guarantee

Unregistered Non-U.S. Dealer (or Market Participant) with U.S. Guarantee										
<i>Entity-Level Requirements</i>										
Capital	N/A									
Margin	N/A									
Other	N/A									
<i>Transaction-Level Requirements</i>										
Location of Dealer /Agent	Within the U.S.					Outside the U.S.				
Transaction Counter-Party	U.S. Person (other than Foreign Branch)	Non-U.S. Person Within the U.S.	Foreign Branch of U.S. Bank	Non-U.S. Person w/ U.S. Guarantee Outside the U.S.	Non-U.S. Person w/o U.S. Guarantee Outside the U.S.	U.S. Person (other than Foreign Branch)	Non-U.S. Person Within the U.S.	Foreign Branch of U.S. Bank	Non-U.S. Person w/ U.S. Guarantee Outside the U.S.	Non-U.S. Person w/o U.S. Guarantee Outside the U.S.
<i>Transaction-Level Requirements Applicable to Security-Based Swap Dealers</i>										
External Business Conduct	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Segregation	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
<i>Other Transaction-Level Requirements</i>										
Regulatory Reporting	Yes	Yes	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp
Public Reporting	Yes	Yes	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	No
Clearing	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	No
Trade Execution	Yes	Yes	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	No

Table IV—Registered Non-U.S. Security-Based Swap Dealer Without U.S. Guarantee

Registered Non-U.S. Security-Based Swap Dealer Without U.S. Guarantee										
<i>Entity-Level Requirements</i>										
Capital	SEC (Substituted Compliance) or Prudential Regulator									
Margin	SEC (Substituted Compliance) or Prudential Regulator									
Other	SEC (Substituted Compliance)									
<i>Transaction-Level Requirements</i>										
Location of Dealer /Agent	Within the U.S.					Outside the U.S.				
Transaction Counter-Party	U.S. Person (other than Foreign Branch)	Non-U.S. Person Within the U.S.	Foreign Branch of U.S. Bank	Non-U.S. Person w/ U.S. Guarantee Outside the U.S.	Non-U.S. Person w/o U.S. Guarantee Outside the U.S.	U.S. Person (other than Foreign Branch)	Non-U.S. Person Within the U.S.	Foreign Branch of U.S. Bank	Non-U.S. Person w/ U.S. Guarantee Outside the U.S.	Non-U.S. Person w/o U.S. Guarantee Outside the U.S.
<i>Transaction-Level Requirements Applicable to Security-Based Swap Dealers</i>										
External Business Conduct	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	No	No	No
Segregation (Cleared SBS)	Yes	See Release	Yes	See Release	See Release	Yes	See Release	Yes	See Release	See Release
Segregation (Uncleared SBS)	Yes	See Release	Yes	See Release	See Release	Yes	See Release	Yes	See Release	See Release
<i>Other Transaction-Level Requirements</i>										
Regulatory Reporting	Yes	Yes	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp
Public Reporting	Yes	Yes	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	No
Clearing	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	No
Trade Execution	Yes	Yes	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	No

Table V—Unregistered Non-U.S. Dealer (or Market Participant) Without U.S. Guarantee

Unregistered Non-U.S. Dealer (or Market Participant) Without U.S. Guarantee										
<i>Entity-Level Requirements</i>										
Capital	N/A									
Margin	N/A									
Other	N/A									
<i>Transaction-Level Requirements</i>										
Location of Dealer /Agent	Within the U.S.					Outside the U.S.				
Transaction Counter-Party	U.S. Person (other than Foreign Branch)	Non-U.S. Person Within the U.S.	Foreign Branch of U.S. Bank	Non-U.S. Person w/ U.S. Guarantee Outside the U.S.	Non-U.S. Person w/o U.S. Guarantee Outside the U.S.	U.S. Person (other than Foreign Branch)	Non-U.S. Person Within the U.S.	Foreign Branch of U.S. Bank	Non-U.S. Person w/ U.S. Guarantee Outside the U.S.	Non-U.S. Person w/o U.S. Guarantee Outside the U.S.
<i>Transaction-Level Requirements Applicable to Security-Based Swap Dealers</i>										
External Business Conduct	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Segregation	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
<i>Other Transaction-Level Requirements</i>										
Regulatory Reporting	Yes	Yes	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	No
Public Reporting	Yes	Yes	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	No	No	No
Clearing	Sub Comp	No	Sub Comp	Sub Comp	No	Sub Comp	No	No	No	No
Trade Execution	Yes	No	Sub Comp	Sub Comp	No	Sub Comp	No	No	No	No

Appendix B: Registration of Security-Based Swap Dealers

This table shows the Commission's proposed approach to applying the de minimis threshold in the security-based swap dealer definition in the cross-border context.¹⁹⁷⁸ Specifically, it indicates whether a potential security-based swap dealer listed along the top of the table would be required to count a transaction conducted in a dealing capacity with the various counterparties listed along the left hand column of the table toward its de minimis threshold.

¹⁹⁷⁸ This table in this appendix is only a summary of the rules and interpretations proposed in this release and is provided for ease of reference. It does not supersede, and should be read in conjunction with, the proposed rules and interpretations discussed in the release. All defined terms used in this table have the same meaning as set forth in the release, unless otherwise indicated.

Security-Based Swap Dealer Registration

		Potential Security-Based Swap Dealer		
		U.S. Person	Non-U.S. Person	
			Potential Dealer/Agent Located Within the U.S.	Potential Dealer/Agent Located Outside the U.S.
Counterparty	U.S. Person (other than Foreign Branch)	Count	Count	Count
	Non-U.S. Person Within the U.S.	Count	Count	Count
	Non-U.S. Branch of U.S. Bank	Count	Count	Don't Count
	Non-U.S. Person Outside the U.S.	Count	Count	Don't Count

Appendix C: Re-proposal of Registration Forms

Form SBSE

Form SBSE-A

Form SBSE-BD

Form SBSE

OMB Approval
OMB Number:3235-____
Expires:..... Month __, 2016
Estimated average burden hours per response:
per amendment:

**Application for
Registration of Security-based
Swap Dealers and Major Security-
based Swap Participants**

FORM SBSE INSTRUCTIONS

A. GENERAL INSTRUCTIONS

1. **FORM** - Form SBSE is the Application for Registration as either a Security-based Swap Dealer or Major Security-based Swap Participant (collectively, "SBS Entities"). SBS Entities that are not registered with the Commission as broker-dealers nor registered or registering with the Commodity Futures Trading Commission ("CFTC") as a swap dealer or major swap participant must file this form to register with the Securities and Exchange Commission. An applicant must also file Schedules A, B, D, E, F, and G as appropriate. There is no Schedule C.
2. **ELECTRONIC FILING** - The applicant must file Form SBSE through the EDGAR system, and must utilize the EDGAR Filer Manual (as defined in 17 CFR 232.11) to file and amend Form SBSE electronically to assure the timely acceptance and processing of those filings.¹⁹⁷⁹
3. **UPDATING** - By law, the *applicant* must promptly update Form SBSE information by submitting amendments whenever the information on file becomes inaccurate or incomplete for any reason [17 CFR 240.15Fb2-2]. In addition, the *applicant* must update any incomplete or inaccurate information contained on Form SBSE prior to filing a notice of withdrawal from registration on Form SBSE-W [17 CFR 15Fb3-2(a)].
4. **CONTACT EMPLOYEE** - The individual listed as the contact employee must be authorized to receive all compliance information, communications, and mailings, and be responsible for disseminating it within the *applicant's* organization.
5. **FEDERAL INFORMATION LAW AND REQUIREMENTS** - An agency may not conduct or sponsor, and a *person* is not required to respond to, a collection of information unless it displays a currently valid control number. Sections 15F, 17(a) and 23(a) of the Exchange Act authorize the SEC to collect the information on this form from registrants. See 15 U.S.C. §§78o-10, 78q and 78w. Filing of this form is mandatory; however, the social security number information, which aids in identifying the applicant, is voluntary. The principal purpose of this Form is to permit the Commission to determine whether the *applicant* meets the statutory requirements to engage in the security-based swap business. The Commission maintain[s] a file of the information on this form and will make certain information collected via the form publicly available. Any member of the public may direct to the Commission any comments concerning the accuracy of the burden estimate on this Form, and any suggestions for reducing this burden. This collection of information has been reviewed by the Office of Management and Budget in accordance with the clearance requirements of 44 U.S.C. §3507. The information contained in this form is part of a system of records subject to the Privacy Act of 1974, as amended. The Securities and Exchange Commission has published in the Federal Register the Privacy Act Systems of Records Notice for these records.

B. FILING INSTRUCTIONS

1. FORMAT

- a. Sections 1-14 must be answered and all fields requiring a response must be completed before the filing will be accepted.
 - b. Failure to follow instructions or properly complete the form may result in the application being delayed or rejected.
 - c. *Applicant* must complete the execution screen certifying that Form SBSE and amendments thereto have been executed properly and that the information contained therein is accurate and complete.
 - d. To amend information, the *applicant* must update the appropriate Form SBSE screens.
 - e. A paper copy, with original signatures, of the initial Form SBSE filing and amendments to Disclosure Reporting Pages (DRPs) must be retained by the *applicant* and be made available for inspection upon a regulatory request.
2. **DISCLOSURE REPORTING PAGE (DRP)** - Information concerning the *applicant* or *control affiliate* that relates to the occurrence of an event reportable under Item 12 must be provided on the *applicant's* appropriate DRP.
 3. **DIRECT AND INDIRECT OWNERS** - Amend the Direct Owners and Executive Officers screen and the Indirect Owners screen when changes in ownership occur.

The mailing address for questions and correspondence is:

1979

As discussed in the release proposing this Form, the Commission is currently developing a system to facilitate receipt of applications electronically. More specific instructions on how to file this Form may be included in the final version of the Form.

EXPLANATION OF TERMS
(The following terms are italicized throughout this form.)

1. GENERAL

APPLICANT - The security-based swap dealer or major security-based swap participant applying on or amending this form.

CONTROL - The power, directly or indirectly, to direct the management or policies of a company, whether through ownership of securities, by contract, or otherwise. Any *person* that (i) is a director, general partner or officer exercising executive responsibility (or having similar status or functions); (ii) directly or indirectly has the right to vote 25% or more of a class of a voting security or has the power to sell or direct the sale of 25% or more of a class of voting securities; or (iii) in the case of a partnership, has the right to receive upon dissolution, or has contributed, 25% or more of the capital, is presumed to *control* that company.

STATE - Any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, any other territory of the United States, or any subdivision or regulatory body thereof.

PERSON - An individual, partnership, corporation, trust, or other organization.

SELF-REGULATORY ORGANIZATION (SRO) - Any national securities or futures exchange, registered securities or futures association, registered clearing agency, or derivatives clearing organization.

SUCCESSOR - The term "successor" is defined to be an unregistered entity that assumes or acquires substantially all of the assets and liabilities, and that continues the business of, a predecessor security-based swap dealer or major security-based swap participant that ceases its security-based swap activities. [See Exchange Act Rule 15Fb2-5 (17 CFR 240.15Fb2-5)]

2. FOR THE PURPOSE OF ITEM 12 AND THE CORRESPONDING DISCLOSURE REPORTING PAGES (DRPs)

CHARGED - Being accused of a crime in a formal complaint, information, or indictment (or equivalent formal charge).

CONTROL AFFILIATE - A person named in Items 10 or 11 as a control person or any other individual or organization that directly or indirectly controls, is under common control with, or is controlled by, the *applicant*, including any current employee of the applicant except one performing only clerical, administrative, support or similar functions, or who, regardless of title, performs no executive duties or has no senior policy making authority.

ENJOINED - Includes being subject to a mandatory injunction, prohibitory injunction, preliminary injunction, or a temporary restraining order.

FELONY - For jurisdictions that do not differentiate between a *felony* and a *misdemeanor*, a *felony* is an offense punishable by a sentence of at least one year imprisonment and/or a fine of at least \$1,000. The term also includes a general court martial.

FOUND - Includes adverse final actions, including consent decrees in which the respondent has neither admitted nor denied the findings, but does not include agreements, deficiency letters, examination reports, memoranda of understanding, letters of caution, admonishments, and similar informal resolutions of matters.

INVESTMENT OR INVESTMENT-RELATED - Pertaining to securities, commodities, banking, savings association activities, credit union activities, insurance, or real estate (including, but not limited to, acting as or being associated with a broker-dealer, municipal securities dealer, government

securities broker or dealer, issuer, investment company, investment adviser, futures sponsor, bank, security-based swap dealer, major security-based swap participant, savings association, credit union, insurance company, or insurance agency).

INVOLVED – Doing an act or aiding, abetting, counseling, commanding, inducing, conspiring with or failing reasonably to supervise another in doing an act.

MINOR RULE VIOLATION – A violation of a *self-regulatory organization* rule that has been designated as "minor" pursuant to a plan approved by the SEC or CFTC. A rule violation may be designated as "minor" under a plan if the sanction imposed consists of a fine of \$2,500 or less, and if the sanctioned person does not contest the fine. (Check with the appropriate *self-regulatory organization* to determine if a particular rule violation has been designated as "minor" for these purposes).

MISDEMEANOR – For jurisdictions that do not differentiate between a *felony* and a *misdemeanor*, a *misdemeanor* is an offense punishable by a sentence of less than one year imprisonment and/or a fine of less than \$1,000. The term also includes a special court martial.

ORDER – A written directive issued pursuant to statutory authority and procedures, including orders of denial, suspension, or revocation; does not include special stipulations, undertakings or agreements relating to payments, limitations on activity or other restrictions unless they are included in an *order*.

PROCEEDING – Includes a formal administrative or civil action initiated by a governmental agency, *self-regulatory organization* or a *foreign financial regulatory authority*; a *felony* criminal indictment or information (or equivalent formal charge); or a *misdemeanor* criminal information (or equivalent formal charge). Does not include other civil litigation, investigations, or arrests or similar charges effected in the absence of a formal criminal indictment or information (or equivalent formal charge).

FORM SBSE Page 1 (Execution Page)	Uniform Application for Security-based Swap Dealer and Major Security-based Swap Participant Registration Date: _____ SEC Filer No: _____	Official Use	Official Use Only
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WARNING: Failure to keep this form current and to file accurate supplementary information on a timely basis, or the failure to keep accurate books and records or otherwise to comply with the provisions of law applying to the conduct of business as an SBS Entity, would violate the Federal securities laws and may result in disciplinary, administrative, injunctive or criminal action.

INTENTIONAL MISSTATEMENTS OR OMISSIONS OF FACTS MAY CONSTITUTE CRIMINAL VIOLATIONS.

[] APPLICATION [] AMENDMENT

1. Exact name, principal business address, mailing address, if different, and telephone number of the *applicant*:

A. Full name of the *applicant*:

B. Tax Identification No.: Applicant's CIK # (if any):

C. (1) The *business name* under which the *applicant* primarily conducts business, if different from 1A.
 (2) List on Schedule D, Page 1, Section I any other name by which the *applicant* conducts business and where it is used.

D. If this filing makes a name change on behalf of an *applicant*, enter the new name and specify whether the change is to the [] *applicant's name* (1A) or [] *business name* (1C):
 Please check above.

E. *Applicant's Main Address*: (Do not use a P.O. Box)
 Number and Street 1: Number and Street 2:
 City: State: Country: Zip/Postal Code:

Other business locations must be reported on Schedule E. Security-based swap dealers and major security-based swap participants that do not reside in the United States of America shall designate a U.S. agent for service of process on Schedule F.

F. *Mailing Address*, if different:
 Number and Street 1: Number and Street 2:
 City: State: Country: Zip/Postal Code:

G. Business Telephone Number:

H. Website/URL:

I. Contact Employee:
 Name: Title:
 Telephone Number: Email Address:

J. Chief Compliance Officer designated by the *applicant* in accordance with Exchange Act Section 15F(k):
 Name: Title:
 Telephone Number: Email Address:

EXECUTION:

The applicant consents that service of any civil action brought by or notice of any proceeding before the Securities and Exchange Commission in connection with the applicant's security-based swap activities, unless the applicant is a nonresident SBS Entity, may be given by registered or certified mail or confirmed telegram to the applicant's contact employee at the main address, or mailing address if different, given in Items 1E and 1F. If the applicant is a nonresident SBS Entity, it must complete Schedule F to designate a U.S. agent for service of process.

The undersigned certifies that he/she has executed this form on behalf of, and with the authority of, said applicant. The undersigned and applicant represent that the information and statements contained herein, including schedules attached hereto, and other information filed herewith are current, true and complete. The undersigned and applicant further represent that to the extent any information previously submitted is not amended such information is currently accurate and complete.

Date (MM/DD/YYYY) Name of Applicant
 By: Signature
 Name and Title of Person Signing on Applicant's behalf

This page must always be completed in full.

DO NOT WRITE BELOW THIS LINE - FOR OFFICIAL USE ONLY

FORM SBSE Page 2		Applicant Name: _____ Date: _____ SEC Filer No: _____	Official Use	Official Use Only
2.	A.	The applicant is registering as a security-based swap dealer:	<input type="checkbox"/> Yes	<input type="checkbox"/> No
	B.	The applicant is registering as a major security-based swap participant: Because it: (check all that apply) <input type="checkbox"/> maintains a substantial security-based swap position <input type="checkbox"/> has substantial counterparty exposure <input type="checkbox"/> is highly leveraged relative to its capital position	<input type="checkbox"/> Yes	<input type="checkbox"/> No
3.	A.	Is the <i>applicant</i> a foreign security-based swap dealer that intends to: <ul style="list-style-type: none"> work with the Commission and its primary regulator to have the Commission determine whether the requirements of its primary regulator's regulatory system are comparable to the Commission's <input type="checkbox"/> Yes <input type="checkbox"/> No avail itself of a previously granted substituted compliance determination <input type="checkbox"/> Yes <input type="checkbox"/> No with respect to the requirements of Section 15F of the Exchange Act of 1934 and the rules and regulations thereunder?		
	B.	If "yes" to either of the questions in Item 3.A. above, identify the foreign financial regulatory authority that serves as the <i>applicant's</i> primary regulator and for which the Commission has made, or may make, a substituted compliance determination: _____		
	C.	If the applicant is relying on a previously granted substituted compliance determination, please describe how the <i>applicant</i> satisfies any conditions the Commission may have placed on such substituted compliance determination: _____		
4.		Does the applicant intend to compute capital or margin, or price customer or proprietary positions, using mathematical models? <input type="checkbox"/> Yes <input type="checkbox"/> No		
5.		Is the <i>applicant</i> subject to regulation by a prudential regulator, as defined in Section 1a(39) of the Commodity Exchange Act. <input type="checkbox"/> Yes <input type="checkbox"/> No If "yes," identify the prudential regulator: _____		
6.		Is the <i>applicant</i> a U.S. branch of a non-resident entity? <input type="checkbox"/> Yes <input type="checkbox"/> No If "yes," identify the non-resident entity and its location: _____		
7.		Briefly describe the <i>applicant's</i> business: _____ _____ _____		
8.	A.	Indicate legal status of the <i>applicant</i> : <input type="checkbox"/> Corporation <input type="checkbox"/> Limited Liability Company <input type="checkbox"/> Other (specify) _____ <input type="checkbox"/> Partnership _____		
	B.	Month <i>applicant's</i> fiscal year ends: _____		
	C.	Indicate date and place <i>applicant</i> obtained its legal status (i.e., state or country where incorporated, where partnership agreement was filed, or where <i>applicant</i> entity was formed): State of formation: _____ Country of formation: _____ Date of formation: MM/DD/YYYY _____		
Schedule A and, if applicable, Schedule B must be completed as part of all initial applications.				
9.		Is the <i>applicant</i> at the time of this filing succeeding to the business of a currently registered SBS Entity? <input type="checkbox"/> YES <input type="checkbox"/> NO If "Yes," complete appropriate items on Schedule D, Page 1, Section III.		
10.		Does the <i>applicant</i> hold or maintain any funds or securities to collateralize counterparty transactions?	<input type="checkbox"/> YES	<input type="checkbox"/> NO

11.	<p>Does the <i>applicant</i> have any arrangement:</p> <p>A. With any other <i>person</i>, firm, or organization under which any books or records of the <i>applicant</i> are kept, maintained, or audited by such other <i>person</i>, firm or organization?</p> <p>B. Under which any other person, firm or organization executes, trades, custodies, clears or settles on behalf of the applicant (including any SRO or swap execution facility in which the applicant is a member)?</p> <p><i>If "Yes" to any part of Item 11, complete appropriate items on Schedule D, Page 1, Section IV.</i></p>	<p><input type="checkbox"/> <input type="checkbox"/></p> <p><input type="checkbox"/> <input type="checkbox"/></p>
12.	<p>Does any <i>person</i> directly or indirectly:</p> <p>A. Control the management or policies of the <i>applicant</i> through agreement or otherwise?</p> <p>B. Wholly or partially finance the business of the <i>applicant</i>?</p> <p><i>Do not answer "Yes" to 12B if the person finances the business of the applicant through: 1) a public offering of securities made pursuant to the Securities Act of 1933; or 2) credit extended in the ordinary course of business by suppliers, banks, and others.</i></p> <p><i>If "Yes" to any part of Item 12, complete appropriate items on Schedule D, Page 1, Section IV.</i></p>	<p><input type="checkbox"/> <input type="checkbox"/></p> <p><input type="checkbox"/> <input type="checkbox"/></p>
13.	<p>A. Directly or indirectly, does the <i>applicant control</i>, is the <i>applicant controlled</i> by, or is the <i>applicant</i> under common control with, any partnership, corporation, or other organization that is engaged in the securities or investment advisory business?</p> <p><i>If "Yes" to item 13A, complete appropriate items on Schedule D, Page 2, Section V.</i></p> <p>B. Directly or indirectly, is applicant controlled by any bank holding company or does applicant control, is applicant controlled by, or is applicant under common control with any bank (as defined in 15 U.S.C. 78c(a)(6)) or any foreign bank?</p> <p><i>If "Yes" to item 13B, complete appropriate items on Schedule D, Page 3, Section VI.</i></p>	<p><input type="checkbox"/> <input type="checkbox"/></p> <p><input type="checkbox"/> <input type="checkbox"/></p>

FORM SBSE Page 3	Applicant Name: _____ Date: _____ SEC Filer No: _____	Official Use	Official Use Only																																				
14. Use the appropriate DRP for providing details to "yes" answers to the questions in Item 14. Refer to the Explanation of Terms section of Form SBSE Instructions for explanations of italicized terms.																																							
CRIMINAL DISCLOSURE	A. In the past ten years has the <i>applicant</i> or a <i>control affiliate</i> : (1) Been convicted of or pled guilty or nolo contendere ("no contest") in a domestic, foreign or military court to any <i>felony</i> ? (2) Been charged with a <i>felony</i> B. In the past ten years has the <i>applicant</i> or a <i>control affiliate</i> : (1) Been convicted of or pled guilty or or nolo contendere ("no contest") in a domestic, foreign or military court to a <i>misdemeanor involving</i> : investments or an <i>investment-related</i> business, or any fraud, false statements or omissions, wrongful taking of property, bribery, perjury, forgery, counterfeiting, extortion, or a conspiracy to commit any of these offenses? (2) Been charged with a <i>misdemeanor</i> specified in 14B(1)?	<table border="1"> <tr> <td>YES</td> <td>NO</td> </tr> <tr> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> </tr> </table>	YES	NO	<input type="checkbox"/>																																		
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REGULATORY ACTION DISCLOSURE	C. Has the U.S. Securities and Exchange Commission or the Commodity Futures Trading Commission ever: (1) <i>Found</i> the <i>applicant</i> or a <i>control affiliate</i> to have made a false statement or omission? (2) <i>Found</i> the <i>applicant</i> or a <i>control affiliate</i> to have been involved in a violation of its regulations or statutes? (3) <i>Found</i> the <i>applicant</i> or a <i>control affiliate</i> to have been a cause of an <i>investment-related</i> business having its authorization to do business denied, revoked, or restricted? (4) Entered an <i>order</i> against the <i>applicant</i> or a <i>control affiliate</i> in connection with <i>investment-related</i> activity? (5) Imposed a civil money penalty on the <i>applicant</i> or a <i>control affiliate</i> , or ordered the <i>applicant</i> or a <i>control affiliate</i> to cease and desist from any activity? D. Has any other federal regulatory agency, state regulatory agency, or <i>foreign financial regulatory authority</i> : (1) Ever found the <i>applicant</i> or a <i>control affiliate</i> to have made a false statement or omission or been dishonest, unfair, or unethical? (2) Ever found the <i>applicant</i> or a <i>control affiliate</i> to have been involved in a violation of <i>investment-related</i> regulations or statutes? (3) Ever found the <i>applicant</i> or a <i>control affiliate</i> to have been a cause of an <i>investment-related</i> business having its authorization to do business denied, suspended, revoked or restricted? (4) In the past ten years, entered an order against the <i>applicant</i> or a <i>control affiliate</i> in connection with an <i>investment-related</i> activity? (5) Ever denied, suspended, or revoked the <i>applicant's</i> or a <i>control affiliate's</i> registration or license or otherwise, by order, prevented it from associating with an <i>investment-related</i> business or restricted its activities? E. Has any <i>self-regulatory organization</i> : (1) <i>found</i> the <i>applicant</i> or a <i>control affiliate</i> to have made a false statement or omission? (2) <i>found</i> the <i>applicant</i> or a <i>control affiliate</i> to have been involved in a violation of its rules (other than a violation designated as a " <i>minor rule violation</i> " under a plan approved by the U.S. Securities and exchange Commission)? (3) <i>found</i> the <i>applicant</i> or a <i>control affiliate</i> to have been the cause of an <i>investment-related</i> business having its authorization to do business denied, suspended, revoked or restricted? (4) Disciplined the <i>applicant</i> or a <i>control affiliate</i> by expelling or suspending it from membership, barring or suspending its association with other members, or otherwise restricting its activities? F. Has the <i>applicant's</i> or a <i>control affiliate's</i> authorization to act as an attorney, accountant, or federal contractor ever been revoked or suspended? G. Is the <i>applicant</i> or a <i>control affiliate</i> now the subject of any regulatory proceeding that could result in a "yes" answer to any part of 14C, D, or E?	<table border="1"> <tr> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> </tr> </table>	<input type="checkbox"/>																																				
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FORM SBSE Page 4		Applicant Name: _____ Date: _____ SEC Filer No: _____	Official Use	Official Use Only
CIVIL JUDICIAL DISCLOSURE	H. (1) Has any domestic or foreign civil judicial court:		YES NO	
	(a) In the past ten years, enjoined the <i>applicant</i> or a <i>control affiliate</i> in connection with any investment-related activity?		<input type="checkbox"/> <input type="checkbox"/>	
	(b) Ever <i>found</i> that the <i>applicant</i> or a <i>control affiliate</i> was involved in a violation of <i>investment-related</i> statutes or regulations?		<input type="checkbox"/> <input type="checkbox"/>	
	(c) Ever dismissed, pursuant to a settlement agreement, an <i>investment-related</i> civil judicial action brought against the <i>applicant</i> or <i>control affiliate</i> by a state or foreign financial regulatory authority?		<input type="checkbox"/> <input type="checkbox"/>	
	(2) Is the <i>applicant</i> or a <i>control affiliate</i> now the subject of any civil judicial <i>proceeding</i> that could result in a "yes" answer to any part of 14H(1)?		<input type="checkbox"/> <input type="checkbox"/>	
FINANCIAL DISCLOSURE	I. In the past ten years has the <i>applicant</i> or a <i>control affiliate</i> ever been a securities firm or a futures firm, or a control affiliate of a securities firm or a futures firm that:			
	(1) Has been the subject of a bankruptcy petition?		<input type="checkbox"/> <input type="checkbox"/>	
	(2) Has had a trustee appointed or a direct payment procedure initiated under the Securities Investor Protection Act?		<input type="checkbox"/> <input type="checkbox"/>	
15.	Is the <i>applicant</i> registered with the Commission as an investment adviser or municipal securities advisor or with the CFTC as a commodity trading adviser? If "yes," provide all unique identification numbers assigned to the firm relating to this business on Schedule D, Page 1, Section II.		<input type="checkbox"/> <input type="checkbox"/>	
16.	A. Does <i>applicant</i> effect transactions in commodity futures, commodities or commodity options as a broker for others or as a dealer for its own account? If "yes," provide all unique identification numbers assigned to the firm relating to this business on Schedule D, Page 1, Section II.		<input type="checkbox"/> <input type="checkbox"/>	
	B. Does <i>applicant</i> engage in any other investment-related, non-securities business? If "yes," provide all unique identification numbers assigned to the firm relating to this business and describe each other business briefly on Schedule D, Page 1, Section II.		<input type="checkbox"/> <input type="checkbox"/>	
17.	Is the <i>applicant</i> registered with a foreign financial regulatory authority? If "yes," list all such registrations on Schedule F, Page 1, Section II.		<input type="checkbox"/> <input type="checkbox"/>	

Schedule A of FORM SBSE DIRECT OWNERS AND EXECUTIVE OFFICERS (Answer for Form SBSE Item 8)	Applicant Name: _____ Date: _____ SEC Filer No: _____	Official Use
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1. Use Schedule A to provide information on the direct owners and executive officers of the applicant. Use Schedule B to provide information on indirect owners. Complete each column.
2. List below the names of:
 - (a) Each Chief Executive Officer, Chief Financial Officer, Chief Operations Officer, Chief Legal Officer, Chief Compliance Officer, Director, and individuals with similar status or function;
 - (b) In the case of an applicant that is a corporation, each shareholder that directly owns 5% or more of a class of a voting security of the applicant, unless the applicant is a public reporting company (a company subject to Sections 12 or 15(d) of the Securities Exchange Act of 1934).
Direct owners include any person that owns, beneficially owns, has the right to vote, or has the power to sell or direct the sale of, 5% or more of a class of a voting security of the applicant. For purposes of this Schedule, a person beneficially owns any securities (i) owned by his/her child, stepchild, grandchild, parent, stepparent, grandparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law, sharing the same residence, or (ii) that he/she has the right to acquire, within 60 days, through the exercise of any option, warrant or right to purchase the security.
 - (c) In the case of an applicant that is a partnership, all general partners, and those limited and special partners that have the right to receive upon dissolution, or have contributed, 5% or more of the partnership's capital; and
 - (d) In the case of a trust that directly owns 5% or more of a class of a voting security of the applicant, or that has the right to receive upon dissolution, or has contributed, 5% or more of the applicant's capital, the trust and each trustee.
 - (e) In the case of an applicant that is a Limited Liability Company ("LLC"), (i) those members that have the right to receive upon dissolution, or have contributed, 5% or more of the LLC's capital, and (ii) if managed by elected managers, all elected managers.
3. Are there any indirect owners of the applicant required to be reported on Schedule B? Yes No
4. In the "DE/FE/I" column, enter "DE" if the owner is a domestic entity, or enter "FE" if owner is an entity incorporated or domiciled in a foreign country, or enter "I" if the owner is an individual.
5. Complete the "Title or Status" column by entering board/management titles; status as partner, trustee, sole proprietor, or shareholder; and for shareholders, the class of securities owned (if more than one is issued).
6. Ownership Codes are:

NA - less than 5%	B - 10% but less than 25%	D - 50% but less than 75%
A - 5% but less than 10%	C - 25% but less than 50%	E - 75% or more
7. (a) In the "Control Person" column, enter "Yes" if person has control as defined in the instructions to this form, and enter "No" if the person does not have control. Note that under this definition most executive officers and all 25% owners, general partners, and trustees would be "control persons".
 (b) In the "PR" column, enter "PR" if the owner is a public reporting company under Sections 12 or 15(d) of the Securities Exchange Act of 1934.

FULL LEGAL NAME (Individuals: Last Name, First Name, Middle Name)	DE/FE/I	Title or Status	Date Title or Status Acquired		Ownership Code	Control Person		CRD and/or IARD No. and/or foreign business No. If None, IRS Tax No.	Official Use Only
			MM	YYYY			PR		
For individuals not presently registered through CRD or IARD, describe prior investment-related experience (e.g., for each prior position - employer, job title, and dates of service):									
For individuals not presently registered through CRD or IARD, describe prior investment-related experience (e.g., for each prior position - employer, job title, and dates of service):									
For individuals not presently registered through CRD or IARD, describe prior investment-related experience (e.g., for each prior position - employer, job title, and dates of service)									
For individuals not presently registered through CRD or IARD, describe prior investment-related experience (e.g., for each prior position - employer, job title, and dates of service):									

Schedule D of FORM SBSE Page 1		Applicant Name: _____ Date: _____ SEC Filer No: _____		Official Use Only
Use Schedule D Page 1 to report details for items listed below. This is an <input type="checkbox"/> INITIAL <input type="checkbox"/> AMENDED detail filing for the Form SBSE items checked below:				
Section I Other Business Names				
(Check if applicable) <input type="checkbox"/> Item 1C(2) List each of the "other" names and the state(s) or country(ies) in which they are used.				
1. Name	State/Country	2. Name	State/Country	
3. Name	State/Country	4. Name	State/Country	
Section II Other Business				
(Check if applicable) <input type="checkbox"/> Item 15 <input type="checkbox"/> Item 16A <input type="checkbox"/> Item 16B Applicant must complete a separate Schedule D Page 1 for each affirmative response in this section.				
Unique Identification Number(s):			Assigning Regulator(s)/Entity(s):	
Briefly describe any other investment-related, non-securities business. Use reverse side of this sheet for additional comments if necessary.				
Section III Successions				
(Check if applicable) <input type="checkbox"/> Item 9				
Date of Succession MM DD YYYY / /		Name of Predecessor		
IRS Employer Number (if any)			SEC File Number (if any)	
Briefly describe details of the succession including any assets or liabilities not assumed by the successor. Use reverse side of this sheet for additional comments if necessary.				
Section IV Record Maintenance Arrangements / Business Arrangements / Control Persons / Financings				
(Check one) <input type="checkbox"/> Item 11A <input type="checkbox"/> Item 11B <input type="checkbox"/> Item 12A <input type="checkbox"/> Item 12B Applicant must complete a separate Schedule D Page 1 for each affirmative response in this section including any multiple responses to any item. Complete the "Effective Date" box with the Month, Day and Year that the arrangement or agreement became effective. When reporting a change or termination of an arrangement, enter the effective date of the change.				
Firm or Organization Name			SEC File, CRD, NFA, IARD, foreign business No., and/or CIK Number (if any)	
Business Address (Street, City, State/Country, Zip + 4 Postal Code)			Effective Date MM DD YYYY / /	Termination Date MM DD YYYY / /
Individual Name			CRD, NFA, and/or IARD Number (if any)	
Business Address (if applicable) (Street, City, State/Country, Zip + 4 Postal Code)			Effective Date MM DD YYYY / /	Termination Date MM DD YYYY / /
Briefly describe the nature of the arrangement with respect to books or records (ITEM 11A); the nature of the execution, trading, custody, clearing or settlement arrangement (ITEM 11B); the nature of the control or agreement (ITEM 12A); or the method and amount of financing (ITEM 12B). Use reverse side of this sheet for additional comments if necessary.				
For ITEM 12A ONLY - If the control person is an individual not presently registered through CRD or IARD, describe prior investment-related experience (e.g., for each prior position - employer, job title, and dates of service).				

Schedule D of FORM SBSE Page 2	Applicant Name: _____ Date: _____ SEC Filer No: _____	Official Use	Official Use Only
Use this Schedule D Page 2 to report details for Item 13A. Supply details for <i>all</i> partnerships, corporations, organizations, institutions and individuals necessary to answer each item completely. Use additional copies of Schedule D Page 2 if necessary.			
Use the "Effective Date" box to enter the Month, Day, and Year that the affiliation was effective or the date of the most recent change in the affiliation.			
This is an <input type="checkbox"/> INITIAL <input type="checkbox"/> AMENDED detail filing for Form SBSE Item 13A			
<input type="checkbox"/> 13A. Directly or indirectly, does <i>applicant control</i> , is <i>applicant controlled</i> by, or is <i>applicant</i> under common control with, any partnership, corporation, or other organization that is engaged in the securities or investment advisory business?			
Section V <i>Complete this section for control issues relating to ITEM 13A only.</i>			
The details supplied relate to:			
1.	Partnership, Corporation, or Organization Name	CRD Number (if any)	
<i>(check only one)</i> This Partnership, Corporation, or Organization <input type="checkbox"/> controls applicant <input type="checkbox"/> is controlled by applicant <input type="checkbox"/> is under common control with applicant			
Business Address (Street, City, State/Country, Zip + 4/Postal Code)		Effective Date MM DD YYYY / /	Termination Date MM DD YYYY / /
Is Partnership, Corporation or Organization a foreign entity <input type="checkbox"/> Yes <input type="checkbox"/> No	If Yes, provide country of domicile or incorporation	Check "Yes" or "No" for activities of this partnership Corporation, or organization: Securities <input type="checkbox"/> Yes <input type="checkbox"/> No Activities:	Investment Advisory <input type="checkbox"/> Yes <input type="checkbox"/> No Activities:
Briefly describe the control relationship. Use reverse side of this sheet for additional comments if necessary.			
2.	Partnership, Corporation, or Organization Name	CRD Number (if any)	
<i>(check only one)</i> This Partnership, Corporation, or Organization <input type="checkbox"/> controls applicant <input type="checkbox"/> is controlled by applicant <input type="checkbox"/> is under common control with applicant			
Business Address (Street, City, State/Country, Zip + 4/Postal Code)		Effective Date MM DD YYYY / /	Termination Date MM DD YYYY / /
Is Partnership, Corporation or Organization a foreign entity <input type="checkbox"/> Yes <input type="checkbox"/> No	If Yes, provide country of domicile or incorporation	Check "Yes" or "No" for activities of this partnership Corporation, or organization: Securities <input type="checkbox"/> Yes <input type="checkbox"/> No Activities:	Investment Advisory <input type="checkbox"/> Yes <input type="checkbox"/> No Activities:
Briefly describe the control relationship. Use reverse side of this sheet for additional comments if necessary.			
3.	Partnership, Corporation, or Organization Name	CRD Number (if any)	
<i>(check only one)</i> This Partnership, Corporation, or Organization <input type="checkbox"/> controls applicant <input type="checkbox"/> is controlled by applicant <input type="checkbox"/> is under common control with applicant			
Business Address (Street, City, State/Country, Zip + 4/Postal Code)		Effective Date MM DD YYYY / /	Termination Date MM DD YYYY / /
Is Partnership, Corporation or Organization a foreign entity <input type="checkbox"/> Yes <input type="checkbox"/> No	If Yes, provide country of domicile or incorporation	Check "Yes" or "No" for activities of this partnership Corporation, or organization: Securities <input type="checkbox"/> Yes <input type="checkbox"/> No Activities:	Investment Advisory <input type="checkbox"/> Yes <input type="checkbox"/> No Activities:
Briefly describe the control relationship. Use reverse side of this sheet for additional comments if necessary.			
If applicant has more than 3 organizations to report, complete additional Schedule D Page 2s.			

Schedule D of FORM SBSE Page 3		Applicant Name: _____ Date: _____ SEC Filer No: _____		Official Use	Official Use Only
Use Schedule D Page 3 to report details for Item 13B. Report only new information or changes/updates to previously submitted details. Do not report previously submitted information. Supply details for all partnerships, corporations, organizations, institutions and individuals necessary to answer each item completely. Use additional copies of Schedule D Page 3 if necessary.					
Use the "Effective Date" box to enter the Month, Day, and Year that the affiliation was effective or the date of the most recent change in the affiliation.					
This is an <input type="checkbox"/> INITIAL <input type="checkbox"/> AMENDED detail filing for Form SBSE Item 13B					
<input type="checkbox"/> 13B. Directly or indirectly, is applicant controlled by any bank holding company or does applicant control, is applicant controlled by, or is applicant under common control with any bank (as defined in 15 U.S.C. 78c(a)(6)) or any foreign bank?					
Section VI		Complete this section for control issues relating to ITEM 12B only.			
Provide the details for each organization or institution that controls the applicant, including each organization or institution in the applicant's chain of ownership. The details supplied relate to:					
1.	Financial Institution Name		CRD Number (if applicable)		
Institution Type (e.g., bank holding company, national bank, state member bank of the Federal Reserve System, state non-member bank, savings bank or association, credit union, foreign bank.)		Effective Date		MM DD YYYY / /	
		Termination Date		MM DD YYYY / /	
Business Address (Street, City, State/Country, Zip + 4/Postal Code)			If foreign, country of domicile or incorporation		
Briefly describe the control relationship. Use reverse side of this sheet for additional comments, if necessary.					
2.	Financial Institution Name		CRD Number (if applicable)		
Institution Type (e.g., bank holding company, national bank, state member bank of the Federal Reserve System, state non-member bank, savings bank or association, credit union, foreign bank.)		Effective Date		MM DD YYYY / /	
		Termination Date		MM DD YYYY / /	
Business Address (Street, City, State/Country, Zip + 4/Postal Code)			If foreign, country of domicile or incorporation		
Briefly describe the control relationship. Use reverse side of this sheet for additional comments, if necessary.					
3.	Financial Institution Name		CRD Number (if applicable)		
Institution Type (e.g., bank holding company, national bank, state member bank of the Federal Reserve System, state non-member bank, savings bank or association, credit union, foreign bank.)		Effective Date		MM DD YYYY / /	
		Termination Date		MM DD YYYY / /	
Business Address (Street, City, State/Country, Zip + 4/Postal Code)			If foreign, country of domicile or incorporation		
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4.	Financial Institution Name		CRD Number (if applicable)		
Institution Type (e.g., bank holding company, national bank, state member bank of the Federal Reserve System, state non-member bank, savings bank or association, credit union, foreign bank.)		Effective Date		MM DD YYYY / /	
		Termination Date		MM DD YYYY / /	
Business Address (Street, City, State/Country, Zip + 4/Postal Code)			If foreign, country of domicile or incorporation		
Briefly describe the control relationship. Use reverse side of this sheet for additional comments, if necessary.					
If applicant has more than 4 organizations/institutions to report, complete additional Schedule D page 3s.					

Schedule E of FORM SBSE Page 1	Applicant Name: _____ Date: _____ SEC Filer No: _____	Official Use																		
INSTRUCTIONS General: Use this schedule to identify other business locations of the <i>applicant</i> . Repeat Items 1-6 for each other business location. Each item must be completed unless otherwise noted. Use additional copies of this schedule as necessary.																				
Specific: Item 1. Specify only one box. Check "Add" when the applicant is filing the initial notice to inform the Commission that it has opened another business location, "Delete" when the applicant closes another business location, and "Amendment" to indicate any other change to previously filed information. Item 2. Complete this item for all entries. Provide the date that the other business location was opened (ADD), closed (DELETE), or the effective date of the change (AMENDMENT). Item 3. Complete this item for all entries. A physical location must be included; post office box designations alone are not sufficient. Item 4. Complete this item only when the <i>applicant</i> changes the address of an existing other business location. Item 5. If the other business location occupies or shares space on premises within a bank, or other financial institution, enter the name of the institution in the space provided. Item 6. Complete this item for all entries. Enter the name of the associated person who is responsible for the operations of, and is physically at, this location.																				
<table style="width:100%; border:none;"> <tr> <td style="width:33%;">1. Check only one box: <input type="checkbox"/> Add <input type="checkbox"/> Delete <input type="checkbox"/> Amendment</td> <td style="width:33%;"></td> <td style="width:33%;"></td> </tr> <tr> <td>2. Effective Date: _____</td> <td>4. Street: _____</td> <td></td> </tr> <tr> <td>3. Street: _____</td> <td>P.O. Box (if applicable), Suite, Floor: _____</td> <td></td> </tr> <tr> <td>P.O. Box (if applicable), Suite, Floor: _____</td> <td>City, State/Country, Zip Code +4/Postal Code: _____</td> <td></td> </tr> <tr> <td>City, State/Country, Zip Code +4/Postal Code: _____</td> <td>5. Institution Name: _____</td> <td></td> </tr> <tr> <td></td> <td>6. Responsible Associated Person: _____</td> <td></td> </tr> </table>			1. Check only one box: <input type="checkbox"/> Add <input type="checkbox"/> Delete <input type="checkbox"/> Amendment			2. Effective Date: _____	4. Street: _____		3. Street: _____	P.O. Box (if applicable), Suite, Floor: _____		P.O. Box (if applicable), Suite, Floor: _____	City, State/Country, Zip Code +4/Postal Code: _____		City, State/Country, Zip Code +4/Postal Code: _____	5. Institution Name: _____			6. Responsible Associated Person: _____	
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	6. Responsible Associated Person: _____																			

Schedule F of FORM SBSE Page 1	Applicant Name: _____	Official Use
	Date: _____ SEC Filer No: _____	

Section I **Service of Process and Certification Regarding Access to Records**

Each nonresident security-based swap dealer and non-resident security-based swap participant shall use Section I to identify its United States agent for service of process and the certify that it can

- (1) provide the Commission with prompt access to its books and records, and
- (2) submit to onsite inspection and examination by the Commission.

1. Service of Process:

A. Name of United States person *applicant* designates and appoints as agent for service of process

B. Address of United States person *applicant* designates and appoints as agent for service of process

The above identified agent for service of process may be served any process, pleadings, subpoenas, or other papers in

- (a) any investigation or administrative proceeding conducted by the Commission that relates to the *applicant* or about which the *applicant* may have information; and
- (b) any civil or criminal suit or action or proceeding brought against the *applicant* or to which the *applicant* has been joined as defendant or respondent, in any appropriate court in any place subject to the jurisdiction of any state or of the United States or of any of its territories or possessions or of the District of Columbia, to enforce the Exchange Act. The *applicant* has stipulated and agreed that any such suit, action or administrative proceeding may be commenced by the service of process upon, and that service of an administrative subpoena shall be effected by service upon the above-named Agent for Service of Process, and that service as aforesaid shall be taken and held in all courts and administrative tribunals to be valid and binding as if personal service thereof had been made.

2. Certification regarding access to records:

Applicant can as a matter of law;

- (1) provide the Commission with prompt access to its books and records, and
- (2) submit to onsite inspection and examination by the Commission.

Applicant must attach to this Form SBSE a copy of the opinion of counsel it is required to obtain in accordance with paragraph (c)(2) or (c)(3) of Exchange Act Rule 15Fb2-4, as appropriate [paragraphs (c)(2) or (c)(3) of 17 CFR 240.15Fb2-4.

Signature: _____

Name and Title: _____

Date: _____

Section II **Registration with Foreign Financial Regulatory Authorities**

Complete this Section for Registration with Foreign Financial Regulatory Authorities relating to ITEM 17. Each security-based swap dealer and major security-based swap participant that is registered with a foreign financial regulatory authority must list on Section II of this Schedule F, for each foreign financial regulatory authority with which it is registered, the following information:

1.	_____	Foreign Registration No. (if _____ any)	English Name of Country: _____
	English Name of Foreign Financial Regulatory Authority		
2.	_____	Foreign Registration No. (if _____ any)	English Name of Country: _____
	English Name of Foreign Financial Regulatory Authority		
3.	_____	Foreign Registration No. (if _____ any)	English Name of Country: _____
	English Name of Foreign Financial Regulatory Authority		

If applicant has more than 3 Foreign Financial Regulatory Authorities to report, complete additional Schedule F Page 1s.

Schedule G of FORM SBSE CERTIFICATION ON STATUTORY DISQUALIFICATION	Applicant Name: _____	Official Use
	Date: _____ SEC Filer No: _____	

Use Schedule G to certify that none of the *applicant's* associated persons is subject to statutory disqualification (as that term is defined in Section 3(a)(39) of the Exchange Act [15 U.S.C. 78c(a)(39)]).

Instructions: This certification must be signed by the *applicant's* Chief Compliance Officer designated pursuant to Exchange Act Section 15F(k) or by his or her designee.
 For purposes of this Form, the term *associated person* shall have the meaning as specified in Section 3(a)(70) of the Exchange Act [15 U.S.C. 78c(a)(70)].

This is a: CERTIFICATION RE-CERTIFICATION

The *applicant* certifies that it has

- (a) performed background checks on all of its *associated persons* who effect or are involved in effecting, or who will effect or be involved in effecting, security-based swaps on its behalf, and
- (b) determined that no *associated person* who effects or is involved in effecting, or who will effect or be involved in effecting, security-based swaps on its behalf is subject to statutory disqualification, as defined in Section 3(a)(39) of the Securities Exchange Act of 1934 [15 U.S.C. 78c(a)(39)].

Applicant Name:	Date:
Signature of Chief Compliance Officer or Designee:	
Name of Chief Compliance Officer or Designee:	If Designee, Title of Designee:

CRIMINAL DISCLOSURE REPORTING PAGE (SBSE)

GENERAL INSTRUCTIONS

This Disclosure Reporting Page [DRP (SBSE)] is an INITIAL OR AMENDED response to report details for affirmative responses to **Items 14A and 14B** of Form SBSE;

Check item(s) being responded to:

14A. In the past ten years has the applicant or a control affiliate:

(1) Been convicted of or pled guilty or nolo contendere ("no contest") in a domestic, foreign or military court to any felony?

(2) Been charged with a felony?

14B. In the past ten years has the applicant or a control affiliate:

(1) Been convicted of or pled guilty or nolo contendere ("no contest") in a domestic, foreign or military court to a misdemeanor involving: investments or an investment-related business, or any fraud, false statements or omissions, wrongful taking of property, bribery, perjury, forgery, counterfeiting, extortion, or a conspiracy to commit any of these offenses?

(2) Been charged with a misdemeanor specified in 14B(1)?

Use a separate DRP for each event or *proceeding*. An event or *proceeding* may be reported for more than one person or entity using one DRP. File with a completed Execution Page.

Multiple counts of the same charge arising out of the same event(s) should be reported on the same DRP. Unrelated criminal actions, including separate cases arising out of the same event, must be reported on separate DRPs. Use this DRP to report all charges arising out of the same event. One event may result in more than one affirmative answer to the above items.

If a *control affiliate* is an individual or organization registered through the CRD, such *control affiliate* need only complete Part I of the *applicant's* appropriate DRP (SBSE). Details of the event must be submitted on the *control affiliate's* appropriate DRP (BD) or DRP (U-4). If a *control affiliate* is an individual or organization not registered through the CRD, provide complete answers to all the items on the *applicant's* appropriate DRP (SBSE). The completion of this DRP does not relieve the *control affiliate* of its obligation to update its CRD records.

Applicants must attach a copy of each applicable court document (*i.e.*, criminal complaint, information or indictment as well as judgment of conviction or sentencing documents) if not previously submitted through CRD (as they could be in the case of a *control affiliate* registered through CRD). Documents will not be accepted as disclosure in lieu of answering the questions on this DRP.

PART I

A. The *person(s)* or entity(ies) for whom this DRP (SBSE) is being filed is (are):

The *Applicant*

Applicant and one or more *control affiliate(s)*

One or more *control affiliate(s)*

If this DRP is being filed for a *control affiliate*, give the full name of the *control affiliate* below (for individuals, Last name, First name, Middle name).

If the *control affiliate* is registered with the CRD, provide the CRD number. If not, indicate "non-registered" by checking the appropriate checkbox.

Name of *Applicant*

SBSE DRP – CONTROL AFFILIATE

CRD NUMBER

This *Control Affiliate* is Firm Individual

Registered: Yes No

NAME (For individuals, Last, First, Middle)

This DRP should be removed from the SBS Entity's record because the control affiliate(s) are no longer associated with the SBS Entity.

B. If the *control affiliate* is registered through the CRD, has the *control affiliate* submitted a DRP (with Form U-4) or DRP (BD) to the CRD System for the event?

If the answer is "Yes," no other information on this DRP must be provided: If "No," complete Part II.

Yes No

Note: The completion of this Form does not relieve the *control affiliate* of its obligation to update its CRD records.

CRIMINAL DISCLOSURE REPORTING PAGE (SBSE)
(continuation)

PART II

1. If charge(s) were brought against an organization over which the applicant or control affiliate exercise(d) control: Enter organization name, whether or not the organization was an investment-related business and the applicant's or control affiliate's position, title or relationship.

2. Formal Charge(s) were brought in: (include name of Federal, Military, State or Foreign Court, Location of Court – City or County and State or Country, Docket/Case number).

3. Event Disclosure Detail (Use this for both organizational and individual charges.)

A. Date First Charged (MM/DD/YYYY): [] Exact [] Explanation

If not exact, provide explanation:

B. Event Disclosure Detail (include Charge(s)/Charge Description(s), and for each charge provide: 1. number of counts, 2. felony or misdemeanor, 3. plea for each charge, and 4. product type if charge is investment-related):

C. Current status of the Event? [] Pending [] On Appeal [] Final

D. Event Status Date (complete unless status is Pending) (MM/DD/YYYY): [] Exact [] Explanation

If not exact, provide explanation:

4. Disposition Disclosure Detail: Include for each charge, A. Disposition Type [e.g., convicted, acquitted, dismissed, pretrial.], B. Date, C. Sentence/Penalty, D. Duration [if sentence-suspension, probation, etc.], E. Start Date of Penalty, F. Penalty/Fine Amount and G. Date Paid.

5. Provide a brief summary of the circumstances leading to the charge(s) as well as the disposition. Include the relevant dates when the conduct which was the subject of the char(s) occurred. (The information must fit within the space provided.)

REGULATORY ACTION DISCLOSURE REPORTING PAGE (SBSE)

GENERAL INSTRUCTIONS

This Disclosure Reporting Page [DRP (SBSE)] is an INITIAL OR AMENDED response to report details for affirmative responses to *Items 14C, 14D, 14E, 14F, or 14G* of Form SBSE;

Check item(s) being responded to:

14C. Has the U.S. Securities and Exchange Commission or the Commodity Futures Trading Commission ever:

- (1) Found the applicant or a control affiliate to have made a false statement or omission?
- (2) Found the applicant or a control affiliate to have been involved in a violation of its regulations or statutes?
- (3) the applicant or a control affiliate to have been a cause of an investment-related business having its authorization to do business denied, revoked, or restricted?
- (4) Entered an order against the applicant or a control affiliate in connection with investment-related activity?
- (5) Imposed a civil money penalty on the applicant or a control affiliate, or ordered the applicant or a control affiliate to cease and desist from any activity?

14D. Has any other federal regulatory agency, state regulatory agency, or foreign financial regulatory authority:

- (1) Ever found the applicant or a control affiliate to have made a false statement or omission or been dishonest, unfair, or unethical?
- (2) Ever found the applicant or a control affiliate to have been involved in a violation of investment-related regulations or statutes?
- (3) Ever found the applicant or a control affiliate to have been a cause of an investment-related business having its authorization to do business denied, suspended, revoked or restricted?
- (4) In the past ten years, entered an order against the applicant or a control affiliate in connection with an investment-related activity?
- (5) Ever denied, suspended, or revoked the applicant's or a control affiliate's registration or license or otherwise, by order, prevented it from associating with an investment-related business or restricted its activities?

14E. Has any self-regulatory organization or commodities exchange ever:

- (1) found the applicant or a control affiliate to have made a false statement or omission?
- (2) found the applicant or a control affiliate to have been involved in a violation of its rules (other than a violation designated as a "minor rule violation" under a plan approved by the U.S. Securities and exchange Commission)?
- (3) found the applicant or a control affiliate to have been the cause of an investment-related business having its authorization to do business denied, suspended, revoked or restricted?
- (4) Disciplined the applicant or a control affiliate by expelling or suspending it from membership, barring or suspending its association with other members, or otherwise restricting its activities?

14F. Has the applicant's or a control affiliate's authorization to act as an attorney, accountant, or federal contractor ever been revoked or suspended?

14G. Is the applicant or a control affiliate now the subject of any regulatory proceeding that could result in a "yes" answer to any part of 14C, D, or E?

Use a separate DRP for each event or *proceeding*. An event or *proceeding* may be reported for more than one person or entity using one DRP. File with a completed Execution Page.

One event may result in more than one affirmative answer to Items 14C, 14D, 14E, 14F or 14G. Use only one DRP to report details related to the same event. If an event gives rise to actions by more than one regulator, provide details for each action on a separate DRP.

It is not a requirement that documents be provided for each event or proceeding. Should they be provided, they will not be accepted as disclosure in lieu of answering the questions on this DRP.

If a *control affiliate* is an individual or organization registered through the CRD, such *control affiliate* need only complete Part I of the *applicant's* appropriate DRP (SBSE). Details of the event must be submitted on the *control affiliate's* appropriate DRP (BD) or DRP (U-4). If a *control affiliate* is an individual or organization not registered through the CRD, provide complete answers to all the items on the *applicant's* appropriate DRP (SBSE). The completion of this DRP does not relieve the *control affiliate* of its obligation to update its CRD records.

PART I

A. The *person(s)* or entity(ies) for whom this DRP is being filed is (are):

- The *Applicant*
- Applicant and one or more *control affiliate(s)*
- One or more *control affiliate(s)*

If this DRP is being filed for a *control affiliate*, give the full name of the *control affiliate* below (for individuals, Last name, First name, Middle name).

If the *control affiliate* is registered with the CRD, provide the CRD number. If not, indicate "non-registered" by checking the appropriate checkbox.

Name of *Applicant*

SBSE DRP – CONTROL AFFILIATE

CRD NUMBER

This *Control Affiliate* is Firm Individual

Registered: Yes No

NAME (For individuals, Last, First, Middle)

This DRP should be removed from the SBS Entity's record because the control affiliate(s) are no longer associated with the SBS Entity.

B. If the *control affiliate* is registered through the CRD, has the *control affiliate* submitted a DRP (with Form U-4) or DRP (BD) to the CRD System for the event?

If the answer is "Yes," no other information on this DRP must be provided: If "No," complete Part II.

Yes No

Note: The completion of this Form does not relieve the *control affiliate* of its obligation to update its CRD records.

REGULATORY ACTION DISCLOSURE REPORTING PAGE (SBSE)

(continuation)

PART II

1. Regulatory Action initiated by:
 SEC Other Federal State SRO Foreign
 (Full name of regulator, foreign financial regulatory authority, federal, state or SRO)

2. Principal Sanction: (check appropriate item)

<input type="checkbox"/> Civil and Administrative Penalty(ies)/Fine(s)	<input type="checkbox"/> Disgorgement	<input type="checkbox"/> Restitution
<input type="checkbox"/> Bar	<input type="checkbox"/> Expulsion	<input type="checkbox"/> Revocation
<input type="checkbox"/> Cease and Desist	<input type="checkbox"/> Injunction	<input type="checkbox"/> Suspension
<input type="checkbox"/> Censure	<input type="checkbox"/> Prohibition	<input type="checkbox"/> Undertaking
<input type="checkbox"/> Denial	<input type="checkbox"/> Reprimand	<input type="checkbox"/> Other _____

Other Sanctions:

3. Date Initiated (MM/DD/YYYY) Exact Explanation

If not exact, provide explanation: _____

4. Docket/Case Number: _____

Control Affiliate Employing Firm when activity occurred which led to the regulatory action (if applicable):

6. Principal Product Type: (check appropriate item)

<input type="checkbox"/> Annuity(ies) - Fixed	<input type="checkbox"/> Debt - Municipal	<input type="checkbox"/> Investment Contract(s)
<input type="checkbox"/> Annuity(ies) - Variable	<input type="checkbox"/> Derivative(s)	<input type="checkbox"/> Money Market Fund(s)
<input type="checkbox"/> Banking Products (other than CD(s))	<input type="checkbox"/> Direct Investment(s) - DPP & LP Interest(s)	<input type="checkbox"/> Mutual Fund(s)
<input type="checkbox"/> CD(s)	<input type="checkbox"/> Equity - OTC	<input type="checkbox"/> No Product
<input type="checkbox"/> Commodity Option(s)	<input type="checkbox"/> Equity Listed (Common & Preferred Stock)	<input type="checkbox"/> Options
<input type="checkbox"/> Debt - Asset Backed	<input type="checkbox"/> Futures - Commodity	<input type="checkbox"/> Penny Stock(s)
<input type="checkbox"/> Debt - Corporate	<input type="checkbox"/> Futures - Financial	<input type="checkbox"/> Unit Investment Trust(s)
<input type="checkbox"/> Debt - Government	<input type="checkbox"/> Index Option(s)	<input type="checkbox"/> Other _____
	<input type="checkbox"/> Insurance	

Other Product Type:

7. Describe the allegations related to this regulatory action. (The information must fit within the space provided.):

8. Current Status? Pending On Appeal Final

9. If on appeal, regulatory action appealed to: (SEC, SRO, Federal or State Court) and Date Appeal Filed: _____

CIVIL JUDICIAL ACTION DISCLOSURE REPORTING PAGE (SBSE)

GENERAL INSTRUCTIONS

This Disclosure Reporting Page [DRP (BD)] is an INITIAL OR AMENDED response to report details for affirmative responses to **Items 14H** of Form BD;

Check item(s) being responded to:

14H(1) Has any domestic or foreign civil judicial court:

- (a) in the past ten years, enjoined the applicant or a control affiliate in connection with any investment-related activity?
- (b) ever found that the applicant or a control affiliate was involved in a violation of investment-related statutes or regulations?
- (c) ever dismissed, pursuant to a settlement agreement, an investment-related civil judicial action brought against the applicant or a control affiliate by a state or foreign financial regulatory authority?

14H(2) Is the applicant or a control affiliate now the subject of any civil judicial proceeding that could result in a "yes" answer to any part of 14H(1)?

Use a separate DRP for each event or *proceeding*. An event or *proceeding* may be reported for more than one person or entity using one DRP. File with a completed Execution Page.

One event may result in more than one affirmative answer to Items 14H. Use only one DRP to report details related to the same event. Unrelated civil judicial actions must be reported on separate DRPs.

It is not a requirement that documents be provided for each event or proceeding. Should they be provided, they will not be accepted as disclosure in lieu of answering the questions on this DRP.

If a *control affiliate* is an individual or organization registered through the CRD, such *control affiliate* need only complete Part I of the *applicant's* appropriate DRP (SBSE). Details of the event must be submitted on the *control affiliate's* appropriate DRP (BD) or DRP (U-4). If a *control affiliate* is an individual or organization not registered through the CRD, provide complete answers to all the items on the *applicant's* appropriate DRP (SBSE). The completion of this DRP does not relieve the *control affiliate* of its obligation to update its CRD records.

PART I

A. The *person(s)* or entity(ies) for whom this DRP is being filed is (are):

- The *Applicant*
- Applicant and one or more *control affiliate(s)*
- One or more *control affiliate(s)*

If this DRP is being filed for a *control affiliate*, give the full name of the *control affiliate* below (for individuals, Last name, First name, Middle name).

If the *control affiliate* is registered with the CRD, provide the CRD number. If not, indicate "non-registered" by checking the appropriate checkbox.

Name of *Applicant*

DRP SBSE – CONTROL AFFILIATE

CRD NUMBER

This *Control Affiliate* is Firm Individual

Registered: Yes No

NAME (For individuals, Last, First, Middle)

This DRP should be removed from the SBS Entity's record because the control affiliate(s) are no longer associated with the SBS Entity.

B. If the *control affiliate* is registered through the CRD, has the *control affiliate* submitted a DRP (with Form U-4) or BD DRP to the CRD System for the event?

If the answer is "Yes," no other information on this DRP must be provided: If "No," complete Part II.

Yes No

Note: The completion of this Form does not relieve the *control affiliate* of its obligation to update its CRD records.

CIVIL JUDICIAL ACTION DISCLOSURE REPORTING PAGE (SBSE)

(continuation)

PART II

1. Court Action initiated by: (Name of regulator, foreign financial regulatory authority, SRO, commodities exchange, agency, firm, private plaintiff, etc.)

2. Principal Relief Sought: (check appropriate item)

- | | | | |
|---|---------------------------------------|--|--|
| <input type="checkbox"/> Cease and Desist | <input type="checkbox"/> Disgorgement | <input type="checkbox"/> Money Damages (Private/Civil Complaint) | <input type="checkbox"/> Restraining Order |
| <input type="checkbox"/> Civil Penalty(ies)/Fine(s) | <input type="checkbox"/> Injunction | <input type="checkbox"/> Restitution | <input type="checkbox"/> Other _____ |

Other Relief Sought:

3. Filing Date of Court Action (MM/DD/YYYY) Exact Explanation

If not exact, provide explanation:

4. Principal Product Type: (check appropriate item)

- | | | |
|--|--|---|
| <input type="checkbox"/> Annuity(ies) - Fixed | <input type="checkbox"/> Debt - Municipal | <input type="checkbox"/> Investment Contract(s) |
| <input type="checkbox"/> Annuity(ies) - Variable | <input type="checkbox"/> Derivative(s) | <input type="checkbox"/> Money Market Fund(s) |
| <input type="checkbox"/> Banking Products (other than CD(s)) | <input type="checkbox"/> Direct Investment(s) - DPP & LP Interest(s) | <input type="checkbox"/> Mutual Fund(s) |
| <input type="checkbox"/> CD(s) | <input type="checkbox"/> Equity - OTC | <input type="checkbox"/> No Product |
| <input type="checkbox"/> Commodity Option(s) | <input type="checkbox"/> Equity Listed (Common & Preferred Stock) | <input type="checkbox"/> Options |
| <input type="checkbox"/> Debt - Asset Backed | <input type="checkbox"/> Futures - Commodity | <input type="checkbox"/> Penny Stock(s) |
| <input type="checkbox"/> Debt - Corporate | <input type="checkbox"/> Futures - Financial | <input type="checkbox"/> Unit Investment Trust(s) |
| <input type="checkbox"/> Debt - Government | <input type="checkbox"/> Index Option(s) | <input type="checkbox"/> Other _____ |
| | <input type="checkbox"/> Insurance | |

Other Product Type:

5. Formal Action was brought in (include name of Federal, State or Foreign Court, Location of Court - City or County and State or Country, Docket/Case Number):

6. Control Affiliate Employing Firm when activity occurred which led to the civil judicial action (if applicable):

7. Describe the allegations related to this civil judicial action. (The information must fit within the space provided.):

8. Current Status? Pending On Appeal Final

9. If on appeal, action appealed to (provide name of court): Date Appeal Filed (MM/DD/YYYY):

10. If pending, date notice/process was served (MM/DD/YYYY) Exact Explanation

If not exact, provide explanation:

BANKRUPTCY / SIPC DISCLOSURE REPORTING PAGE (SBSE)

GENERAL INSTRUCTIONS

This Disclosure Reporting Page [DRP (SBSE)] is an an INITIAL **OR** AMENDED response to report details for affirmative responses to **Questions 14I** on Form SBSE;

Check item(s) being responded to:

14I In the past ten years has the *applicant* or a *control affiliate* of the *applicant* ever been a securities firm or a *control affiliate* of a securities firm that:

(1) has been the subject of a bankruptcy petition?

(2) has had a trustee appointed or a direct payment procedure initiated under the Securities Investor Protection Act?

Use a separate DRP for each event or *proceeding*. An event or *proceeding* may be reported for more than one person or entity using one DRP. File with a completed Execution Page.

It is not a requirement that documents be provided for each event or *proceeding*. Should they be provided, they will not be accepted as disclosure in lieu of answering the questions on this DRP.

If a *control affiliate* is an individual or organization registered through CRD, such *control affiliate* need only complete Part I of the *applicant's* appropriate DRP (SBSE). Details of the event must be submitted on the *control affiliate's* appropriate DRP (BD) or DRP (U-4). If a *control affiliate* is an individual or organization not registered through the CRD, provide complete answers to all the items on the *applicant's* appropriate DRP (SBSE). The completion of this DRP does not relieve the *control affiliate* of its obligation to update its CRD records.

PART I

A. The *person* or entity for whom this DRP (SBSE) is being filed is:

The *Applicant*

Applicant and one or more *control affiliate(s)*

One or more *control affiliate(s)*

If this DRP is being filed for a *control affiliate*, give the full name of the *control affiliate* below (for individuals, Last name, First name, Middle name).

If the *control affiliate* is registered with the CRD, provide the CRD number. If not, indicate "non-registered" by checking the appropriate checkbox.

Name of *Applicant*

BD DRP – CONTROL AFFILIATE

CRD NUMBER

This *Control Affiliate* is Firm Individual

Registered: Yes No

NAME (For individuals, Last, First, Middle)

This DRP should be removed from the SBS Entity's record because the *control affiliate(s)* are no longer associated with the SBS Entity.

B. If the *control affiliate* is registered through the CRD, has the *control affiliate* submitted a DRP (with Form U-4) or DRP (BD) to the CRD System for the event?

If the answer is "Yes," no other information on this DRP must be provided: If "No," complete Part II.

Yes No

Note: The completion of this Form does not relieve the *control affiliate* of its obligation to update its CRD records.

PART II

1. Action Type: (check appropriate item)

Bankruptcy Declaration Receivership

Compromise Liquidated Other _____

2. Action Date (MM/DD/YYYY) _____ Exact Explanation

If not exact, provide explanation: _____

(continued)

3. If the financial action relates to an organization over which the *applicant* or the *control affiliate* exercise(d) *control*, enter organization name and the applicant's or control affiliate's position, title or relationship:

Was the Organization investment-related? Yes No

4. Court action brought in (Name of Federal, State or Foreign Court), Location of Court (City or County and State or Country), Docket/Case Number and Bankruptcy Chapter Number (if Federal Bankruptcy Filing):

5. Is action currently pending? Yes No

6. If not pending, provide Disposition Type: (check appropriate item)

Direct Payment Procedure Dismissed Satisfied/Released
 Discharged Dissolved SIPA Trustee Appointed Other _____

7. Disposition Date (MM/DD/YYYY): _____ Exact Explanation

If not exact, provide explanation: _____

8. Provide a brief summary of events leading to the action and if not discharged, explain. (The information must fit within the space provided.):

9. If a SIPA trustee was appointed or a direct payment procedure was begun, enter the amount paid or agreed to be paid by you; or the name of the trustee:

Currently open? Yes No

Date Direct Payment Initiated/Filed or Trustee Appointed (MM/DD/YYYY): _____ Exact Explanation

If not exact, provide explanation: _____

10. Provide details of any status/disposition. Include details of creditors, terms, conditions, amounts due and settlement schedule (if applicable). (The information must fit within the space provided.)

Form SBSE-A

OMB Approval
OMB Number:3235-____
Expires:..... ..Month __, 2016
Estimated average burden hours per response: _____.
per amendment: _____.

**Application for Registration
of Security-based Swap
Dealers and Major Security-
based Swap Participants that
are Registered or Registering
with the Commodity Futures
Trading Commission as a
Swap Dealer or Major Swap
Participant**

FORM SBSE-A INSTRUCTIONS

A. GENERAL INSTRUCTIONS

1. **FORM** - Form SBSE-A is the Application for Registration as either a Security-based Swap Dealer or Major Security-based Swap Participant (collectively, "SBS Entities") by an entity that is not registered or registering with the Commission as a broker-dealer but is registered or registering with the Commodity Futures Trading Commission ("CFTC") as a swap dealer or major swap participant. **These SBS Entities must file this form and a copy of the Form 7-R they file with the CFTC (or its designee) to register with the Securities and Exchange Commission.** An applicant must also file Schedules A, B, C, F, and G, as appropriate. There are no Schedules D, or E. An entity that is registered with the Commission as a broker-dealer and also is registered or registering with the Commodity Futures Trading Commission ("CFTC") as a swap dealer or major swap participant should file Form SBSE-BD to register with the Commission as an SBS Entity.
2. **ELECTRONIC FILING** - This Form SBSE-A must be filed electronically with the Commission through the EDGAR system, and must utilize the EDGAR Filer Manual (as defined in 17 CFR 232.11) to file and amend Form SBSE-A electronically to assure the timely acceptance and processing of those filings.¹⁹⁸⁰ Additional documents shall be attached to this electronic application.
3. **UPDATING** - By law, the *applicant* must promptly update Form SBSE-A information by submitting amendments whenever the information on file becomes inaccurate or incomplete for any reason [17 CFR 240.15Fb2-2]. In addition, the applicant must update any incomplete or inaccurate information contained on Form SBSE-A prior to filing a notice of withdrawal from registration on Form SBSE-W [17 CFR 15Fb3-2(a)].
4. **CONTACT EMPLOYEE** - The individual listed as the contact employee must be authorized to receive all compliance information, communications, and mailings, and be responsible for disseminating it within the *applicant's* organization.
4. **FEDERAL INFORMATION LAW AND REQUIREMENTS** - An agency may not conduct or sponsor, and a *person* is not required to respond to, a collection of information unless it displays a currently valid control number. Sections 15F, 17(a) and 23(a) of the Exchange Act authorize the SEC to collect the information on this form from registrants. See 15 U.S.C. §§78o-10, 78q and 78w. Filing of this form is mandatory; however, the social security number information, which aids in identifying the applicant, is voluntary. The principal purpose of this Form is to permit the Commission to determine whether the *applicant* meets the statutory requirement to engage in the security-based swap business. The Commission maintain[s] a file of the information on this form and will make certain information collected via the form publicly available. Any member of the public may direct to the Commission any comments concerning the accuracy of the burden estimate on this Form, and any suggestions for reducing this burden. This collection of information has been reviewed by the Office of Management and Budget in accordance with the clearance requirements of 44 U.S.C. §3507. The information contained in this form is part of a system of records subject to the Privacy Act of 1974, as amended. The Securities and Exchange Commission has published in the Federal Register the Privacy Act Systems of Records Notice for these records.

B. FILING INSTRUCTIONS

1. **FORMAT**
 - a. Items 1-16 and the accompanying Schedules and DRP pages must be answered and all fields requiring a response must be completed before the filing will be accepted.
 - b. Failure to follow instructions or properly complete the form may result in the application being delayed or rejected.
 - c. *Applicant* must complete the execution screen certifying that Form SBSE-A and amendments thereto have been executed properly and that the information contained therein is accurate and complete.
 - d. To amend information, the *applicant* must update the appropriate Form SBSE-A screens.
 - e. A paper copy, with original signatures, of the initial Form SBSE-A filing [and amendments to Disclosure Reporting Pages (DRPs)] must be retained by the *applicant* and be made available for inspection upon a regulatory request.
2. **DISCLOSURE REPORTING PAGE (DRP)** - Information concerning a *principal* that relates to the occurrence of an event reportable in Schedule C must be provided on the appropriate DRP.

The mailing address for questions and correspondence is:

1980

As discussed in the release proposing this Form, the Commission is currently developing a system to facilitate receipt of applications electronically. More specific instructions on how to file this Form may be included in the final version of the Form.

EXPLANATION OF TERMS
(The following terms are italicized throughout this form.)

1. GENERAL

Terms used in this Form SBSE-A that are defined in the form the CFTC requires that swap dealers and major swap participants use to apply for registration with the CFTC shall have the same meaning as set forth in that form.

APPLICANT - The security-based swap dealer or major security-based swap participant applying on or amending this form.

CONTROL - The power, directly or indirectly, to direct the management or policies of a company, whether through ownership of securities, by contract, or otherwise. Any *person* that (i) is a director, general partner or officer exercising executive responsibility (or having similar status or functions); (ii) directly or indirectly has the right to vote 25% or more of a class of a voting security or has the power to sell or direct the sale of 25% or more of a class of voting securities; or (iii) in the case of a partnership, has the right to receive upon dissolution, or has contributed, 25% or more of the capital, is presumed to *control* that company.

JURISDICTION - A state, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, or any subdivision or regulatory body thereof.

SUCCESSOR - The term "successor" is defined to be an unregistered entity that assumes or acquires substantially all of the assets and liabilities, and that continues the business of, a predecessor security-based swap dealer or major security-based swap participants that ceases its security-based swap activities. [See Exchange Act Rule 15b2-5 (17 CFR 240.15Fb2-5)]

3. FOR THE PURPOSE OF SCHEDULE C AND THE CORRESPONDING DISCLOSURE REPORTING PAGES (DRPs)

FOREIGN FINANCIAL REGULATORY AUTHORITY - Includes (1) a foreign securities authority; (2) other governmental body or foreign equivalent of a *self-regulatory organization* empowered by a foreign government to administer or enforce its laws relating to the regulation of *financial services industry-related* activities; and (3) a foreign membership organization, a function of which is to regulate the participation of its members in the activities listed above.

FINANCIAL SERVICES INDUSTRY-RELATED - Pertaining to securities, commodities, banking, savings association activities, credit union activities, insurance, or real estate (including, but not limited to, acting as or being associated with a broker-dealer, municipal securities dealer, government securities broker or dealer, issuer, investment company, investment adviser, futures sponsor, bank, security-based swap dealer, major security-based swap participant, savings association, credit union, insurance company, or insurance agency). (This definition is used solely for the purpose of Form SBSE-A.)

INVOLVED - Doing an act or aiding, abetting, counseling, commanding, inducing, conspiring with or failing reasonably to supervise another in doing an act.

ORDER - A written directive issued pursuant to statutory authority and procedures, including orders of denial, suspension, or revocation; does not include special stipulations, undertakings or agreements relating to payments, limitations on activity or other restrictions unless they are included in an *order*.

PROCEEDING - Includes a formal administrative or civil action initiated by a governmental agency, *self-regulatory organization* or a *foreign financial regulatory authority*; a *felony* criminal indictment or information (or equivalent formal charge); or a *misdemeanor* criminal information (or equivalent formal charge). Does not include other civil litigation, investigations, or arrests or similar charges effected in the absence of a formal criminal indictment or information (or equivalent formal charge).

FORM SBSE-A Page 1 (Execution Page)	Application for Registration as a Security-based Swap Dealer and Major Security-based Swap Participant that is Registered or Registering with the CFTC as a Swap Dealer or Major Swap Participant	Official Use	Official Use Only
Date: _____ Applicant NFA Number: _____			

WARNING: Failure to keep this form current and to file accurate supplementary information on a timely basis, or the failure to keep accurate books and records or otherwise to comply with the provisions of law applying to the conduct of business as an SBS Entity, would violate the Federal securities laws and the laws of the *jurisdictions* and may result in disciplinary, administrative, injunctive or criminal action.

INTENTIONAL MISSTATEMENTS OR OMISSIONS OF FACTS MAY CONSTITUTE CRIMINAL VIOLATIONS.

[] APPLICATION [] AMENDMENT

1. Exact name, principal business address, mailing address, if different, and telephone number of the *applicant*:

A. Full name of the *applicant*:

B. IRS Empl. Ident. No.:

C. Applicant's NFA ID #: Applicant's CIK # (if any):

D. Applicant's Main Address: (Do not use a P.O. Box)

Number and Street 1: <input style="width: 90%; height: 20px;" type="text"/>	Number and Street 2: <input style="width: 90%; height: 20px;" type="text"/>
City: <input style="width: 100%; height: 20px;" type="text"/>	Country: <input style="width: 100%; height: 20px;" type="text"/>
State: <input style="width: 100%; height: 20px;" type="text"/>	Zip/Postal Code: <input style="width: 100%; height: 20px;" type="text"/>

E. Mailing Address, if different:

Number and Street 1: <input style="width: 90%; height: 20px;" type="text"/>	Number and Street 2: <input style="width: 90%; height: 20px;" type="text"/>
City: <input style="width: 100%; height: 20px;" type="text"/>	Country: <input style="width: 100%; height: 20px;" type="text"/>
State: <input style="width: 100%; height: 20px;" type="text"/>	Zip/Postal Code: <input style="width: 100%; height: 20px;" type="text"/>

F. Business Telephone Number:

G. Website/URL:

H. Contact Employee:

Name: <input style="width: 90%; height: 20px;" type="text"/>	Title: <input style="width: 90%; height: 20px;" type="text"/>
Telephone Number: <input style="width: 90%; height: 20px;" type="text"/>	Email Address: <input style="width: 90%; height: 20px;" type="text"/>

I. Chief Compliance Officer designated by the *applicant* in accordance with Exchange Act Section 15F(k):

Name: <input style="width: 90%; height: 20px;" type="text"/>	Title: <input style="width: 90%; height: 20px;" type="text"/>
Telephone Number: <input style="width: 90%; height: 20px;" type="text"/>	Email Address: <input style="width: 90%; height: 20px;" type="text"/>

EXECUTION:

The applicant consents that service of any civil action brought by or notice of any proceeding before the Securities and Exchange Commission in connection with the applicant's security-based swap activities, unless the applicant is a nonresident SBS Entity, may be given by registered or certified mail or confirmed telegram to the applicant's contact employee at the main address, or mailing address if different, given in Items 1E and 1F. If the applicant is a nonresident SBS Entity, it must complete Schedule F to designate a U.S. agent for service of process.

The undersigned certifies that he/she has executed this form on behalf of, and with the authority of, said applicant. The undersigned and applicant represent that the information and statements contained herein, including schedules attached hereto, and other information filed herewith are current, true and complete. The undersigned and applicant further represent that to the extent any information previously submitted is not amended such information is currently accurate and complete.

Date (MM/DD/YYYY) <input style="width: 90%; height: 20px;" type="text"/>	Name of Applicant <input style="width: 90%; height: 20px;" type="text"/>
By: <input style="width: 90%; height: 20px;" type="text"/>	<input style="width: 90%; height: 20px;" type="text"/>
Signature	Name and Title of Person Signing on Applicant's behalf

This page must always be completed in full.

DO NOT WRITE BELOW THIS LINE - FOR OFFICIAL USE ONLY

FORM SBSE-A Page 2		Applicant Name: _____ Date: _____ Applicant NFA No.: _____	Official Use	Official Use Only
2.	A.	The <i>applicant</i> is registering as a security-based swap dealer:	<input type="checkbox"/> Yes	<input type="checkbox"/> No
	B.	The <i>applicant</i> is registering as a major security-based swap participant: Because it: (check all that apply)	<input type="checkbox"/> Yes	<input type="checkbox"/> No
		<input type="checkbox"/> maintains a substantial security-based swap position		
		<input type="checkbox"/> has substantial counterparty exposure	<input type="checkbox"/>	<input type="checkbox"/> is highly leveraged relative to its capital position
3.	A.	Is the <i>applicant</i> a foreign security-based swap dealer that intends to: <ul style="list-style-type: none"> work with the Commission and its primary regulator to have the Commission determine whether the requirements of its primary regulator's regulatory system are comparable to the Commission's avail itself of a previously granted substituted compliance determination with respect to the requirements of Section 15F of the Exchange Act of 1934 and the rules and regulations thereunder?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
	B.	If "yes" to either of the questions in Item 3.A. above, identify the foreign financial regulatory authority that serves as the <i>applicant's</i> primary regulator and for which the Commission has made, or may make, a substituted compliance determination:		
	C.	If the <i>applicant</i> is relying on a previously granted substituted compliance determination, please describe how the <i>applicant</i> satisfies any conditions the Commission may have placed on such substituted compliance determination:		
4.		Does the <i>applicant</i> intend to compute capital or margin, or price customer or proprietary positions, using mathematical models?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
5.	A.	The <i>applicant</i> is currently registered with the Commodity Futures Trading Commission as a:	<input type="checkbox"/> Swap Dealer	<input type="checkbox"/> Major Swap Participant
	B.	The <i>applicant</i> is registering with the Commodity Futures Trading Commission as a:	<input type="checkbox"/> Swap Dealer	<input type="checkbox"/> Major Swap Participant
6.		Is the <i>applicant</i> a U.S. branch of a non-resident entity? If "yes," identify the non-resident entity and its location:	<input type="checkbox"/> Yes	<input type="checkbox"/> No
7.		Briefly describe the <i>applicant's</i> business:		
8.		Is the <i>applicant</i> subject to regulation by a prudential regulator, as defined in Section 1a(39) of the Commodity Exchange Act. If "yes," identify the prudential regulator:		YES NO <input type="checkbox"/> <input type="checkbox"/>
9.		Is the <i>applicant</i> registered with the Commission as an investment adviser? Applicant's IARD #: _____		<input type="checkbox"/> <input type="checkbox"/>
10.	A.	Is the <i>applicant</i> registered with the Commodity Futures Trading Commission in any capacity other than as a swap dealer or major swap participant?		<input type="checkbox"/> <input type="checkbox"/>
	B.	If "yes," as a:	<input type="checkbox"/> Futures Commission Merchant	<input type="checkbox"/> Introducing Broker
			<input type="checkbox"/> Commodity Pool Operator	<input type="checkbox"/> Other: _____
11.		Does <i>applicant</i> engage in any other non-securities, financial services industry-related business? If "yes," describe each other business briefly on Schedule B, Section I.		<input type="checkbox"/> <input type="checkbox"/>
12.		Does the <i>applicant</i> hold or maintain any funds or securities to collateralize counterparty transactions?		<input type="checkbox"/> <input type="checkbox"/>

FORM SBSE-A Page 3	Applicant Name: _____ Date: _____ Applicant NFA No.: _____	Official Use	Official Use Only
<p>13. Does the <i>applicant</i> have any arrangement:</p> <p>A. With any other <i>person</i>, firm, or organization under which any books or records of the <i>applicant</i> are kept, maintained, or audited by such other <i>person</i>, firm or organization? <input type="checkbox"/> <input type="checkbox"/></p> <p>B. Under which such other <i>person</i>, firm or organization executes, trades, custodies, clears or settles on behalf of the applicant (including any <i>SRO</i> in which the applicant is a member)? <input type="checkbox"/> <input type="checkbox"/></p> <p><i>If "yes" to any part of Item 11, complete appropriate items on Schedule B, Section II.</i></p>			
<p>14. Does any <i>person</i> directly or indirectly control the management or policies of the <i>applicant</i> through agreement or otherwise? <input type="checkbox"/> <input type="checkbox"/></p> <p><i>If "yes," complete appropriate item on Schedule B, Section II.</i></p>			
<p>15. Does any <i>person</i> directly or indirectly finance (wholly or partially) the business of the <i>applicant</i>? <input type="checkbox"/> <input type="checkbox"/></p> <p><i>Do not answer "Yes" to Item 15 if the person finances the business of the applicant through: 1) a public offering of securities made pursuant to the Securities Act of 1933; or 2) credit extended in the ordinary course of business by suppliers, banks, and others.</i></p> <p><i>If "yes," complete appropriate item on Schedule B, Section II.</i></p>			
<p>16. Is the <i>applicant</i> at the time of this filing succeeding to the business of a currently registered SBS Entity? <input type="checkbox"/> <input type="checkbox"/></p> <p><i>If "yes," complete appropriate items on Schedule B, Section III.</i></p>			
<p>17. Is the <i>applicant</i> registered with a foreign financial regulatory authority? <input type="checkbox"/> <input type="checkbox"/></p> <p><i>If "yes," list all such registrations on Schedule F, Page 1, Section II.</i></p>			
<p>18. The applicant has _____ principals who are individuals. <i>Please list all principals who are individuals on Schedule A.</i></p>			
<p>19. Does any principal not identified in Item 18 and Schedule A effect, or is any principal not identified in Item 18 and Schedule A involved in effecting security-based swaps on behalf of the applicant, or will such principals effect or be involved in effecting such business on the applicant's behalf? <input type="checkbox"/> <input type="checkbox"/></p> <p><i>If "yes," complete appropriate item on Schedule B, Section IV.</i></p>			

Schedule A of FORM SBSE PRINCIPALS THAT ARE INDIVIDUALS (Answer for Form SBSE-A Item 18)		Applicant Name: _____ Date: _____ Applicant NFA No.: _____				Official Use				
Use Schedule A to identify all principals of the applicant who are individuals.										
Complete the "Title or Status" column by entering board/management titles; status as partner, trustee, sole proprietor, or shareholder; and for shareholders, the class of securities owned (if more than one is issued).										
Ownership Codes are: NA - less than 5% B - 10% but less than 25% D - 50% but less than 75% A - 5% but less than 10% C - 25% but less than 50% E - 75% or more										
	FULL LEGAL NAME (Individuals: Last Name, First Name, Middle Name)	Title or Status	Date Title or Status Acquired		Date Individual began working for applicant		Does person have an ownership interest in the applicant	If yes, include ownership code	NFA Identification No., CRD No. and/or IARD No.	Official Use Only
			MM	YYYY	MM	YYYY				
1.							Y / N			
For individuals not presently registered through NFA, CRD or IARD, describe prior <i>investment-related</i> experience (e.g., for each prior position - employer, job title, and dates of service):										
2.							Y / N			
For individuals not presently registered through NFA, CRD or IARD, describe prior <i>investment-related</i> experience (e.g., for each prior position - employer, job title, and dates of service):										
3.							Y / N			
For individuals not presently registered through NFA, CRD or IARD, describe prior <i>investment-related</i> experience (e.g., for each prior position - employer, job title, and dates of service):										
4.							Y / N			
For individuals not presently registered through NFA, CRD or IARD, describe prior <i>investment-related</i> experience (e.g., for each prior position - employer, job title, and dates of service):										
5.							Y / N			
For individuals not presently registered through NFA, CRD or IARD, describe prior <i>investment-related</i> experience (e.g., for each prior position - employer, job title, and dates of service):										
6.							Y / N			
For individuals not presently registered through NFA, CRD or IARD, describe prior <i>investment-related</i> experience (e.g., for each prior position - employer, job title, and dates of service):										
7.							Y / N			
For individuals not presently registered through NFA, CRD or IARD, describe prior <i>investment-related</i> experience (e.g., for each prior position - employer, job title, and dates of service):										
8.							Y / N			
For individuals not presently registered through NFA, CRD or IARD, describe prior <i>investment-related</i> experience (e.g., for each prior position - employer, job title, and dates of service):										
9.							Y / N			
For individuals not presently registered through NFA, CRD or IARD, describe prior <i>investment-related</i> experience (e.g., for each prior position - employer, job title, and dates of service):										
10.							Y / N			
For individuals not presently registered through NFA, CRD or IARD, describe prior <i>investment-related</i> experience (e.g., for each prior position - employer, job title, and dates of service):										

Schedule B of FORM SBSE-A Page 1	Applicant Name: _____	Official Use	Official Use Only
	Date: _____ Applicant NFA No.: _____		

Use this Schedule B to report details for items listed below. Report only new information or changes/updates to previously submitted details. Do not repeat previously submitted information.
 This is an INITIAL AMENDED detail filing for the Form SBSE-A items checked below:

Section I Other Business

Item 11: Does applicant engage in any other non-securities, financial services industry-related business?

Unique Identification Number(s): _____ Assigning Regulator(s)/Entity(s): _____

Briefly describe any other financial services industry-related, non-securities business in which the applicant is engaged:

Section II Record Maintenance Arrangements / Business Arrangements / Control Persons / Financings

(Check one) Item 13A Item 13B Item 14 Item 15
 Applicant must complete a separate Schedule B Page 1 for each affirmative response in this section including any multiple responses to any item. Complete the "Effective Date" box with the Month, Day and Year that the arrangement or agreement became effective. When reporting a change or termination of an arrangement, enter the effective date of the change.

Firm or Organization Name	SEC File, CRD, NFA, IARD, and/or CIK Number (if any)	
---------------------------	--	--

Business Address (Street, City, State/Country, Zip + 4 Postal Code)	Effective Date	Termination Date
	MM DD YYYY / /	MM DD YYYY / /

Individual Name	CRD, NFA, and/or IARD Number (if any)
-----------------	---------------------------------------

Business Address (if applicable) (Street, City, State/Country, Zip + 4 Postal Code)	Effective Date	Termination Date
	MM DD YYYY / /	MM DD YYYY / /

Briefly describe the nature of the arrangement with respect to books or records (ITEM 13A); the nature of the execution, trading, custody, clearing or settlement arrangement (ITEM 13B); the nature of the control or agreement (ITEM 14); or the method and amount of financing (ITEM 15). Use reverse side of this sheet for additional comments if necessary.

For ITEM 14 ONLY - If the control person is an individual not presently registered through CRD or IARD, describe prior investment-related experience (e.g., for each prior position - employer, job title, and dates of service).

Section III Successions

Item 16: Is the applicant at the time of this filing succeeding to the business of a currently registered SBS Entity?

Date of Succession MM DD YYYY _____ Name of Predecessor _____
 / /

SEC File, CRD, NFA, IARD, and/or CIK Number (if any) _____ IRS Employer Number (if any) _____

Briefly describe details of the succession including any assets or liabilities not assumed by the successor. Use reverse side of this sheet for additional comments if necessary.

Section IV Principals Effecting or Involved in Effecting SBS Business

Item 19: Does any principal not identified in Item 18 and Schedule A effect, or is any principal not identified in Item 15 and Schedule A involved in effecting security-based swaps on behalf of the applicant, or will such principals effect or be involved in effecting such business on the applicant's behalf?

For each Principal identified in Section IV, complete Schedule C of the Form SBSE-A and the relevant DRP pages.

1.	Name of Principal	Type of Entity (Corp, Partnership, LLC, etc.)	SEC File No., CRD, NFA, IARD, CIK Number, and/or Tax Identification Number
	Business Address (Street, City, State/Country, Zip + 4/Postal Code)		

This entity effects is involved in effecting security based swaps on behalf of the applicant. (check only one)

Briefly describe the details of the principal's activities relating to its effecting or involvement in effecting security-based swap transactions on behalf of the applicant:

Schedule B of FORM SBSE-A Page 2		Applicant Name: _____ Date: _____ Applicant NFA No.: _____		Official Use	Official Use
Section IV, Continued		Principals Effecting or Involved in Effecting SBS Business			
For each Principal identified in Section IV, complete Schedule C of the Form SBSE-A and the relevant DRP pages.					
2.	Name of Principal	Type of Entity (Corp, Partnership, LLC, etc.)	SEC File No., CRD, NFA, IARD, CIK Number, and/or Tax Identification Number		
	Business Address (Street, City, State/Country, Zip + 4/Postal Code)				
	This entity <input type="checkbox"/> <u>effects</u> <input type="checkbox"/> <u>is involved in effecting</u> security based swaps on behalf of the applicant. (check only one)				
Briefly describe the details of the principal's activities relating to its effecting or involvement in effecting security-based swap transactions on behalf of the applicant:					
3.	Name of Principal	Type of Entity (Corp, Partnership, LLC, etc.)	SEC File No., CRD, NFA, IARD, CIK Number, and/or Tax Identification Number		
	Business Address (Street, City, State/Country, Zip + 4/Postal Code)				
	This entity <input type="checkbox"/> <u>effects</u> <input type="checkbox"/> <u>is involved in effecting</u> security based swaps on behalf of the applicant. (check only one)				
Briefly describe the details of the principal's activities relating to its effecting or involvement in effecting security-based swap transactions on behalf of the applicant:					
4.	Name of Principal	Type of Entity (Corp, Partnership, LLC, etc.)	SEC File No., CRD, NFA, IARD, CIK Number, and/or Tax Identification Number		
	Business Address (Street, City, State/Country, Zip + 4/Postal Code)				
	This entity <input type="checkbox"/> <u>effects</u> <input type="checkbox"/> <u>is involved in effecting</u> security based swaps on behalf of the applicant. (check only one)				
Briefly describe the details of the principal's activities relating to its effecting or involvement in effecting security-based swap transactions on behalf of the applicant:					
5.	Name of Principal	Type of Entity (Corp, Partnership, LLC, etc.)	SEC File No., CRD, NFA, IARD, CIK Number, and/or Tax Identification Number		
	Business Address (Street, City, State/Country, Zip + 4/Postal Code)				
	This entity <input type="checkbox"/> <u>effects</u> <input type="checkbox"/> <u>is involved in effecting</u> security based swaps on behalf of the applicant. (check only one)				
Briefly describe the details of the principal's activities relating to its effecting or involvement in effecting security-based swap transactions on behalf of the applicant:					
6.	Name of Principal	Type of Entity (Corp, Partnership, LLC, etc.)	SEC File No., CRD, NFA, IARD, CIK Number, and/or Tax Identification Number		
	Business Address (Street, City, State/Country, Zip + 4/Postal Code)				
	This entity <input type="checkbox"/> <u>effects</u> <input type="checkbox"/> <u>is involved in effecting</u> security based swaps on behalf of the applicant. (check only one)				
Briefly describe the details of the principal's activities relating to its effecting or involvement in effecting security-based swap transactions on behalf of the applicant:					

Schedule C of FORM SBSE-A Page 1		Applicant Name: _____ Principal Name: _____ Date: _____ Applicant NFA No.: _____		Official Use	Official Use Only
Use the appropriate DRP for providing details to "yes" answers to the questions in Schedule C. Refer to the Explanation of Terms section of Form SBSE-A Instructions for explanations of italicized terms.					
CRIMINAL DISCLOSURE	A. In the past ten years has the <i>principal</i> :			YES	NO
	(1) Been convicted of or pled guilty or nolo contendere ("no contest") in a domestic, foreign or military court to any <i>felony</i> ?			<input type="checkbox"/>	<input type="checkbox"/>
	(2) Been charged with a <i>felony</i>			<input type="checkbox"/>	<input type="checkbox"/>
	B. In the past ten years has the <i>principal</i> :				
	(1) Been convicted of or pled guilty or or nolo contendere ("no contest") in a domestic, foreign or military court to a <i>misdemeanor involving: financial services industry-related</i> business, or any fraud, false statements or omissions, wrongful taking of property, bribery, perjury, forgery, counterfeiting, extortion, or a conspiracy to commit any of these offenses?			<input type="checkbox"/>	<input type="checkbox"/>
	(2) Been <i>charged</i> with a <i>misdemeanor</i> specified in B(1)?			<input type="checkbox"/>	<input type="checkbox"/>
REGULATORY ACTION DISCLOSURE	C. Has the U.S. Securities and Exchange Commission or the Commodity Futures Trading Commission ever:				
	(1) <i>Found</i> the <i>principal</i> to have made a false statement or omission?			<input type="checkbox"/>	<input type="checkbox"/>
	(2) <i>Found</i> the <i>principal</i> to have been involved in a violation of its regulations or statutes?			<input type="checkbox"/>	<input type="checkbox"/>
	(3) <i>Found</i> the <i>principal</i> to have been a cause of a <i>financial services industry-related</i> business having its authorization to do business denied, revoked, or restricted?			<input type="checkbox"/>	<input type="checkbox"/>
	(4) Entered an <i>order</i> against the <i>principal</i> in connection with <i>financial services industry-related</i> activity?			<input type="checkbox"/>	<input type="checkbox"/>
	(5) Imposed a civil money penalty on the <i>principal</i> , or ordered the <i>principal</i> to cease and desist from any activity?			<input type="checkbox"/>	<input type="checkbox"/>
REGULATORY ACTION DISCLOSURE	D. Has any other federal regulatory agency, state regulatory agency, or <i>foreign financial regulatory authority</i> :				
	(1) Ever found the <i>principal</i> to have made a false statement or omission or been dishonest, unfair, or unethical?			<input type="checkbox"/>	<input type="checkbox"/>
	(2) Ever found the <i>principal</i> to have been involved in a violation of <i>financial services industry-related</i> regulations or statutes?			<input type="checkbox"/>	<input type="checkbox"/>
	(3) Ever found the <i>principal</i> to have been a cause of a <i>financial services industry-related</i> business having its authorization to do business denied, suspended, revoked or restricted?			<input type="checkbox"/>	<input type="checkbox"/>
	(4) In the past ten years, entered an order against the <i>principal</i> in connection with a <i>financial services industry-related</i> activity?			<input type="checkbox"/>	<input type="checkbox"/>
	(5) Ever denied, suspended, or revoked the <i>principal's</i> registration or license or otherwise, by order, prevented it from associating with a <i>financial services industry-related</i> business or restricted its activities?			<input type="checkbox"/>	<input type="checkbox"/>
	E. Has any <i>self-regulatory organization</i> or commodities exchange ever:				
	(1) <i>found</i> the <i>principal</i> to have made a false statement or omission?			<input type="checkbox"/>	<input type="checkbox"/>
	(2) <i>found</i> the <i>principal</i> to have been involved in a violation of its rules (other than a violation designated as a " <i>minor rule violation</i> " under a plan approved by the U.S. Securities and exchange Commission)?			<input type="checkbox"/>	<input type="checkbox"/>
	(3) <i>found</i> the <i>principal</i> to have been the cause of a <i>financial services industry-related</i> business having its authorization to do business denied, suspended, revoked or restricted?			<input type="checkbox"/>	<input type="checkbox"/>
	(4) Disciplined the <i>principal</i> by expelling or suspending it from membership, barring or suspending its association with other members, or otherwise restricting its activities?			<input type="checkbox"/>	<input type="checkbox"/>
	F. Has the <i>principal's</i> authorization to act as an attorney, accountant, or federal contractor ever been revoked or suspended?			<input type="checkbox"/>	<input type="checkbox"/>
	G. Is the <i>principal</i> now the subject of any regulatory <i>proceeding</i> that could result in a "yes" answer to any part of C, D, or E?			<input type="checkbox"/>	<input type="checkbox"/>

Schedule C of FORM SBSE-A Page 2		Applicant Name: _____ Principal Name: _____ Date: _____ Applicant NFA No.: _____		Official Use		<small>Official Use Only</small>	
CIVIL JUDICIAL DISCLOSURE	H. (1) Has any domestic or foreign civil judicial court: (a) In the past ten years, enjoined the <i>principal</i> in connection with any <i>financial services industry-related</i> activity? (b) Ever found that the <i>principal</i> was involved in a violation of <i>financial services industry-related</i> statutes or regulations? (c) Ever dismissed, pursuant to a settlement agreement, a <i>financial services industry-related</i> civil judicial action brought against the <i>principal</i> by a state or foreign <i>financial regulatory authority</i> ? (2) Is the <i>principal</i> now the subject of any civil judicial proceeding that could result in a "yes" answer to any part of H(1)?	YES NO <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>		FINANCIAL DISCLOSURE	I. In the past ten years has the <i>principal</i> ever been a securities firm or a <i>principal</i> of a securities firm that: (1) Has been the subject of a bankruptcy petition? (2) Has had a trustee appointed or a direct payment procedure initiated under the Securities Investor Protection Act?	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	

Schedule F of FORM SBSE-A	Applicant Name: _____ Date: _____ Applicant NFA No.: _____	Official Use
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Section I **Service of Process and Certification Regarding Access to Records**

Each nonresident security-based swap dealer and non-resident security-based swap participant shall use Schedule F to identify its United States agent for service of process and the certify that it can

- (3) provide the Commission with prompt access to its books and records, and
- (4) submit to onsite inspection and examination by the Commission.

1. Service of Process:

A. Name of United States person *applicant* designates and appoints as agent for service of process

B. Address of United States person *applicant* designates and appoints as agent for service of process

The above identified agent for service of process may be served any process, pleadings, subpoenas, or other papers in

- (a) any investigation or administrative proceeding conducted by the Commission that relates to the *applicant* or about which the *applicant* may have information; and
- (b) any civil or criminal suit or action or proceeding brought against the *applicant* or to which the *applicant* has been joined as defendant or respondent, in any appropriate court in any place subject to the jurisdiction of any state or of the United States or of any of its territories or possessions or of the District of Columbia, to enforce the Exchange Act. The *applicant* has stipulated and agreed that any such suit, action or administrative proceeding may be commenced by the service of process upon, and that service of an administrative subpoena shall be effected by service upon the above-named Agent for Service of Process, and that service as aforesaid shall be taken and held in all courts and administrative tribunals to be valid and binding as if personal service thereof had been made.

2. Certification regarding access to records:

Applicant can as a matter of law;

- (3) provide the Commission with prompt access to its books and records, and
- (4) submit to onsite inspection and examination by the Commission.

Applicant must attach to this Form SBSE a copy of the opinion of counsel it is required to obtain in accordance with paragraph (c)(2) or (c)(3) of Exchange Act Rule 15Fb2-4, as appropriate [paragraphs (c)(2) or (c)(3) of 17 CFR 240.15Fb2-4].

Signature:

Name and Title: _____

Date: _____

Section II **Registration with Foreign Financial Regulatory Authorities**

Complete this Section for Registration with Foreign Financial Regulatory Authorities relating to ITEM 17. Each security-based swap dealer and major security-based swap participant that is registered with a foreign financial regulatory authority must list on Section II of this Schedule F, for each foreign financial regulatory authority with which it is registered, the following information:

1. _____ English Name of Foreign Financial Regulatory Authority	Foreign Registration No. (if _____ any)	English Name of Country: _____
2. _____ English Name of Foreign Financial Regulatory Authority	Foreign Registration No. (if _____ any)	English Name of Country: _____
3. _____ English Name of Foreign Financial Regulatory Authority	Foreign Registration No. (if _____ any)	English Name of Country: _____

If applicant has more than 3 Foreign Financial Regulatory Authorities to report, complete additional Schedule F Page 1s.

Schedule G of FORM SBSE-A CERTIFICATION ON STATUTORY DISQUALIFICATION	Applicant Name: _____	Official Use
	Date: _____ Applicant NFA No.: _____	

Use Schedule G to certify that none of the *applicant's* associated persons is subject to statutory disqualification (as that term is defined in Section 3(a)(39) of the Exchange Act [15 U.S.C. 78c(a)(39)]).

Instructions: This certification must be signed by the *applicant's* Chief Compliance Officer designated pursuant to Exchange Act Section 15F(k) or by his or her designee.
 For purposes of this Form, the term *associated person* shall have the meaning as specified in Section 3(a)(70) of the Exchange Act [15 U.S.C. 78c(a)(70)].

This is a: [] CERTIFICATION [] RE-CERTIFICATION

The *applicant* certifies that it has

- (c) performed background checks on all of its *associated persons* who effect or are involved in effecting, or who will effect or be involved in effecting, security-based swaps on its behalf, and
- (d) determined that no *associated person* who effects or is involved in effecting, or who will effect or be involved in effecting, security-based swaps on its behalf is subject to statutory disqualification, as defined in Section 3(a)(39) of the Securities Exchange Act of 1934 [15 U.S.C. 78c(a)(39)].

Applicant Name:	Date:
Signature of Chief Compliance Officer or Designee:	
Name of Chief Compliance Officer or Designee:	If Designee, Title of Designee:

CRIMINAL DISCLOSURE REPORTING PAGE (SBSE-A)

GENERAL INSTRUCTIONS

This Disclosure Reporting Page [DRP (SBSE)] is an INITIAL OR AMENDED response to report details for affirmative responses to **Items A and B** of Schedule C of Form SBSE-A;

Check item(s) being responded to:

A. In the past ten years has the principal:

(1) Been convicted of or pled guilty or nolo contendere ("no contest") in a domestic, foreign or military court to any felony?

(2) Been charged with a felony?

B. In the past ten years has the principal:

(1) Been convicted of or pled guilty or nolo contendere ("no contest") in a domestic, foreign or military court to a misdemeanor involving: investments or an investment-related business, or any fraud, false statements or omissions, wrongful taking of property, bribery, perjury, forgery, counterfeiting, extortion, or a conspiracy to commit any of these offenses?

(2) Been charged with a misdemeanor specified in B(1)?

Use a separate DRP for each event or *proceeding*. An event or *proceeding* may be reported for more than one person or entity using one DRP. File with a completed Execution Page.

Multiple counts of the same charge arising out of the same event(s) should be reported on the same DRP. Unrelated criminal actions, including separate cases arising out of the same event, must be reported on separate DRPs. Use this DRP to report all charges arising out of the same event. One event may result in more than one affirmative answer to the above items.

If a *principal* is an organization registered through the CRD, such *principal* need only complete Part I of the *applicant's* appropriate DRP (SBSE-A). Details of the event must be submitted on the *principal's* appropriate DRP (BD) or DRP (U-4). If a *principal* is an individual or organization not registered through the CRD, provide complete answers to all the items on the *applicant's* appropriate DRP (SBSE-A). The completion of this DRP does not relieve the *principal* of its obligation to update its CRD records.

Applicants must attach a copy of each applicable court document (*i.e.*, criminal complaint, information or indictment as well as judgment of conviction or sentencing documents) if not previously submitted through CRD (as they could be in the case of a *control affiliate* registered through CRD). Documents will not be accepted as disclosure in lieu of answering the questions on this DRP.

PART I

A. If the *principal* is registered with the CRD, provide the CRD number. If not, indicate "non-registered" by checking the appropriate checkbox.

Name of *Principal*

CRD NUMBER

Registered: Yes No

This DRP should be removed from the SBS Entity's record because the principal is no longer associated with the SBS Entity.

B. If the *principal* is registered through the CRD, has the *principal* submitted a DRP (with Form U-4) or DRP (BD) to the CRD System for the event?

If the answer is "Yes," no other information on this DRP must be provided: If "No," complete Part II.

Yes No

Note: The completion of this Form does not relieve the *principal* of its obligation to update its CRD records.

CRIMINAL DISCLOSURE REPORTING PAGE (SBSE-A)
(continuation)

PART II

1. If charge(s) were brought against an organization over which the principal exercise(d) control: Enter organization name, whether or not the organization was an investment-related business and the principal's position, title or relationship.

2. Formal Charge(s) were brought in: (include name of Federal, Military, State or Foreign Court, Location of Court – City or County and State or Country, Docket/Case number).

3. Event Disclosure Detail (Use this for both organizational and individual charges.)

A. Date First Charged (MM/DD/YYYY): [] Exact [] Explanation

If not exact, provide explanation: _____

B. Event Disclosure Detail (include Charge(s)/Charge Description(s), and for each charge provide: 1. number of counts, 2. *felony or misdemeanor*, 3. plea for each charge, and 4. product type if charge is *investment-related*):

C. Current status of the Event? [] Pending [] On Appeal [] Final

D. Event Status Date (complete unless status is Pending) (MM/DD/YYYY): [] Exact [] Explanation

If not exact, provide explanation: _____

4. Disposition Disclosure Detail: Include for each charge, A. Disposition Type [e.g., convicted, acquitted, dismissed, pretrial.], B. Date, C. Sentence/Penalty, D. Duration [if sentence-suspension, probation, etc.], E. Start Date of Penalty, F. Penalty/Fine Amount and G. Date Paid.

5. Provide a brief summary of the circumstances leading to the charge(s) as well as the disposition. Include the relevant dates when the conduct which was the subject of the char(s) occurred. (The information must fit within the space provided.)

REGULATORY ACTION DISCLOSURE REPORTING PAGE (SBSE-A)

GENERAL INSTRUCTIONS

This Disclosure Reporting Page [DRP (SBSE)] is an INITIAL OR AMENDED response to report details for affirmative responses to **Items C, D, E, F, or G** of Schedule C of Form SBSE-A;

Check item(s) being responded to:

- C. Has the U.S. Securities and Exchange Commission or the Commodity Futures Trading Commission ever:
- (1) Found the principal to have made a false statement or omission?
 - (2) Found the principal to have been involved in a violation of its regulations or statutes?
 - (3) the principal to have been a cause of an investment-related business having its authorization to do business denied, revoked, or restricted?
 - (4) Entered an order against the principal in connection with investment-related activity?
 - (5) Imposed a civil money penalty on the principal, or ordered the principal to cease and desist from any activity?
- D. Has any other federal regulatory agency, state regulatory agency, or foreign financial regulatory authority:
- (1) Ever found the principal to have made a false statement or omission or been dishonest, unfair, or unethical?
 - (2) Ever found the principal to have been involved in a violation of investment-related regulations or statutes?
 - (3) Ever found the principal to have been a cause of an investment-related business having its authorization to do business denied, suspended, revoked or restricted?
 - (4) In the past ten years, entered an order against the principal in connection with an investment-related activity?
 - (5) Ever denied, suspended, or revoked the principal's registration or license or otherwise, by order, prevented it from associating with an investment-related business or restricted its activities?
- E. Has any self-regulatory organization or commodities exchange ever:
- (1) found the principal to have made a false statement or omission?
 - (2) found the principal to have been involved in a violation of its rules (other than a violation designated as a "minor rule violation" under a plan approved by the U.S. Securities and exchange Commission)?
 - (3) found the principal to have been the cause of an investment-related business having its authorization to do business denied, suspended, revoked or restricted?
 - (4) Disciplined the principal by expelling or suspending it from membership, barring or suspending its association with other members, or otherwise restricting its activities?
- F. Has the principal's authorization to act as an attorney, accountant, or federal contractor ever been revoked or suspended?
- G. Is the principal now the subject of any regulatory proceeding that could result in a "yes" answer to any part of C, D, or E?

Use a separate DRP for each event or *proceeding*. An event or *proceeding* may be reported for more than one person or entity using one DRP. File with a completed Execution Page.

One event may result in more than one affirmative answer to Items C, D, E, F or G. Use only one DRP to report details related to the same event. If an event gives rise to actions by more than one regulator, provide details for each action on a separate DRP.

It is not a requirement that documents be provided for each event or proceeding. Should they be provided, they will not be accepted as disclosure in lieu of answering the questions on this DRP.

If the principal is an organization registered through the CRD, such principal need only complete Part I of the *applicant's* appropriate DRP (SBSE). Details of the event must be submitted on the *principal's* appropriate DRP (BD) or DRP (U-4). If a *principal* is an organization not registered through the CRD, provide complete answers to all the items on the *applicant's* appropriate DRP (SBSE). The completion of this DRP does not relieve the *principal* of its obligation to update its CRD records.

PART I

- A. If the *principal* is registered with the CRD, provide the CRD number. If not, indicate "non-registered" by checking the appropriate checkbox.

Name of <i>Principal</i>	<i>Principal's</i> CRD Number
--------------------------	-------------------------------

Registered: Yes No

This DRP should be removed from the SBS Entity record because the control affiliate(s) are no longer associated with the SBS Entity.

- B. If the *principal* is registered through the CRD, has the *principal* submitted a DRP (with Form U-4) or DRP (BD) to the CRD System for the event?

If the answer is "Yes," no other information on this DRP must be provided: If "No," complete Part II.

Yes No

Note: The completion of this Form does not relieve the *principal* of its obligation to update its CRD records.

REGULATORY ACTION DISCLOSURE REPORTING PAGE (SBSE-A)

(continuation)

PART II

1. Regulatory Action initiated by:
 SEC Other Federal State SRO Foreign
 (Full name of regulator, foreign financial regulatory authority, federal, state or SRO)

2. Principal Sanction: (check appropriate item)

<input type="checkbox"/> Civil and Administrative Penalty(ies)/Fine(s)	<input type="checkbox"/> Disgorgement	<input type="checkbox"/> Restitution
<input type="checkbox"/> Bar	<input type="checkbox"/> Expulsion	<input type="checkbox"/> Revocation
<input type="checkbox"/> Cease and Desist	<input type="checkbox"/> Injunction	<input type="checkbox"/> Suspension
<input type="checkbox"/> Censure	<input type="checkbox"/> Prohibition	<input type="checkbox"/> Undertaking
<input type="checkbox"/> Denial	<input type="checkbox"/> Reprimand	<input type="checkbox"/> Other _____

Other Sanctions:

3. Date Initiated (MM/DD/YYYY) Exact Explanation

If not exact, provide explanation: _____

4. Docket/Case Number:

5. Principal Employing Firm when activity occurred which led to the regulatory action (if applicable):

6. Principal Product Type: (check appropriate item)

<input type="checkbox"/> Annuity(ies) - Fixed	<input type="checkbox"/> Debt - Municipal	<input type="checkbox"/> Investment Contract(s)
<input type="checkbox"/> Annuity(ies) - Variable	<input type="checkbox"/> Derivative(s)	<input type="checkbox"/> Money Market Fund(s)
<input type="checkbox"/> Banking Products (other than CD(s))	<input type="checkbox"/> Direct Investment(s) – DPP & LP Interest(s)	<input type="checkbox"/> Mutual Fund(s)
<input type="checkbox"/> CD(s)	<input type="checkbox"/> Equity - OTC	<input type="checkbox"/> No Product
<input type="checkbox"/> Commodity Option(s)	<input type="checkbox"/> Equity Listed (Common & Preferred Stock)	<input type="checkbox"/> Options
<input type="checkbox"/> Debt – Asset Backed	<input type="checkbox"/> Futures - Commodity	<input type="checkbox"/> Penny Stock(s)
<input type="checkbox"/> Debt - Corporate	<input type="checkbox"/> Futures - Financial	<input type="checkbox"/> Unit Investment Trust(s)
<input type="checkbox"/> Debt - Government	<input type="checkbox"/> Index Option(s)	<input type="checkbox"/> Other _____
	<input type="checkbox"/> Insurance	

Other Product Type:

7. Describe the allegations related to this regulatory action. (The information must fit within the space provided.):

8. Current Status? Pending On Appeal Final

9. If on appeal, regulatory action appealed to: (SEC, SRO, Federal or State Court) and Date Appeal Filed:

REGULATORY ACTION DISCLOSURE REPORTING PAGE (SBSE-A)

(continuation)

If Final or On Appeal, complete all items below. For Pending Actions, complete Item 13 only.

10. How was matter resolved: (check appropriate item)

- | | | |
|--|------------------------------------|--|
| <input type="checkbox"/> Acceptance, Waiver & Consent (AWC) | <input type="checkbox"/> Consent | <input type="checkbox"/> Settled |
| <input type="checkbox"/> Decision & Order of Offer of Settlement | <input type="checkbox"/> Dismissed | <input type="checkbox"/> Stipulation and Consent |
| <input type="checkbox"/> Decision | <input type="checkbox"/> Order | <input type="checkbox"/> Vacated |

11. Resolution Date (MM/DD/YYYY) Exact Explanation

If not exact, provide explanation:

12. A. Were any of the following Sanctions Ordered? (Check all appropriate items):

- | | | |
|--|--|--|
| <input type="checkbox"/> Monetary/Fine | <input type="checkbox"/> Revocation/Expulsion/Denial | <input type="checkbox"/> Disgorgement/Restitution |
| Amount \$_____ | <input type="checkbox"/> Censure | <input type="checkbox"/> Cease and Desist/Injunction |
| | <input type="checkbox"/> Bar | <input type="checkbox"/> Suspension |

B. Other Sanctions Ordered:

C. Sanction Detail: If suspended, enjoined or barred, provide duration including start date and capacities affected (General Securities Principal, Financial Operations Principal, etc.). If requalification, by exam/retraining was a condition of the sanction, provide length of time given to re-qualify/retrain, type of exam required and whether condition has been satisfied. If disposition resulted in a fine, penalty, restitution, disgorgement or monetary compensation, provide total amount, portion levied against principal, date paid and if any portion of penalty was waived.

13. Provide a brief summary of details related to the action status and (or) disposition and include relevant terms, conditions and dates. (The information must fit within the space provided.)

CIVIL JUDICIAL ACTION DISCLOSURE REPORTING PAGE (SBSE-A)

GENERAL INSTRUCTIONS

This Disclosure Reporting Page [DRP (BD)] is an INITIAL OR AMENDED response to report details for affirmative responses to **Item H** of Schedule C of Form BD;

Check item(s) being responded to:

H(1) Has any domestic or foreign civil judicial court:

(a) in the past ten years, enjoined the principal in connection with any investment-related activity?

(b) ever found that the principal was involved in a violation of investment-related statutes or regulations?

(c) ever dismissed, pursuant to a settlement agreement, an investment-related civil judicial action brought against the principal by a state or foreign financial regulatory authority?

H(2) Is the principal now the subject of any civil judicial proceeding that could result in a "yes" answer to any part of H?

Use a separate DRP for each event or *proceeding*. An event or *proceeding* may be reported for more than one person or entity using one DRP. File with a completed Execution Page.

One event may result in more than one affirmative answer to Item H. Use only one DRP to report details related to the same event. Unrelated civil judicial actions must be reported on separate DRPs.

It is not a requirement that documents be provided for each event or proceeding. Should they be provided, they will not be accepted as disclosure in lieu of answering the questions on this DRP.

If a *principal* is an individual or organization registered through the CRD, such *principal* need only complete Part I of the *applicant's* appropriate DRP (SBSE-A). Details of the event must be submitted on the *principal's* appropriate DRP (BD) or DRP (U-4). If a *principal* is an organization not registered through the CRD, provide complete answers to all the items on the *applicant's* appropriate DRP (SBSE-A). The completion of this DRP does not relieve the *principal* of its obligation to update its CRD records.

PART I

- A. If the *principal* is registered with the CRD, provide the CRD number. If not, indicate "non-registered" by checking the appropriate checkbox.

Name of *Principal*

CRD NUMBER

Registered: Yes No

This DRP should be removed from the SBS Entity's record because the principal is no longer associated with the SBS Entity.

- B. If the *principal* is registered through the CRD, has the *principal* submitted a DRP (with Form U-4) or DRP (BD) to the CRD System for the event?

If the answer is "Yes," no other information on this DRP must be provided: If "No," complete Part II.

Yes No

Note: The completion of this Form does not relieve the *principal* of its obligation to update its CRD records.

CIVIL JUDICIAL ACTION DISCLOSURE REPORTING PAGE (SBSE-A)

(continuation)

PART II

1. Court Action initiated by: (Name of regulator, foreign financial regulatory authority, SRO, commodities exchange, agency, firm, private plaintiff, etc.)

2. Principal Relief Sought: (check appropriate item)

- | | | | |
|---|---------------------------------------|--|--|
| <input type="checkbox"/> Cease and Desist | <input type="checkbox"/> Disgorgement | <input type="checkbox"/> Money Damages (Private/Civil Complaint) | <input type="checkbox"/> Restraining Order |
| <input type="checkbox"/> Civil Penalty(ies)/Fine(s) | <input type="checkbox"/> Injunction | <input type="checkbox"/> Restitution | <input type="checkbox"/> Other _____ |

Other Relief Sought:

3. Filing Date of Court Action (MM/DD/YYYY) Exact Explanation

If not exact, provide explanation: _____

4. Principal Product Type: (check appropriate item)

- | | | |
|--|--|---|
| <input type="checkbox"/> Annuity(ies) - Fixed | <input type="checkbox"/> Debt - Municipal | <input type="checkbox"/> Investment Contract(s) |
| <input type="checkbox"/> Annuity(ies) - Variable | <input type="checkbox"/> Derivative(s) | <input type="checkbox"/> Money Market Fund(s) |
| <input type="checkbox"/> Banking Products (other than CD(s)) | <input type="checkbox"/> Direct Investment(s) – DPP & LP Interest(s) | <input type="checkbox"/> Mutual Fund(s) |
| <input type="checkbox"/> CD(s) | <input type="checkbox"/> Equity - OTC | <input type="checkbox"/> No Product |
| <input type="checkbox"/> Commodity Option(s) | <input type="checkbox"/> Equity Listed (Common & Preferred Stock) | <input type="checkbox"/> Options |
| <input type="checkbox"/> Debt – Asset Backed | <input type="checkbox"/> Futures - Commodity | <input type="checkbox"/> Penny Stock(s) |
| <input type="checkbox"/> Debt - Corporate | <input type="checkbox"/> Futures - Financial | <input type="checkbox"/> Unit Investment Trust(s) |
| <input type="checkbox"/> Debt - Government | <input type="checkbox"/> Index Option(s) | <input type="checkbox"/> Other _____ |
| | <input type="checkbox"/> Insurance | |

Other Product Type:

5. Formal Action was brought in (include name of Federal, State or Foreign Court, Location of Court – City or County and State or Country, Docket/Case Number):

6. Control Affiliate Employing Firm when activity occurred which led to the civil judicial action (if applicable):

7. Describe the allegations related to this civil action. (The information must fit within the space provided.):

8. Current Status? Pending On Appeal Final

9. If on appeal, action action appealed to (provide name of court): Date Appeal Filed (MM/DD/YYYY):

10. If pending, date notice/process was served (MM/DD/YYYY) Exact Explanation

If not exact, provide explanation: _____

BANKRUPTCY / SIPC DISCLOSURE REPORTING PAGE (SBSE-A)

GENERAL INSTRUCTIONS

This Disclosure Reporting Page [DRP (SBSE)] is an an INITIAL OR AMENDED response to report details for affirmative responses to **Questions 1** on Schedule C of Form SBSE;

Check item(s) being responded to:

In the past ten years has the *principal* ever been a securities firm or a *control affiliate* of a securities firm that:

(1) has been the subject of a bankruptcy petition?

(2) has had a trustee appointed or a direct payment procedure initiated under the Securities Investor Protection Act?

Use a separate DRP for each event or *proceeding*. An event or *proceeding* may be reported for more than one person or entity using one DRP. File with a completed Execution Page.

It is not a requirement that documents be provided for each event or *proceeding*. Should they be provided, they will not be accepted as disclosure in lieu of answering the questions on this DRP.

If a *principal* is an individual or organization registered through CRD, such *principal* need only complete Part I of the *applicant's* appropriate DRP (SBSE-A). Details of the event must be submitted on the *principal's* appropriate DRP (BD) or DRP (U-4). If a *principal* is an organization not registered through the CRD, provide complete answers to all the items on the *applicant's* appropriate DRP (SBSE-a). The completion of this DRP does not relieve the *principal* of its obligation to update its CRD records.

PART I

- A. If the *principal* is registered with the CRD, provide the CRD number. If not, indicate "non-registered" by checking the appropriate checkbox.

Name of *Principal*

CRD NUMBER

Registered: Yes No

This DRP should be removed from the SBS Entity's record because the principal is no longer associated with the SBS Entity.

- B. If the *principal* is registered through the CRD, has the *principal* submitted a DRP (with Form U-4) or DRP (BD) to the CRD System for the event?

If the answer is "Yes," no other information on this DRP must be provided: If "No," complete Part II.

Yes No

Note: The completion of this Form does not relieve the *principal* of its obligation to update its CRD records.

PART II

1. Action Type: (check appropriate item)
 Bankruptcy Declaration Receivership
 Compromise Liquidated Other _____
2. Action Date (MM/DD/YYYY) _____ Exact Explanation

If not exact, provide explanation: _____

Form SBSE-BD

OMB Approval
OMB Number:3235-____
Expires:.....Month __, 2016
Estimated average burden hours per response:
per amendment:

**Application for Registration
of Security-based Swap
Dealers and Major Security-
based Swap Participants that
are Registered Broker-dealers**

FORM SBSE-BD INSTRUCTIONS

A. GENERAL INSTRUCTIONS

1. **FORM** - Form SBSE-BD is the Application for Registration as either a Security-based Swap Dealer or Major Security-based Swap Participant (collectively, "SBS Entities") by an entity that is registered or registering with the Commission as a broker or dealer. These SBS Entities must file this form to register with the Securities and Exchange Commission. An applicant must also file Schedules F and G, as appropriate. There are no Schedules A, B, C, D, or E.
2. **DEFINITIONS** - Form SBSE-BD uses the same definitions as in Form BD.
3. **ELECTRONIC FILING** - This Form SBSE-BD must be filed electronically with the Commission through the EDGAR system, and must utilize the EDGAR Filer Manual (as defined in 17 CFR 232.11) to file and amend Form SBSE-BD electronically to assure the timely acceptance and processing of those filings.¹⁹⁸¹ Additional documents shall be attached to this electronic application.
4. **UPDATING** - By law, the *applicant* must promptly update Form SBSE-BD information by submitting amendments whenever the information on file becomes inaccurate or incomplete for any reason [17 CFR 240.15Fb2-2]. In addition, the applicant must update any incomplete or inaccurate information contained on Form SBSE-BD prior to filing a notice of withdrawal from registration on Form SBSE-W [17 CFR 15Fb3-2(a)].
4. **FEDERAL INFORMATION LAW AND REQUIREMENTS** - An agency may not conduct or sponsor, and a *person* is not required to respond to, a collection of information unless it displays a currently valid control number. Sections 15F, 17(a) and 23(a) of the Exchange Act authorize the SEC to collect the information on this form from registrants. See 15 U.S.C. §§78o-10, 78q and 78w. Filing of this form is mandatory. The principal purpose of this Form is to permit the Commission to determine whether the *applicant* meets the statutory requirements to engage in the security-based swap business. The Commission maintain[s] a file of the information on this form and will make certain information collected via the form publicly available. Any member of the public may direct to the Commission any comments concerning the accuracy of the burden estimate on this Form, and any suggestions for reducing this burden. This collection of information has been reviewed by the Office of Management and Budget in accordance with the clearance requirements of 44 U.S.C. §3507. The information contained in this form is part of a system of records subject to the Privacy Act of 1974, as amended. The Securities and Exchange Commission has published in the Federal Register the Privacy Act Systems of Records Notice for these records.

B. FILING INSTRUCTIONS

1. FORMAT

- a. Items 1-4 and the accompanying Schedules must be answered and all fields requiring a response must be completed before the filing will be accepted.
- b. Failure to follow instructions or properly complete the form may result in the application being delayed or rejected.
- c. *Applicant* must complete the execution screen certifying that Form SBSE-BD and amendments thereto have been executed properly and that the information contained therein is accurate and complete.
- d. To amend information, the *applicant* must update the appropriate Form SBSE-BD screens.
- e. A paper copy, with original signatures, of the initial Form SBSE-BD filing and Schedules must be retained by the *applicant* and be made available for inspection upon a regulatory request.

The mailing address for questions and correspondence is:

1981

As discussed in the release proposing this Form, the Commission is currently developing a system to facilitate receipt of applications electronically. More specific instructions on how to file this Form may be included in the final version of the Form.

FORM SBSE-BD	Application for Registration as a Security-based Swap Dealer and Major Security-based Swap Participant that is Registered as a Broker-Dealer	Official Use	Official Use Only
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WARNING: Failure to keep this form current and to file accurate supplementary information on a timely basis, or the failure to keep accurate books and records or otherwise to comply with the provisions of law applying to the conduct of business as an SBS Entity, would violate the Federal securities laws and may result in disciplinary, administrative, injunctive or criminal action.

INTENTIONAL MISSTATEMENTS OR OMISSIONS OF FACTS MAY CONSTITUTE CRIMINAL VIOLATIONS.

[] APPLICATION [] AMENDMENT

1. Exact name and CRD number of the *applicant*:

A. Full name of the *applicant*: _____

B. CRD No.: _____

C. Website/URL: _____

D. Contact Employee:
 Name: _____ Title: _____
 Telephone Number: _____ Email Address: _____

E. Chief Compliance Officer designated by the *applicant* in accordance with Exchange Act Section 15F(k):
 Name: _____ Title: _____
 Telephone Number: _____ Email Address: _____

2. A. The *applicant* is registering as a security-based swap dealer: [] Yes [] No

B. The *applicant* is registering as a major security-based swap participant: [] Yes [] No

Because it: (check all that apply)
 [] maintains a substantial security-based swap position
 [] has substantial counterparty exposure [] is highly leveraged relative to its capital position

3. A. The *applicant* is presently registered with the Commodity Futures Trading Commission as a:
 [] Swap Dealer [] Major Swap Participant

B. The *applicant* is registering with the Commodity Futures Trading Commission as a:
 [] Swap Dealer [] Major Swap Participant

4. Is the *applicant* subject to regulation by a prudential regulator, as defined in Sec. 1a(39) of the Commodity Exchange Act.
 [] Yes [] No If "yes," identify the prudential regulator: _____

Briefly describe the *applicant's* business: _____

5. Is the *applicant* registered with a foreign financial regulatory authority?
 If "yes," list all such registrations on Schedule F, Page 1, Section II. [] []

EXECUTION:

The applicant consents that service of any civil action brought by or notice of any proceeding before the Securities and Exchange Commission in connection with the applicant's security-based swap activities, unless the applicant is a nonresident SBS Entity, may be given by registered or certified mail or confirmed telegram to the applicant's contact employee at the main address, or mailing address if different, given in Items 1E and 1F. If the applicant is a nonresident SBS Entity, it must complete Schedule F to designate a U.S. agent for service of process.

The undersigned certifies that he/she has executed this form on behalf of, and with the authority of, said applicant. The undersigned and applicant represent that the information and statements contained herein, including schedules attached hereto, and other information filed herewith are current, true and complete. The undersigned and applicant further represent that to the extent any information previously submitted is not amended such information is currently accurate and complete.

 Date (MM/DD/YYYY)

By: _____
 Signature

 Name of Applicant

 Name and Title of Person Signing on Applicant's behalf

This page must always be completed in full.

DO NOT WRITE BELOW THIS LINE - FOR OFFICIAL USE ONLY

**Schedule F of FORM SBSE
NONRESIDENT SECURITY-BASED
SWAP DEALERS AND MAJOR
SECURITY-BASED SWAP
PARTICIPANTS**

Applicant Name: _____
Date: _____ Firm SEC No.: _____

Official Use

Section I Service of Process and Certification Regarding Access to Records

Each nonresident security-based swap dealer and non-resident security-based swap participant shall use Schedule F to identify its United States agent for service of process and the certify that it can
(1) provide the Commission with prompt access to its books and records, and
(2) submit to onsite inspection and examination by the Commission.

1. Service of Process:
- A. Name of United States person *applicant* designates and appoints as agent for service of process

- B. Address of United States person *applicant* designates and appoints as agent for service of process

The above identified agent for service of process may be served any process, pleadings, subpoenas, or other papers in
(a) any investigation or administrative proceeding conducted by the Commission that relates to the *applicant* or about which the *applicant* may have information; and
(b) any civil or criminal suit or action or proceeding brought against the *applicant* or to which the *applicant* has been joined as defendant or respondent, in any appropriate court in any place subject to the jurisdiction of any state or of the United States or of any of its territories or possessions or of the District of Columbia, to enforce the Exchange Act. The *applicant* has stipulated and agreed that any such suit, action or administrative proceeding may be commenced by the service of process upon, and that service of an administrative subpoena shall be effected by service upon the above-named Agent for Service of Process, and that service as aforesaid shall be taken and held in all courts and administrative tribunals to be valid and binding as if personal service thereof had been made.

2. Certification regarding access to records:
Applicant can as a matter of law,
(1) provide the Commission with prompt access to its books and records, and
(2) submit to onsite inspection and examination by the Commission.
Applicant must attach to this Form SBSE a copy of the opinion of counsel it is required to obtain in accordance with paragraph (c)(2) or (c)(3) of Exchange Act Rule 15Fb2-4, as appropriate [paragraphs (c)(2) or (c)(3) of 17 CFR 240.15Fb2-4].
- Signature: _____
Name and Title: _____
Date: _____

Section II Registration with Foreign Financial Regulatory Authorities

Complete this Section for Registration with Foreign Financial Regulatory Authorities relating to ITEM 5. Each security-based swap dealer and major security-based swap participant that is registered with a foreign financial regulatory authority must list on Section II of this Schedule F, for each foreign financial regulatory authority with which it is registered, the following information:

1. _____
English Name of Foreign Financial Regulatory Authority Foreign Registration No. (if any) _____ English Name of Country: _____
2. _____
English Name of Foreign Financial Regulatory Authority Foreign Registration No. (if any) _____ English Name of Country: _____
3. _____
English Name of Foreign Financial Regulatory Authority Foreign Registration No. (if any) _____ English Name of Country: _____

If applicant has more than 3 Foreign Financial Regulatory Authorities to report, complete additional Schedule F Page 1s.

Schedule G of FORM SBSE-BD CERTIFICATION ON STATUTORY DISQUALIFICATION	Applicant Name: _____	Official Use
	Date: _____ Firm SEC No.: _____	

Use Schedule G to certify that none of the *applicant's* associated persons is subject to statutory disqualification (as that term is defined in Section 3(a)(39) of the Exchange Act [15 U.S.C. 78c(a)(39)]).

Instructions: This certification must be signed by the *applicant's* Chief Compliance Officer designated pursuant to Exchange Act Section 15F(k) or by his or her designee.
 For purposes of this Form, the term *associated person* shall have the meaning as specified in Section 3(a)(70) of the Exchange Act [15 U.S.C. 78c(a)(70)].

This is a: CERTIFICATION RE-CERTIFICATION

The *applicant* certifies that it has

- (a) performed background checks on all of its *associated persons* who effect or are involved in effecting, or who will effect or be involved in effecting, security-based swaps on its behalf, and
- (b) determined that no *associated person* who effects or is involved in effecting, or who will effect or be involved in effecting, security-based swaps on its behalf is subject to statutory disqualification, as defined in Section 3(a)(39) of the Securities Exchange Act of 1934 [15 U.S.C. 78c(a)(39)].

Applicant Name:	Date:
Signature of Chief Compliance Officer or Designee:	
Name of Chief Compliance Officer or Designee:	If Designee, Title of Designee:

Appendix D: List of Commenters

Market participants, foreign regulators, and other interested parties have submitted to the Commission (and the CFTC) numerous written comment letters that address the application of Title VII to cross-border activities. Because of the interdisciplinary nature of cross-border issues, these comments were filed in connection with several rulemakings and following the joint public roundtable regarding the application of Title VII to cross-border activities held by the Commission and the CFTC on August 1, 2011. The Commission has provided the legend and table below to facilitate the public's ability to access and review these comment letters.

Abbreviation	Source	Location
Definitions Concept Release (Advanced Joint Notice of Proposed Rulemaking or "ANPR")	Definitions Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act	http://www.sec.gov/comments/s7-16-10/s71610.shtml
Study on International Swap Regulation ("ISR")	Comments on Acceptance of Public Submissions for a Study on International Swap Regulation Mandated by Section 719(c) of the Dodd-Frank Wall Street Reform and Consumer Protection Act	http://www.sec.gov/comments/4-635/4-635.shtml
Intermediary Definitions Adopting Release ("IDAR")	SEC Final Rules on the Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant"	http://www.sec.gov/comments/s7-39-10/s73910.shtml
Registration Proposing Release ("RPR")	SEC Proposed Rules on the Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants	http://www.sec.gov/comments/s7-40-11/s74011.shtml
Regulation SBSR Proposing Release ("RSPR")	SEC Proposed Rules on Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information	http://www.sec.gov/comments/s7-34-10/s73410.shtml
Regulation SB SEF Proposing Release ("PRSB")	SEC Proposed Rules on the Registration and Regulation of Security-Based Swap Execution Facilities	http://www.sec.gov/comments/s7-06-11/s70611.shtml

Product Definitions ("PD")	Product Definitions Contained in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act	http://www.sec.gov/comments/s7-16-11/s71611.shtml
Public Comments on SEC Regulatory Initiatives Under the Dodd-Frank Act ("PC")	Security-Based Swap Dealers and Major Security-Based Swap Participants: Title VII Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act	http://www.sec.gov/comments/df-title-vii/swap/swap.shtml
Roundtable ("T7R")	August 1, 2011 – Joint Public Roundtable on International Issues Relating to the Implementation of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act.	http://www.sec.gov/comments/4-636/4-636.shtml
SDR Proposing Release ("SPR")	Security-Based Swap Data Repository Registration, Duties, and Core Principles	http://www.sec.gov/comments/s7-35-10/s73510.shtml
CFTC Title VII Definitions ("CFTC-D")	CFTC Proposed Rule 75 FR 51429: Definitions Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act	http://comments.cftc.gov/PublicPublicCom/CommentList.aspx?id=759
CFTC Further Definitions of "Swap Dealer" ("FSDS")	CFTC Proposed Rule 75 FR 80174: Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant"	http://comments.cftc.gov/PublicComments/CommentList.aspx?id=933
CFTC Further Definition of "Swap" ("FDS")	CFTC Proposed Rule 76 FR 29818: Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping	http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1032
CFTC Cross-Border Guidance ("CBG")	CFTC Proposed Interpretive Guidance and Policy Statement 77 FR 41214: Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act	http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1234
Interim Final Rule on Reporting of Security-Based Swap Transaction Data ("IFTR")	Interim Final Temporary Rule for Reporting of Security-Based Swap Transaction Data	http://sec.gov/comments/s7-28-10/s72810.shtml
End-User Exception Proposing Release ("EUEPR")	SEC Proposed Rules on the End-User Exception to Mandatory Clearing of Security-Based Swaps	http://www.sec.gov/comments/s7-43-10/s74310.shtml

Sequencing Policy Release ("SQPR")	SEC Statement of General Policy on the Sequencing of the Compliance Dates for Final Rules Applicable to Security-Based-Swaps Adopted Pursuant to the Securities Exchange Act of 1934 and the Dodd-Frank Wall Street Reform and Consumer Protection Act	http://www.sec.gov/comments/s7-05-12/s70512.shtml
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Below is a list of comment letters that we considered in this release.

1. "ABC Letter" American Benefits Council, to Elizabeth M. Murphy, Secretary, SEC (Apr. 8, 2011) (available in PRSBR)
2. "ACP/AMF Letter" Christian Noyer, Chairman, Autorité de Contrôle Prudential and Jean-Pierre Jouyet, Chairman, Autorité des Marchés Financiers to Mary Schapiro, Chairman, SEC (Feb. 11, 2011) (available in IDAR)
3. "AIMA Letter" Mary Richardson, Director of Regulatory and Tax Department, Alternative Investment Management Association to David A. Stawick, Secretary, CFTC and Elizabeth M. Murphy, Secretary, SEC (Feb. 22, 2011) (available in IDAR)
4. "APG Asset Management Letter" Guus Warringa, Chief Counsel, Legal, Tax, Regulations and Compliance, APG Algemene Pensioen Groep NV/ APG Asset Management to

- David A. Stawick, Secretary, CFTC and Elizabeth M. Murphy, Secretary, SEC (undated) (available in IDAR)
5. "AFGI Letter" Bruce Stern, Chairman, Association of Financial Guaranty Insurers (AFGI) to David A. Stawick, Secretary, CFTC and Elizabeth M. Murphy, Secretary, SEC (Sept. 19, 2011) (available in T7R)
6. "Asian-Pacific Regulators Letter" Belinda Gibson, Deputy Chairman, Australian Securities and Investments Commission; Malcolm Edey, Assistant Governor (Financial System), Reserve Bank of Australia; Arthur Yuen, Deputy Chief Executive, Hong Kong Monetary Authority; Keith Lui, Executive Director, Supervision of Markets, Securities and Futures Commission, Hong Kong; Teo Swee Lian, Deputy Managing Director (Financial Supervision), Monetary Authority of Singapore to Gary Gensler, Chairman, CFTC (Aug. 27, 2012) (unavailable online).
7. "BaFin Letter" Thomas Happel, Executive Director for Banking Supervision, Bundesanstalt für

- Finanzdienstleistungsaufsicht to Mary Schapiro, Chairman, SEC and Gary Gensler, Chairman, CFTC (Mar. 25, 2011) (available in IDAR)
8. "Better Markets Letter" Dennis M. Kelleher, President & CEO, Stephen W. Hall, Securities Specialist, Wallace C. Turbeville, Derivatives Specialist, Better Markets, Inc., to Elizabeth M. Murphy, Secretary, SEC (Feb. 4, 2011) (available in EUEPR)
9. "BIS Letter I" Gunter Pleines, Head of Banking, and Diego Devos, General Counsel, Bank for International Settlements to Ananda Radhakrishnan, Director of Clearing and Intermediary Oversight, CFTC and James Brigagliano, Deputy Director, Division of Trading and Markets, SEC (Mar. 18, 2011) (available in ANPR)
10. "BIS Letter II" Günter Pleines, Head of Banking Department, and Diego Devos, General Counsel, Bank for International Settlements to David A. Stawick, Secretary, CFTC, and Elizabeth M. Murphy, Secretary, SEC (July 20, 2011) (available in PD)
11. "BlackRock Letter" Joanne Medero, Richard Prager, and Supurna

- VedBrat, BlackRock, Inc. to Elizabeth M. Murphy, Secretary, SEC (Apr. 4, 2011) (available in PRSBR)
12. "Bloomberg Letter" Ben Macdonald, Global Head Fixed Income, Bloomberg LP to Elizabeth M. Murphy, Secretary, SEC (Apr. 4, 2011) (available in PRSBR)
13. "CEB Letter" Jacques Mirante-Peré, Chief Financial Officer, and Jan De Bel, General Counsel, Council of Europe Development Bank to Elizabeth M. Murphy, Secretary, SEC, and David A. Stawick, Secretary, CFTC (July 22, 2011) (available in PD)
14. "China Investment Letter" Wang Jianxi, Executive Vice President, China Investment Corp. to David A. Stawick, Secretary, CFTC and Elizabeth Murphy, Secretary, SEC (Feb. 22, 2011) (available in IDAR)
15. "Citadel Letter" Adam C. Cooper, Senior Managing Director and Chief Legal Officer, Citadel LLC, to Elizabeth M. Murphy, Secretary, SEC (Aug. 13, 2012) (available in SQPR)
16. "Citigroup Letter" James A. Forese, Chief Executive Officer,

Securities & Banking, Citigroup Inc. to David A. Stawick, Secretary, CFTC (Aug. 27, 2012)
(available in CBG)

17. "Cleary Letter I" Edward Rosen, Cleary Gottlieb Steen & Hamilton, LLP to David A. Stawick, Secretary, CFTC and Elizabeth M. Murphy, Secretary, SEC (Sept. 21, 2010) (available in ANPR)

18. "Cleary Letter II" Edward Rosen, Cleary Gottlieb Steen & Hamilton, LLP, for Bank of America, BNP Paribas, Citi, Credit Agricole, Credit Suisse (USA), Deutsche Bank AG, Morgan Stanley, Nomura Securities International, Inc., PNC Bank, National Association, Société Générale, UBS Securities LLC, and Wells Fargo & Co. to David A. Stawick, Secretary, CFTC and Elizabeth M. Murphy, Secretary, SEC (Feb. 14, 2011) (available in RSPR)

19. "Cleary Letter III" Edward J. Rosen, Partner, Cleary Gottlieb Steen & Hamilton LLP, for Bank of America, Merrill Lynch, Barclays Capital, BNP Paribas, Citi, Crédit Agricole Corporate and Investment Bank, Credit Suisse Securities (USA), Deutsche Bank AG,

HSBC, Morgan Stanley, Nomura Securities International, Inc., Société Générale, UBS Securities LLC, and Wells Fargo & Co. to Elizabeth M. Murphy, Secretary, SEC and David A. Stawick, Secretary, CFTC (April 5, 2011) (available in PRSBR)

20. "Cleary Letter IV"

Edward Rosen, Cleary Gottlieb Steen & Hamilton, LLP, for Bank of America, Barclays Capital, BNP Paribas, Citi, Credit Agricole, Credit Suisse (USA), Deutsche Bank AG, HSBC, Morgan Stanley, Nomura Securities International, Inc., Société Générale, and UBS Securities LLC to David A. Stawick, Secretary, CFTC, Elizabeth M. Murphy, Secretary, SEC, Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, Office of the Comptroller of the Currency, Robert E. Feldman, Executive Secretary, Federal Deposit Insurance Corp., Gary K. Van Meter, Director, Office of Regulatory Policy, Farm Credit Administration, and Alfred Pollard, General Counsel, Federal Housing Finance Agency (Sept. 20, 2011) (available in

T7R)

21. "CME Letter" Craig S. Donohue, Chief Executive Officer, CME Group Inc., to Elizabeth M. Murphy, Secretary, SEC (Apr. 4, 2011) (available in PRSBR)
22. "Davis Polk Letter I" Lanny Schwartz, Arthur Long, Bob Colby, and Courtenay Myers, Davis Polk & Wardwell, for Barclays Bank PLC, BNP Paribas S.A., Deutsche Bank AG, Royal Bank of Canada, The Royal Bank of Scotland Group PLC, Société Générale, and UBS AG to David A. Stawick, Secretary, CFTC, Elizabeth M. Murphy, Secretary, SEC, and Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System (Jan. 11, 2011) (available in IDAR)
23. "Davis Polk Letter II" Lanny Schwartz, Arthur Long, Bob Colby, and Courtenay Myers, Davis Polk & Wardwell, for Barclays Bank PLC, BNP Paribas S.A., Credit Suisse AG, Deutsche Bank AG, HSBC, Nomura Securities International, Inc., Rabobank Nederland, Royal Bank of Canada, The Royal Bank of Scotland Group PLC, Société Générale, The Toronto-Dominion Bank, and UBS AG to

David A. Stawick, Secretary, CFTC, Elizabeth M. Murphy, Secretary, SEC, and Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System (Feb. 17, 2011) (available in IDAR)

24. "Deutsche Bank Letter"

Ernest C. Goodrich, Jr., Managing Director – Legal Department, and Marcelo Riffaud, Managing Director - Legal Department, Deutsche Bank AG to David A. Stawick, Secretary, CFTC, Elizabeth M. Murphy, Secretary, SEC (Nov. 5, 2010) (available in IFTR)

25. "DTCC Letter I"

Larry E. Thompson, General Counsel, Depository Trust & Clearing Corporation to Mary Schapiro, Chairman, SEC and Gary Gensler, Chairman, CFTC (Nov. 15, 2010) (available in SPR)

26. "DTCC Letter II"

Larry E. Thompson, General Counsel, Depository Trust & Clearing Corporation to Elizabeth M. Murphy, Secretary, SEC (Jan. 18, 2011) (available in RSPR)

27. "DTCC Letter III"

Larry E. Thompson, General Counsel, Depository Trust & Clearing Corporation to Elizabeth M.

Murphy, Secretary, SEC (Jan. 24, 2011)

(available in SPR)

28. "DTCC Letter IV"

Larry E. Thompson, General Counsel, Depository Trust & Clearing Corporation to Mary Schapiro, Chairman, SEC and Gary Gensler, Chairman, CFTC (June 3, 2011) (available in RSPR and SPR)

29. "ECB Letter I"

Daniela Russo, Director General, Directorate General Payments and Market Infrastructure, and Antonio Sainz de Vicuna, General Counsel, European Central Bank to Ananda Radhakrishnan, Director of Clearing and Intermediary Oversight, CFTC and James Brigagliano, Deputy Director, Division of Trading and Markets, SEC (May 6, 2011) (available in CFTC-D; not available on SEC website, but accessible via CFTC website)

30. "ECB Letter II"

Daniela Russo, Director General, Directorate General Payments and Market Infrastructure, European Central Bank to Natalie Markman Radhakrishnan, Office of International Affairs, CFTC, and Babbak Sabahi, Office of International Affairs, SEC (Sep. 29, 2011) (available in ISR)

31. "EDF Letter" Eric Dennison, Sr. Vice President and General Counsel, Stephanie Miller, Assistant General Counsel-Commodities, Bill Hellinghausen, Director of Regulatory Affairs, EDF Trading North America, LLC to David A. Stawick, Secretary, CFTC (Feb. 22, 2011) (available in IDAR)
32. "EIB Letter" A. Querejeta, Secretary General and General Counsel, and B. de Mazières, Director General, European Investment Bank to Ananda Radhakrishnan, Director of Clearing and Intermediary Oversight, CFTC, and James Brigagliano, Deputy Director, Division of Trading and Markets, SEC (July 22, 2011) (available in PD)
33. "ESMA Letter" Carlos Tavares, Vice-Chairman, European Securities and Markets Authority to Mary Schapiro, Chairman, SEC (Jan. 17, 2011) (available in SPR)
34. "European Commission Letter I" Michel Barnier, European Commissioner for Internal Markets and Services, European Commission to Mary Schapiro, Chairman, SEC

- and Gary Gensler, Chairman, CFTC (July 19, 2011) (unavailable online)
35. “European Commission Letter II” Michel Barnier, European Commissioner for Internal Markets and Services, European Commission to Mary Schapiro, Chairman, SEC and Gary Gensler, Chairman, CFTC (Oct. 24, 2011) (unavailable online)
36. “European Financial Markets Letter” Antonio Sainz de Vicuna, European Financial Markets Lawyers Group to David A. Stawick, Secretary, CFTC and Elizabeth M. Murphy, Secretary, SEC (Mar. 24, 2011) (available in PC)
37. “Financial Services Roundtable Letter” Richard M. Whiting, Executive Director and General Counsel, Financial Services Roundtable to David A. Stawick, Secretary, CFTC and Elizabeth M. Murphy, Secretary, SEC (Feb. 22, 2011) (available in IDAR)
38. “GFI Letter” Scott Pintoff, General Counsel, GFI Group Inc., to Elizabeth Murphy, Secretary, SEC (July 12, 2011) (available in PRSBR)
39. “GIC Letter” Lee Ming Chua, General Counsel, Government of Singapore Investment Corp. Pte Ltd. to David A.

- Stawick, Secretary, CFTC and Elizabeth M. Murphy, Secretary, SEC (Feb. 22, 2011) (available in ANPR)
40. "ICI Letter" Karrie McMillan, General Counsel, Investment Company Institute to Elizabeth M. Murphy, Secretary, SEC, dated (Jan.18, 2011) (available in RSPR)
41. "IIB Letter" Sarah A. Miller, Chief Executive Officer, Institute of International Bankers to David A. Stawick, Secretary, CFTC and Elizabeth M. Murphy, Secretary, SEC (Jan. 10, 2011) (available in IDAR)
42. "ISDA Letter I" Robert Pickel, Executive Vice Chairman, International Swaps and Derivatives Association, Inc. to David A. Stawick, Secretary, CFTC and Elizabeth M. Murphy, Secretary, SEC (Feb. 22, 2011) (available in IDAR)
43. "ISDA Letter II" Robert Pickel, Executive Vice Chairman, International Swaps and Derivatives Association, Inc. to Elizabeth M. Murphy, Secretary, SEC (Feb. 22, 2011) (available in IFTR)

44. "ISDA/SIFMA Letter I" Robert Pickel, Executive Vice Chairman,
International Swaps and Derivatives Association,
Inc. and Kenneth Bentsen, Jr. Executive Vice
President, Public Policy and Advocacy, Securities
Industry and Financial Markets Association to
Elizabeth M. Murphy, Secretary, SEC (Jan. 18,
2011) (available in RSPR)
45. "ISDA/SIFMA Letter II" Robert Pickel, Executive Vice Chairman,
International Swaps and Derivatives Association,
Inc. and Kenneth E. Bentsen, Jr., Executive Vice
President, Public Policy and Advocacy, Securities
Industry and Financial Markets Association to
Elizabeth M. Murphy, Secretary, SEC (Apr. 4,
2011) (available in PRSBR)
46. "Japanese Banks Letter" Bank of Tokyo-Mitsubishi UFJ, Ltd., Mizuho
Corporate Bank, Ltd., and Sumitomo Mitsui
Banking Corp. to David A. Stawick, Secretary,
CFTC, Elizabeth M. Murphy, Secretary, SEC, and
Jennifer J. Johnson, Secretary, Board of Governors
of the Federal Reserve System (May 6, 2011)
(available in RSPR)
47. "JFSA Letter I" Katsunori Mikuniya, Commissioner and Chief

Executive, Financial Services Agency,
Government of Japan to Gary Gensler, Chairman,
CFTC; copy recipients include Chairman Mary
Schapiro and Commissioners Luis Aguilar,
Kathleen Casey, Troy Parades, and Elisse Walter,
SEC (Apr. 1, 2011) (unavailable online)

48. "JFSA Letter II"

Chikahisa Sumi, Deputy Commissioner for
International Affairs, Financial Services Agency,
Government of Japan to Jill Sommers,
Commissioner, CFTC; copy recipients include
Chairman Mary Schapiro and Commissioners Luis
Aguilar, Kathleen Casey, Troy Parades, and Elisse
Walter, SEC (June 3, 2011) (unavailable online)

49. "Jones Day Letter"

Joel Telpner, Jones Day to David A. Stawick,
Secretary, CFTC, and Elizabeth M. Murphy,
Secretary, SEC (Feb. 22, 2011) (available in
IDAR)

50. "KfW Letter"

Dr. Lutz-Christian Funke, Sr. Vice President, and
Dr. Frank Czichowski, Sr. Vice President and
Treasurer, KfW Bankengruppe to David A.
Stawick, Secretary, CFTC, and Elizabeth M.
Murphy, Secretary, SEC (Mar. 20, 2012)

(available in PD)

51. "MFA Letter I" Stuart J. Kaswell, Executive Vice President, Managing Director, and General Counsel, Managed Funds Association to David A. Stawick, Secretary, CFTC, and Elizabeth M. Murphy, Secretary, SEC (Jan. 24, 2011) (available in SPR)
52. "MFA Letter II" Stuart J. Kaswell, Executive Vice President and Managing Director, General Counsel, Managed Funds Association to David A. Stawick, Secretary, CFTC, and Elizabeth M. Murphy, Secretary, SEC (Feb. 22, 2011) (available in IDAR)
53. "MFA Letter III" Stuart J. Kaswell, Executive Vice President, Managing Director & General Counsel, Managed Funds Association, to Elizabeth M. Murphy, Secretary, SEC (Apr. 4, 2011) (available in PRSBR)
54. "MFA Letter IV" Stuart J. Kaswell, Executive Vice President & Managing Director, General Counsel, Managed Funds Association to Elizabeth M. Murphy, Secretary, SEC (Aug. 13, 2012) (available in SQPR)

55. "MarketAxess Letter" Richard M. McVey, Chairman and Chief Executive Officer, MarketAxess Holdings Inc. to Elizabeth M. Murphy, Secretary, SEC (April 4, 2011) (available in PRSBR)
56. "Markit Letter" Kevin Gould, President, Markit North America, Inc. to David A. Stawick, Secretary, CFTC and Elizabeth M. Murphy, Secretary, SEC (Sept. 19, 2011) (available in T7R)
57. "MarkitSERV Letter I" Jeff Gooch, Chief Executive Officer, MarkitSERV to Elizabeth M. Murphy, Secretary, SEC (Jan. 24, 2011) (available in RSPR and SPR)
58. "MarkitSERV Letter II" Jeff Gooch, CEO, MarkitSERV to David A. Stawick, Secretary, CFTC, Elizabeth M. Murphy, Secretary, SEC (Sept. 19, 2011) (available in T7R)
59. "Milbank Tweed Letter" Winthrop N. Brown, Milbank, Tweed, Hadley & McCloy, LLP to David A. Stawick, Secretary, CFTC, and Elizabeth M. Murphy, Secretary, SEC (Feb. 22, 2011) (available in IDAR)
60. "Multiple Associations Letter I" Financial Services Forum, Futures Industry Association, International Swaps and Derivatives Association, and Securities Industry and Financial

Markets Association to David A. Stawick,
Secretary, CFTC, and Elizabeth M. Murphy,
Secretary, SEC (May 4, 2011) (available in
ANPR)

61. "Multiple Associations Letter II"
Futures Industry Association, the Financial
Services Roundtable, Institute of International
Bankers, Insured Retirement Institute,
International Swaps and Derivatives Association,
Securities Industry and Financial Markets
Association, and U.S. Chamber of Commerce to
Elizabeth M. Murphy, Secretary, SEC (May 31,
2011) (available in ANPR)
62. "Multiple Associations Letter III"
Conrad Voldstad, CEO, International Swaps and
Derivatives Association; T. Timothy Ryan, Jr.,
President and CEO, Global Financial Markets
Association; Guido Ravoet, CEO, Alternative
Investment Management Association; Anthony
Belchambers, CEO, Futures and Options
Association; Jane Lowe, Director, Markets,
Investment Management Association; and Alex
McDonald, CEO, Wholesale Market Brokers'
Association and London Energy Brokers'

Association to Michel Barnier, Commissioner for the Internal Market and Services, The European Commission, and Timothy Geithner, Secretary, The Department of the Treasury; copy recipients include Chairman Mary Schapiro and Commissioners Luis Aguilar, Kathleen Casey, Troy Parades, and Elisse Walter, SEC (July 5, 2011) (available in ISR)

63. "Multiple Associations Letter IV"

ABA Securities Association; American Council of Life Insurers; Financial Services Roundtable; Futures Industry Association; Institute of International Bankers; International Swaps and Derivatives Association; and Securities Industry and Financial Markets Association to David A. Stawick, Secretary, CFTC; Elizabeth M. Murphy, Secretary, SEC; Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System; Office of the Comptroller of the Currency; Robert E. Feldman, Executive Secretary, Federal Deposit Insurance Corporation; Alfred M. Pollard, General Counsel, Federal Housing Finance Agency; Gary K. Van Meter,

- Director, Office of Regulatory Policy, Farm Credit Administration (Sept. 8, 2011) (available in ANPR)
64. "Newedge Letter" Gary DeWaal, Senior Managing Director and General Counsel, Newedge Group to David A. Stawick, Secretary, CFTC and Elizabeth M. Murphy, SEC (Feb. 24, 2011) (available in IDAR)
65. "NIB Letter" Heikki Cantell, General Counsel, and Lars Eibeholm, Vice President, Chief Financial Officer, Head of Treasury, and Pernelle de Klauman, Deputy Chief Counsel, Nordic Investment Bank to David A. Stawick, Secretary, CFTC and Elizabeth M. Murphy, Secretary, SEC (Aug. 2, 2011) (available in PD)
66. "Norges Bank Letter" Yngve Slyngstad, CEO, and Marius Nygaard Haug, Global Head of Legal, Norges Bank Investment Management to David A. Stawick, Secretary, CFTC and Elizabeth M. Murphy, Secretary, SEC (Feb. 18, 2011) (available in IDAR)
67. "Phoenix Letter" Nicholas J. Stephan, Chief Executive Officer,

- Phoenix Partners Group LP, to Elizabeth M. Murphy, Secretary, SEC (Apr. 4, 2011) (available in PRSBR)
68. "Rabobank Letter" William R. Mansfield, Managing Director, Head of Global Financial Markets Americas, Rabobank Nederland to David A. Stawick, Secretary, CFTC, and Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System (Apr. 5, 2011) (available in FDSD; not available on SEC website, but accessible via CFTC website)
69. "SDMA Letter I" Michael Hisler, Swaps & Derivatives Market Association, to Elizabeth M. Murphy, Secretary, SEC (Feb. 18, 2012) (available in PRSBR)
70. "SDMA Letter II" Michael Hisler, Swaps & Derivatives Market Association, to Elizabeth M. Murphy, Secretary, SEC (Apr. 21, 2012) (available in PRSBR)
71. "SIFMA Letter I" Kenneth Bentsen, Executive Vice President, Public Policy and Advocacy, Securities Industry and Financial Markets Association to David A. Stawick, Secretary, CFTC, Elizabeth M. Murphy, Secretary, SEC, Jennifer J. Johnson, Secretary,

Board of Governors of the Federal Reserve
System, John Walsh, Acting Comptroller, Office
of the Comptroller of the Currency, Administrator
of National Banks, Robert E. Feldman, Executive
Secretary, Federal Deposit Insurance Corp.,
Edward DeMarco, Acting Director, Federal
Housing Finance Agency, and Gary Van Meter,
Acting Director, Farm Credit Administration (Feb.
3, 2011) (available in IDAR)

72. "SIFMA Letter II"

Kenneth E. Bentsen, Executive Vice President,
Public Policy and Advocacy, Securities Industry
and Financial Markets Association to Elizabeth M.
Murphy, Secretary, SEC (Dec. 16, 2011)
(available in RPR)

73. "SIFMA AMG Letter I"

Timothy W. Cameron, Managing Director, Asset
Management Group, Securities Industry and
Financial Markets Association to Elizabeth M.
Murphy, Secretary, SEC (Jan. 18, 2011) (available
in RSPR)

74. "SIFMA AMG Letter II"

Timothy W. Cameron, Managing Director, Asset
Management Group, Securities Industry and
Financial Markets Association, to Elizabeth M.

- Murphy, Secretary, SEC (Apr. 4, 2011) (available in PRSBR)
75. "Société Générale Letter I" Laura J. Schisgall, Managing Director and Senior Counsel, Société Générale to Ananda Radhakrishnan, Director of Clearing and Intermediary Oversight, CFTC, John M. Ramsay, Deputy Director, Division of Trading and Markets, SEC, and Mark E. Van Der Weide, Senior Associate Director, Division of Supervision and Regulation, Board of Governors of the Federal Reserve System (Nov. 23, 2010) (available in PC)
76. "Société Générale Letter II" Laura J. Schisgall, Managing Director and Senior Counsel, Société Générale to David A. Stawick, Secretary, Commodity Futures Trading Commission, Elizabeth M. Murphy, Secretary, SEC (Feb. 18, 2011) (available in IDAR)
77. "Sullivan & Cromwell Letter" Kenneth Raisler, Sullivan & Cromwell LLP, on behalf of Bank of America Corp., Citigroup Inc., and JP Morgan Chase & Co. to David A. Stawick, Secretary, CFTC, Elizabeth M. Murphy, Secretary, SEC, and Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System (Feb.

22, 2011) (available in IDAR)

78. "TCX Letter"

Joost Zuidberg, Managing Director, Chief Executive Officer and Brice Ropion, Director and Chief Operating Officer, TCX Investment Management Company B.V. to Marcia Blase, Counsel, Office of Commissioner Jill E. Sommers, CFTC (Dec. 15, 2011) (available in FDSD; not available on SEC website, but accessible via CFTC website)

79. "Thomson Letter"

Nancy C. Gardner, Executive Vice President and General Counsel, Thomson Reuters Markets to Elizabeth M. Murphy, Secretary, SEC (Apr. 4, 2011) (available in PRSBR)

80. "TradeWeb Letter"

Lee H. Olesky, Chief Executive Officer, and Douglas L. Friedman, General Counsel, Tradeweb Markets LLC to Elizabeth M. Murphy, Secretary, SEC (Apr. 4, 2011) (available in PRSBR)

81. "UBS Letter"

David Kelly, Managing Director, and Paul Hamill, Executive Director, UBS Securities LLC, to Elizabeth M. Murphy, Secretary, SEC (Nov. 2, 2011) (available in PRSBR)

82. "Vanguard Letter" Gus Sauter, Managing Director and Chief Investment Officer, and John Hollyer, Principal and Head of Risk Management and Strategy Analysis, Vanguard to Elizabeth M. Murphy, Secretary, SEC (Jan. 18, 2011) (available in RSPR)
83. "WMBAA Letter" Stephen Merkel, Chairman, Shawn Bernardo, Vice Chairman, Christopher Ferreri, Board Member, J. Christopher Giancarlo, Board Member, and Julian Harding, Board Member, Wholesale Market Brokers' Association, Americas to Elizabeth M. Murphy, Secretary, SEC (Apr. 4, 2011) (available in PRSBR)
84. "World Bank Letter I" John Gandolfo, Acting Vice President and Treasurer, The World Bank to Jill Sommers, Commissioner, CFTC (Apr. 5, 2011) (available in ANPR)
85. "World Bank Letter II" Vincenzo La Via, World Bank Group CFO, Anne-Marie Leroy, Senior Vice President and Group General Counsel, and Rachel Robbins, Vice President and General Counsel of International Finance Corp. to David A. Stawick, Secretary,

CFTC (July 22, 2011) (available in FDS; not
available on SEC website, but accessible via
CFTC website)

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Date: May 1, 2013



SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240, 242, and 249

Release No. 34-69491; File Nos. S7-27-10, S7-32-10, S7-34-10, S7-35-10, S7-43-10, S7-03-11, S7-06-11, S7-08-11, S7-25-11, S7-40-11, S7-05-12, S7-08-12

RIN 3235-AK74, 3235-AK77, 3235-AK80, 3235-AK79, 3235-AK88, 3235-AK91, 3235-AK93, 3235-AL13, 3235-AL10, 3235-AL05, 3235-AL12

REOPENING OF COMMENT PERIODS FOR CERTAIN RULEMAKING RELEASES AND POLICY STATEMENT APPLICABLE TO SECURITY-BASED SWAPS PROPOSED PURSUANT TO THE SECURITIES EXCHANGE ACT OF 1934 AND THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT

AGENCY: Securities and Exchange Commission.

ACTION: Reopening of comment periods.

SUMMARY: The Securities and Exchange Commission ("Commission") is reopening the comment periods for its outstanding rulemaking releases, published in the Federal Register and listed herein, that concern security-based swaps ("SB swaps") and SB swap market participants and were proposed pursuant to certain provisions of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") and the Securities Exchange Act of 1934 (the "Exchange Act"), among other provisions (together, the "Proposed Rules"). The Commission is also reopening the comment period for its Statement of General Policy on the Sequencing of the Compliance Dates for Final Rules Applicable to Security-Based Swaps adopted pursuant to the Exchange Act and the Dodd-Frank Act, published in the Federal Register on June 14, 2012 (the "Policy Statement"). The reopening of these comment periods is intended to allow interested persons additional time to analyze and comment upon the Proposed Rules and the Policy Statement in light of the Commission's proposal of substantially all of the rules required to be adopted by Title VII of the Dodd-Frank Act, its proposal of rules and interpretations addressing the application of the SB swap provisions of Title VII of the Dodd-

Frank Act to cross-border SB swap transactions and non-U.S. persons that act in capacities regulated under the Dodd-Frank Act (the "Cross-Border Proposed Rules"), and the Commodity Futures Trading Commission's (the "CFTC") adoption of substantially all of the rulemakings establishing the new regulatory framework for swaps. All comments received to date on the Proposed Rules and the Policy Statement will be considered and need not be resubmitted.

DATES: For the Proposed Rules and the Policy Statement, the comment periods are re-opened until [*insert date 60 days from publication in the Federal Register*].

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/proposed.shtml>);
- Send an email to rule-comments@sec.gov. Please include the file number for the specific action being commented upon on the subject line; or
- Use the Federal Rulemaking portal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

Paper Comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to the file number for the specific action being commented upon. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. We will post all comments on the Commission's Internet website (<http://www.sec.gov>). Comments also are available for website viewing and printing at the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm.

All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: With respect to this release, Ann Parker McKeehan, Special Counsel, at (202) 551-5797, or Jason Williams, Attorney-Adviser, at (202) 551-5763, Office of Derivatives Policy, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549. With respect to a particular action discussed herein, the Commission staff member listed in the action.

SUPPLEMENTARY INFORMATION:

I. Background

Subtitle B of Title VII of the Dodd Frank Act¹ ("Title VII") amends the Securities Act of 1933 ("Securities Act")² and the Exchange Act³ to substantially expand the regulation of the SB swap market with a goal of establishing a new regulatory framework within which this market can evolve in a more transparent, efficient, fair, accessible, and competitive manner.⁴ Under the Dodd-Frank Act, regulatory authority over derivatives is divided between the Commission and the CFTC, with the Commission having authority over SB swaps, the CFTC having authority over swaps, which represent the overwhelming majority of the overall market for derivatives subject to the Dodd-Frank Act, and the Commission and the CFTC jointly regulating mixed swaps.⁵

¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

² 15 U.S.C. 77a *et seq.*

³ 15 U.S.C. 78a *et seq.*

⁴ See generally Subtitle B of Title VII.

⁵ Section 712(d) of the Dodd-Frank Act provides that the Commission and the CFTC, in consultation with the Board of Governors of the Federal Reserve System, shall further define the terms "swap" and "security-based

The Title VII amendments to the Exchange Act generally require, among other things: (1) the registration and comprehensive oversight of security-based swap dealers and major security-based swap participants;⁶ (2) the reporting of SB swaps to a registered security-based swap data repository (“SDR”), or to the Commission (if the SB swap is uncleared and no SDR will accept the SB swap), and dissemination of SB swap information to the public;⁷ (3) the clearing of SB swaps at a registered clearing agency (or a clearing agency that is exempt from registration) if the Commission makes a determination that such SB swaps are required to be cleared, unless an exception from the mandatory clearing requirement applies;⁸ and (4) if an SB swap is subject to the clearing requirement, the execution of the SB swap transaction on an exchange, on a security-based swap execution facility (“SB SEF”) registered under the Exchange Act,⁹ or on an

swap,” among others. These terms are defined in sections 721 and 761 of the Dodd-Frank Act and the Commission and the CFTC have adopted further definitions of these terms in a joint rulemaking. See Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Security-Based Swap Agreement Recordkeeping, Release No. 33-9338 (July 18, 2012); 77 FR 48208 (Aug. 13, 2012) (“Product Definitions Rules”).

⁶ See section 15F of the Exchange Act, 15 U.S.C. 78o-10.

⁷ See section 3(a)(75) of the Exchange Act, 15 U.S.C. 78c(a)(75) (defining the term “security-based swap data repository”); section 13(m) of the Exchange Act (regarding public availability of SB swap data); section 13(n) of the Exchange Act (regarding requirements related to SDRs); and section 13A of the Exchange Act (regarding reporting and recordkeeping requirements for certain SB swaps). See also Security-Based Swap Data Repository Registration, Duties, and Core Principles, Release No. 34-63347 (Nov. 19, 2010), 75 FR 77306 (Dec. 10, 2010); corrected at 75 FR 79320 (Dec. 20, 2010) and 76 FR 2287 (Jan. 13, 2011); and Regulation SBSR – Reporting and Dissemination of Security-Based Swap Information, Release No. 34-63346 (Nov. 19, 2010), 75 FR 75208 (Dec. 2, 2010).

⁸ See section 3C(a)(1) of the Exchange Act, 15 U.S.C. 78c-3(a)(1). See also Process for Submissions for Review of Security-Based Swaps for Mandatory Clearing and Notice Filing Requirements for Clearing Agencies: Technical Amendments to Rule 19b-4 and Form 19b-4 Applicable to All Self-Regulatory Organizations, Release No. 34-63557 (Dec. 15, 2010), 75 FR 82490 (Dec. 30, 2010).

⁹ 15 U.S.C. 78c-4.

SB SEF that has been exempted from registration by the Commission under the Exchange Act,¹⁰ unless no SB SEF or exchange makes such SB swap available for trading.¹¹

The Commission has proposed substantially all of the rules required to be adopted by Title VII.¹² The Commission also has adopted the following rules:

- Joint rules with the CFTC that further define the terms “swap dealer,” “security-based swap dealer,” “major swap participant,” “major security-based swap participant,” and “eligible contract participant;”¹³
- Rules that establish the procedure by which clearing agencies submit SB swaps for a determination as to whether those instruments should be subject to mandatory clearing;¹⁴
- Joint rules with the CFTC that further define the terms “swap,” “security-based swap,” and “security-based swap agreement” and regarding the regulation of mixed swaps and SB swap agreement recordkeeping;¹⁵ and
- Rules that establish standards for how registered clearing agencies should manage their risks and run their operations.¹⁶

¹⁰ Id. at 78c-4(e).

¹¹ See section 3C(g) of the Exchange Act, 15 U.S.C. 78c-3(g) and section 3C(h) of the Exchange Act, 15 U.S.C. 78c-3(h). See also section 3(a)(77) of the Exchange Act, 15 U.S.C. 78c(77) (defining the term “security-based swap execution facility”). See also Registration and Regulation of Security-Based Swap Execution Facilities, Release No. 34-63825 (Feb. 2, 2011), 76 FR 10948 (Feb. 28, 2011).

¹² The Commission has not yet proposed rules regarding the reporting and recordkeeping requirements to which security-based swap dealers and major security-based swap participants will be subject pursuant to Exchange Act section 15F(f). 15 U.S.C. 78o-10(f).

¹³ See Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant”, Release No. 34-66868 (Apr. 27, 2012), 77 FR 30596 (May 23, 2012) (“Entity Definitions Rules”).

¹⁴ See Process for Submissions for Review of Security-Based Swaps for Mandatory Clearing and Notice Filing Requirements for Clearing Agencies; Technical Amendments to Rule 19b-4 and Form 19b-4 Applicable to All Self-Regulatory Organizations, Release No. 34-67286 (June 28, 2012), 77 FR 41602 (July 13, 2012) (“Clearing Procedures Rules”).

¹⁵ See Product Definitions Rules, supra note 5.

Most recently, the Commission has proposed the Cross-Border Proposed Rules, which address the treatment of cross-border SB swap transactions and non-U.S. persons acting in capacities regulated under Title VII.¹⁷ While the Commission may propose additional rules pertaining to SB swaps that are not mandated by Title VII, SB swap market participants and other members of the public now have a substantially complete picture of the Commission's proposed regulatory framework for SB swaps. Additionally, the CFTC has adopted nearly all of the rules establishing the swaps regulatory regime.¹⁸

II. Reopening of Comment Periods

In light of the substantially complete picture of the proposed SB swap regulatory regime and the CFTC's adoption of many of the rulemakings creating the swaps regulatory regime, the Commission is reopening the comment period of the Proposed Rules and the Policy Statement until [*insert date 60 days from publication in the Federal Register*] to provide the public with an additional opportunity to analyze and comment upon the proposed SB swap regulatory framework, either in part or as a whole. Commenters may submit, and the Commission will consider, comments on any aspect of the Proposed Rules and the Policy Statement. In addition to the questions raised in the Proposed Rules and the Policy Statement, the Commission specifically seeks comments on the following:

¹⁶ See Clearing Agency Standards, Release No. 34-68080 (Oct. 22, 2012), 77 FR 66219 (Nov. 2, 2012) ("Clearing Agency Standards").

¹⁷ See Cross-Border Application of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act; Re-Proposal of Regulation SBSR and Certain Rules and Forms Relating to the Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants, Release No. 34-_____ (____, 2013).

¹⁸ CFTC Chairman Gary Gensler has noted that the CFTC has "largely completed the swaps market rulemaking, with 80 percent behind us...." Gary Gensler, Chairman, Commodity Futures Trading Comm'n, Opening Remarks at CFTC Public Roundtable on "Futurization of Swaps" (Jan. 31, 2013) (transcript available at <http://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-130>).

- The economic consequences and effects, including costs and benefits, of the Proposed Rules, either individually or as a whole, including any related quantitative or qualitative information. Please specify whether such information includes the costs and benefits of systems, policies, or procedures already implemented to comply with the CFTC's adoption of final rules and interpretive orders pertaining to Title VII (together, the "CFTC Rules");
- The overall framework and approach to implementation detailed in the Proposed Rules and the Policy Statement;
- The relationship of the Proposed Rules to any parallel requirements of other authorities, including the CFTC and relevant foreign regulatory authorities;
- With respect to the CFTC Rules, whether and to what extent the Commission in adopting its own rules should emphasize consistency with the CFTC Rules versus adopting rules that are more tailored to the SB swap market, with inclusion of any specific examples where consistency or tailoring of a particular rule or rule set is more critically important; and
- Whether there are any areas where additional rules or interpretations should be proposed or formal guidance provided and if so, why.

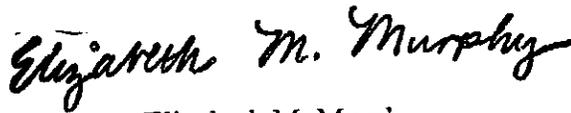
The comment periods for the following actions are being reopened until [*insert date 60 days from publication in the Federal Register*]:¹⁹

¹⁹ The comment periods for the Entity Definitions Rules, the Clearing Procedures Rules, the Product Definitions Rules, and the Clearing Agency Standards are not being reopened given that, as noted in Section I above, these rules have been adopted by the Commission.

Date Published in the Federal Register	Title and Release Number of Rulemaking	Date Closed
10/26/2010	Ownership Limitations and Governance Requirements for Security-Based Swap Clearing Agencies, Security-Based Swap Execution Facilities, and National Securities Exchanges with Respect to Security-Based Swaps under Regulation MC (Release No. 34-63107, File No. S7-27-10) and Reopening of Comment Period (Release No. 34-64018)	4/29/2011
11/8/2010	Prohibition Against Fraud, Manipulation, and Deception in Connection with Security-Based Swaps (Release No. 34-63236, File No. S7-32-10)	12/23/2010
12/2/2010	Regulation SBSR -- Reporting and Dissemination of Security-Based Swap Information (Release No. 34-63346, File No. S7-34-10)	1/18/2011
12/10/2010	Security-Based Swap Data Repository Registration, Duties, and Core Principles (Release No. 34-63347, File No. S7-35-10)	1/24/2011
12/21/2010	End-User Exception to Mandatory Clearing of Security-Based Swaps (Release No. 34-63556, File No. S7-43-10)	2/4/2011
1/21/2011	Trade Acknowledgement and Verification of Security-Based Swap Transactions (Release No. 34-63727, File No. S7-03-11)	2/22/2011
2/28/2011	Registration and Regulation of Security-Based Swap Execution Facilities (Release No. 34-63825, File No. S7-06-11)	4/4/2011
3/16/2011	Clearing Agency Standards for Operation and Governance (Release No. 34-64017, File No. S7-08-11), other than those portions adopted by the Clearing Agency Standards (Release No. 34-68080)	4/29/2011
7/18/2011	Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants (Release No. 34-64766, File No. S7-25-11)	8/29/2011
10/24/2011	Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants (Release No. 34-65543, File No. S7-40-11)	12/19/2011
6/14/2012	Statement of General Policy on the Sequencing of the Compliance Rules Applicable to the Security-Based Swaps Adopted Pursuant to the Securities Exchange Act of 1934 and the Dodd-Frank Wall Street Reform and Consumer Protection Act (Release No. 34-67177, File No. S7-05-12)	8/13/2012
11/23/2012	Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker-Dealers (Release No. 34-68071, File No. S7-08-12) and Extension of Comment Period (Release No. 34-68660)	2/22/2013

All comments received to date on the Proposed Rules and the Policy Statement will be considered and need not be resubmitted.

By the Commission.

A handwritten signature in black ink that reads "Elizabeth M. Murphy". The signature is written in a cursive style with a prominent flourish at the end of the word "Murphy".

Elizabeth M. Murphy
Secretary

Date: May 1, 2013

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT COMPANY ACT OF 1940
Release No. 30502 / May 2, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15313

In the Matter of

NORTHERN LIGHTS
COMPLIANCE SERVICES, LLC,
GEMINI FUND SERVICES, LLC,
MICHAEL MIOLA, LESTER M.
BRYAN, ANTHONY J. HERTL,
GARY W. LANZEN, AND MARK H.
TAYLOR,

Respondents.

ORDER INSTITUTING CEASE-AND-DESIST
PROCEEDINGS PURSUANT TO SECTION
9(f) OF THE INVESTMENT COMPANY ACT
OF 1940, MAKING FINDINGS, AND
IMPOSING REMEDIAL SANCTIONS AND A
CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 9(f) of the Investment Company Act of 1940 ("Investment Company Act") against Northern Lights Compliance Services, LLC, Gemini Fund Services, LLC, Michael Miola, Lester M. Bryan, Anthony J. Hertl, Gary W. Lanzen, and Mark H. Taylor (collectively "Respondents").

II.

In anticipation of the institution of these proceedings, Respondents have submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 9(f) of the Investment Company Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

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III.

On the basis of this Order and Respondents' Offers, the Commission finds¹ that:

Summary

This proceeding relates to certain disclosure, reporting, recordkeeping and compliance violations associated with the turnkey operations of Northern Lights Fund Trust and Northern Lights Variable Trust, two series trusts registered with the Commission as open-end investment companies (collectively, the "Trusts"). During the period January 2009 through December 2010 (the "relevant period"), the Trusts collectively included up to 71 series, most of which were managed by different, unaffiliated advisers and sub-advisers. During this same time, the Trusts utilized, on behalf of each series, the administrative services of Gemini Fund Services, LLC ("GFS"), the chief compliance officer ("CCO") services of Northern Lights Compliance Services, LLC ("NLCS") and shared a common board of five trustees (the "Trustees"). As more fully described below, NLCS, GFS and the Trustees were a cause of certain series' violations of the federal securities laws.

Section 15(c) of the Investment Company Act imposes a duty on the directors of a registered investment company to request and evaluate, and a duty on an adviser to furnish, such information as may reasonably be necessary for the directors to evaluate the terms of an advisory contract. In accordance with fund filing disclosure requirements, a relevant fund's next shareholder report must discuss, in reasonable detail, the material factors and conclusions that formed the basis for the directors' approval or renewal of that contract. Boilerplate disclosure of the evaluation process for advisory contracts does not provide meaningful disclosure. However, on certain occasions during the relevant period, disclosures included in shareholder reports concerning the Trustees' evaluation process filed by certain series of the Trusts contained boilerplate disclosures that were materially untrue or misleading in violation of Section 34(b) of the Investment Company Act. GFS made these disclosures in the fund shareholder reports based on board minutes reviewed by the Trusts' outside counsel, and then reviewed and approved by the Trustees. The Trustees therefore were a cause of these violations. In addition, GFS failed to ensure that certain shareholder reports contained the required disclosures concerning the Trustees' evaluation process and failed to ensure that certain series within the Trusts maintained and preserved their Section 15(c) files in accordance with Investment Company Act recordkeeping requirements. Accordingly, GFS caused those series' violations of Sections 30(e) and 31(a) of the Investment Company Act and Rules 30e-1 and 31a-2(a)(6) thereunder.

¹ The findings herein are made pursuant to Respondents' Offers of Settlement and are not binding on any other person or entity in this or any other proceeding.

During the relevant period, NLCS and the Trustees were also a cause of certain series' violations of Rule 38a-1(a)(1) under the Investment Company Act, which requires registered investment companies to adopt and implement written policies and procedures reasonably designed to prevent violation of the federal securities laws. Specifically, NLCS and the Trustees failed to implement those series' policies and procedures to the extent they required the series' CCO to provide the advisers' compliance manuals to the Trustees for their review or, as an alternative, summaries of the compliance programs upon which the Trustees could rely in approving the compliance manuals of the series' new advisers.

Respondents

1. Northern Lights Compliance Services, LLC ("NLCS"), a Nebraska limited liability company based in Omaha, Nebraska and Hauppauge, New York, is an affiliate of GFS and provides CCO services to investment companies. NLCS has provided its CCO services to the Trusts and their respective series since the Trusts' inception.

2. Gemini Fund Services, LLC ("GFS"), a Nebraska limited liability company based in Omaha, Nebraska and Hauppauge, New York, is a full-service mutual fund administrator, providing comprehensive services to mutual funds for fund administration, fund accounting, transfer agent services, and custody administration. GFS has acted as the fund administrator to the Trusts and their respective series since the Trusts' inception.

3. Michael Miola ("Miola"), age 60, is a resident of Arizona. Miola is the founding trustee of the Trusts, and has been their chairman and the sole interested trustee since their inception. Miola is also an indirect owner of GFS and NLCS.

4. Lester M. Bryan ("Bryan"), age 68, is a resident of Utah. Bryan was an independent trustee of the Trusts since their inception until he retired from that position in December 2011.

5. Anthony J. Hertl ("Hertl"), age 63, is a resident of Florida. Hertl has been an independent trustee of the Trusts since their inception.

6. Gary W. Lanzen ("Lanzen"), age 59, is a resident of Nevada. Lanzen has been an independent trustee of the Trusts since their inception.

7. Mark H. Taylor ("Taylor"), age 49, is a resident of Ohio. Taylor has been an independent trustee of the Trusts since 2007.

Other Relevant Entities

8. Northern Lights Fund Trust ("NLFT"), a Delaware statutory trust with its principal place of business in Omaha, Nebraska, has been registered with the Commission as an open-end management investment company since January 2005. NLFT operates as a series company and was comprised of up to 64 series during the relevant period.

9. Northern Lights Variable Trust ("NLVT"), a Delaware statutory trust with its principal place of business in Omaha, Nebraska, has been registered with the Commission as an open-end management investment company since February 2006. NLVT, a variable insurance trust, operates as a series company and was comprised of up to 7 series during the relevant period.

Facts

The Trusts, Third-Party Service Providers and the Trustees

10. The Trusts are registered open-end series investment companies that were formed to allow advisers that are unaffiliated with each other to manage the portfolios of one or more mutual fund series. Specifically, by utilizing the administrative services of GFS, among other third-party service providers, and a common board of trustees and officers, the Trusts are marketed as a turnkey investment company platform to advisers who want to manage small to mid-size mutual funds (each a series of the Trust) without having to administer the day-to-day operations of a fund, including the management of corporate, board and regulatory governance. During the relevant period, NLFT and NLVT were comprised of up to 64 and 7 series, respectively, many of which were managed by different advisers and sub-advisers.

11. NLCS, an affiliate of GFS, is a company that was formed in 2004 to provide CCO services to mutual funds in light of the Commission's adoption of Rule 38a-1 under the Investment Company Act in 2003. NLCS provides its CCO services to the Trusts and their respective series, and is also paid for its services out of fund assets based on a contract approved by the independent Trustees.

12. GFS is a full-service mutual fund administrator that provides comprehensive services to the Trusts and their respective series for fund administration, fund accounting, and transfer agent services based on a contract approved by the independent Trustees. GFS is affiliated with other service providers of the Trusts, excluding advisers. Each series within the Trusts pays for GFS's services out of fund assets.

13. During the relevant period, the Trusts' boards of trustees consisted of five individuals, four of whom were not an "interested person" of the Trusts as that term is defined under Section 2(a)(19) of the Investment Company Act. They included Miola, the sole interested trustee and chairman of the Trusts, and Bryan, Hertl, Lanzen and Taylor, the not interested trustees.

Section 15(c) of the Investment Company Act and the Related Fund Filing Reports and Disclosures

The Requirements of the Investment Company Act and the Rules Thereunder

14. The Investment Company Act assigns specific responsibilities upon the directors of a mutual fund for the protection of its shareholders, including the duty to evaluate the terms of a fund's advisory contract when approving the contract. Specifically, Section 15(c) of the Investment Company Act makes it unlawful for a fund to enter into or renew any advisory contract unless the terms of the contract are approved by a majority of the fund's independent directors. As part of the approval process, Section 15(c) imposes a specific duty on all directors to request and evaluate, and a duty on an adviser to furnish, such information as may reasonably be necessary for the directors to evaluate the terms of the adviser's contract. The directors' duty under this provision "is one of the most important fund governance obligations assigned to directors under the Investment Company Act." See Role of Independent Directors of Investment Companies, Investment Company Act Release No. 24082 (proposed Nov. 3, 1999)

15. While Section 15(c) does not define what is "reasonably necessary" to evaluate a contract's terms, the Commission has promulgated various fund filing disclosure requirements to better inform shareholders about a board's evaluation process when approving or renewing an advisory contract. First, in 1994, the Commission adopted the requirement that a fund disclose in its proxy statements the material factors that formed the basis for the board's recommendation that shareholders approve an advisory contract. See Amendments to Proxy Rules for Registered Investment Companies, Investment Company Act Release No. 20614 (Oct. 13, 1994). In 2001, the Commission adopted form amendments requiring funds to provide similar disclosures in their Statements of Additional Information ("SAI"). See Role of Independent Directors of Investment Companies, Investment Company Act Release No. 24816 (Jan. 16, 2001). As noted by the Commission in that adopting release, "[m]utual funds fees and expenses, including advisory fees, are extremely important to shareholders," and therefore "[f]unds are required to provide appropriate detail regarding the board's basis for approving an existing investment advisory contract, including the particular factors forming the basis of this determination." Particularly relevant here, with these new form amendments, the Commission reminded funds in enacting the release "that 'boilerplate' disclosure is not appropriate."

16. In 2004, the Commission again adopted form amendments, which replaced the previous SAI requirements² and require that when a fund board approves or renews any advisory contract, the fund's next shareholder report must discuss, in reasonable detail, the material factors and conclusions with respect thereto that formed the basis for the directors' approval or renewal of that contract. See Disclosure Regarding the Approval of Investment Advisory Contracts by Directors of Investment Companies, Investment Company Act Release No. 26486 (June 30, 2004).

² Specifically, the Commission removed the requirement for disclosure in a fund's SAI with respect to the board's approval of any existing investment advisory contract as long as the fund's prospectus includes a statement that a discussion regarding the basis for the board's approval is available in the fund's annual or semi-annual report. See Disclosure Regarding the Approval of Investment Advisory Contracts by Directors of Investment Companies, Investment Company Act Release No. 26486 (June 30, 2004).

In support of these amendments, the Commission reasoned that the visibility of this disclosure to fund shareholders "may encourage funds to provide a meaningful explanation of the board's basis for approving an investment advisory contract," which "in turn, may encourage fund boards to consider investment advisory contracts more carefully."

17. In addition, as part of the 2004 form amendments described in paragraph 16, above, the Commission adopted several enhancements to the existing disclosure requirements to address "concerns regarding the adequacy of review of advisory contracts and management fees by fund boards" with the notion that "[i]ncreased transparency with respect to investment advisory contracts, and fees paid for advisory services, will assist investors in making informed choices among funds and encourage fund boards to engage in vigorous and independent oversight of advisory contracts." Investment Company Act Release No. 26486. Specifically, as to the approval or renewal of an advisory contract, funds must include a discussion in their shareholder reports concerning, at a minimum: (1) the nature, extent, and quality of the services to be provided by the investment adviser; (2) the investment performance of the fund and the investment adviser; (3) the costs of the services to be provided and profits to be realized by the investment adviser and its affiliates from the relationship with the fund; (4) the extent to which economies of scale would be realized as the fund grows; and (5) whether fee levels reflect these economies of scale for the benefit of fund investors. See Form N-1A, Item 27(d)(6)(i). Furthermore, Form N-1A requires that the shareholder report indicate whether the board relied upon fee comparisons with other funds or types of clients in approving the contract and, if so, describe the comparisons that were relied upon and how they assisted the board in concluding that the contract should be approved. Id.

18. As noted by the Commission, "[i]t would be difficult for a board to reach a final conclusion as to whether to approve an advisory contract without reaching conclusions as to each material factor." Investment Company Act Release No. 26486 (Emphasis added). Therefore, the form amendments require a discussion of "how the board evaluated each factor," and indicate that "conclusory statements or a list of factors" will not be considered sufficient disclosure. See Form N-1A, Item 27(d)(6), Instruction No. 2. Thus, the Commission addressed some commenters' views that such specific disclosure "would be useful in ensuring that the discussion has reasonable detail and does not rely on boilerplate disclosure." Investment Company Act Release No. 26486.

19. In connection with a board's Section 15(c) evaluation process, the Commission also amended a fund recordkeeping rule, Rule 31a-2 under the Investment Company Act, which requires that funds retain copies of the written materials that directors considered in approving or renewing an advisory contract. Rule 31a-2(a)(6) under the Investment Company Act. According to the Commission, that requirement was designed "to improve the documentation of a fund board's basis for approving an advisory contract, which would assist [the Commission's] examination staff in determining whether fund directors are fulfilling their fiduciary duties when approving advisory contracts." See Investment Company Governance, Investment Company Act Release No. 26520 (July 27, 2004) (amending Rule 31a-2).

The Disclosures Included Within Certain Shareholder Reports Regarding the Trustees' Section 15(c) Evaluation Process

20. During the relevant period, the Trustees conducted fifteen board meetings during which they considered whether to approve or renew a total of 113 advisory and 32 sub-advisory contracts in accordance with their duties under Section 15(c) of the Investment Company Act. The board meetings also covered other official business of the Trusts and their series, and typically lasted at least a full day. The number of advisory contracts that the Trustees considered varied with respect to each meeting as did the time for which the Trustees discussed each contract, with more time typically spent on new contracts and less on renewals. Because of the large number of series within the Trusts, the Trustees often had to consider several new contracts and renewals at each board meeting, and at two separate board meetings, the Trustees considered over twenty contracts. The Trustees understood that fund shareholder reports were required to disclose the material factors considered and conclusions reached by them in deciding to approve or renew a fund's advisory contract. In all cases, the Trustees knew that the disclosures required to be contained in the shareholder reports would be prepared by GFS and were subject to the review and approval of the Trust's outside counsel prior to their publication. The Trustees further understood that their meeting minutes should document their consideration of and conclusions reached with respect to such material factors. For each contract consideration, and on the advice of the Trusts' outside counsel, the Trustees requested information from the relevant adviser related to the factors discussed in paragraph 17, above, including information related to fee comparisons. Outside counsel solicited and reviewed the information received in response to these requests for completeness on an adviser-by-adviser basis in advance of each board meeting, and the information was then used by the Trustees to evaluate the terms of the advisory contract.

21. Each board meeting included an individual who was responsible, as the note taker or secretary to the Trusts, for taking notes that would be used to draft the board minutes. The secretary was also responsible for preparing and finalizing the board minutes. Typically, the secretary created the first draft of the minutes with the assistance of various GFS paralegals, who were responsible for providing the secretary with a "bones" draft of the minutes normally within six weeks after the relevant board meeting. The paralegals drafted the "bones" version based on their review of the meeting agenda and use of a minutes template, which included boilerplate language concerning the material factors and conclusions which formed the basis for the Trustees' Section 15(c) approval or renewal of the advisory contracts. These initial drafts were supplemented with details by the Trusts' corporate secretary, and then reviewed for accuracy, revised, and approved by the Trusts' outside counsel who led the Trustees in the Section 15(c) process and participated in each meeting.

22. After the secretary finalized the minutes, and they were reviewed and revised by the Trusts' outside counsel using notes taken at the meeting, the minutes were submitted to the Trustees for their review and final approval typically weeks or months after the meeting occurred. During the relevant period, the Trustees were advised by the Trusts' outside counsel that "[m]eeting minutes are the official record of the Board meetings and document the fulfillment by the Board of its regulatory responsibilities. Trustees should review the minutes to confirm that they accurately reflect Board discussions." The minutes, as reviewed and approved by the

Trustees, were later used by GFS to draft those sections of the applicable fund shareholder reports that included a discussion of the Trustees' Section 15(c) evaluation process. Like the minutes, these fund filing disclosures included, among other things, the boilerplate language concerning the material factors and conclusions which formed the basis for the Trustees' approval or renewal of the advisory contracts.

23. During the relevant period, there were instances where certain series' shareholder report disclosures concerning the Trustees' Section 15(c) evaluation process were materially untrue or misleading, in that the boilerplate disclosures either misrepresented material information considered by the Trustees or omitted material information concerning how the Trustees evaluated certain factors. Examples of such untrue or misleading disclosures included:

- a. Example 1: In connection with the Trustees' decision to renew an advisory contract, the applicable fund shareholder report disclosed that the adviser "had provided the Board with written materials regarding . . . the level of the advisory fees charged compared with the fees charged to comparable mutual funds or accounts," and that the Trustees "discussed the comparison of management fees and total operating expense data and reviewed the Fund's advisory fees and overall expenses compared to a peer group of similarly managed funds," and ultimately concluded that the Fund's advisory fee was "acceptable in light of the quality of the services the Fund currently receives from the Adviser, and the level of fees paid by funds in the peer group." However, these boilerplate statements were materially untrue since the adviser had not provided any advisory fee peer group information to the Trustees for their consideration.
- b. Example 2: In connection with the Trustees' decision to renew an advisory contract, the applicable fund shareholder report disclosed that the Trustees "discussed the comparison of management fees and total operating expense data and reviewed the Fund's advisory fees and overall expenses compared to a peer group of similarly managed funds. . . . The Trustees concluded that the Fund's advisory fees and expense ratio were acceptable in light of the quality of the services the Fund currently receives from the Adviser, and the level of fees paid by a peer group of other similarly managed mutual funds of comparable size." However, these boilerplate statements were materially misleading since they implied that the fund was paying fees that were not materially higher than the middle of its peer group range when, in fact, the adviser's approved fee was materially higher than all of the fees of the adviser's selected peer group of 74 funds and nearly double the peer group's mean fee. Therefore, the reference to "the level of fees paid by funds in the selected peer group," without further meaningful discussion about the adviser's comparable fee and other information considered by the Trustees, did not provide current and prospective fund shareholders with all necessary material facts concerning the basis for the Trustees' conclusion that the advisory fee was acceptable.

- c. Example 3: In connection with the Trustees' decision to approve an advisory contract, the applicable fund shareholder report disclosed that the Trustees "reviewed information regarding fees and expenses of comparable funds and concluded that [the adviser's] advisory fee and expense ratio were acceptable in light of the quality of the services the Fund expected to receive from the Adviser, and the level of fees paid by the funds in the peer group." However, these boilerplate statements were materially misleading since they implied that the fund was paying fees that were not materially higher than the middle of its peer group range when, in fact, the adviser's approved fee was materially higher than all of the fees of the adviser's selected peer group of 17 funds and more than double the peer group's mean fee. Therefore, the reference to "the level of fees paid by funds in the peer group," without further meaningful discussion about the adviser's comparable fee and other information considered by the Trustees, did not provide current and prospective fund shareholders with all necessary material facts concerning the basis for the Trustees' conclusion that the advisory was acceptable.

24. Although not created for public disclosure, the relevant board minutes were intended to summarize the key items addressed during the board meetings, and also formed the basis for the shareholder report disclosures, including the examples referenced in paragraph 23, above. The minutes, as drafted by GFS, reviewed and approved by the Trusts' outside counsel and then reviewed and approved by the Trustees, sometimes contained boilerplate language that was materially untrue or misleading.

The Failure by GFS to Ensure that Certain Series Maintained and Preserved Their Complete Section 15(c) Files

25. During the relevant period, GFS, as the fund administrator to all series of the Trusts, was contractually responsible for ensuring that the series maintained and preserved all documents and other written information that the Trustees considered in approving the series' advisory contracts in accordance with Rule 31a-2(a)(6) under the Investment Company Act. However, in several instances, certain series' Section 15(c) files were deficient and therefore failed to comply with the Rule. For example, on three occasions and at the advisers' request, written financial information provided by the advisers as part of their Section 15(c) submissions was discarded by GFS or returned to the advisers after the board meetings due to the advisers' concerns of confidentiality. Furthermore, on four other occasions, certain series failed to maintain written management fee peer group comparisons as submitted by the advisers. Finally, throughout most of the relevant period, certain series failed to maintain written 15(c) summaries that were prepared by the Trusts' outside counsel to assist the Trustees during their 15(c) analysis.

The Failure by GFS to Ensure that Certain Shareholder Reports Included All Disclosures Concerning the Trustees' Section 15(c) Evaluation Process

26. As the fund administrator to all series of the Trusts, GFS was also contractually responsible for preparing the series' shareholder reports, including those portions of the reports that

included a discussion of the Trustees' Section 15(c) evaluation process as required by Item 27(d)(6) of Form N-1A. However, on ten occasions during the relevant period, GFS failed to ensure that certain shareholder reports included the required discussion of the Trustees' evaluation process. After the Commission staff brought the issue to GFS' attention during the course of the staff's investigation, GFS thereafter promptly undertook remedial efforts to correct the error.

Rule 38a-1 under the Investment Company Act Concerning a Fund's Compliance Program

The Requirements of Rule 38a-1 under the Investment Company Act

27. In 2003, the Commission adopted Rule 38a-1 under the Investment Company Act, which generally requires fund boards to adopt and implement written policies and procedures reasonably designed to prevent the fund from violating the federal securities laws. See Compliance Programs of Investment Companies and Investment Advisers, Investment Company Act Release No. 26299 (Dec. 17, 2003). The Rule permits the Commission to address the failure of an adviser or fund to have in place adequate compliance controls, before that failure has a chance to harm clients or investors. To effectuate a fund's compliance program, Rule 38a-1 requires that each fund appoint a CCO who is responsible for administering the fund's policies and procedures as approved by its board.

28. Among other things, the Rule requires fund boards to approve the policies and procedures of fund service providers through which the fund conducts its activities, including the policies and procedures of the fund's adviser. The approval must be based on a finding by the board that the policies and procedures are reasonably designed to prevent violation of the federal securities laws by the fund and its service providers. See Rule 38a-1(a)(2). However, rather than requiring directors to review lengthy compliance manuals, the Commission indicated in the adopting release that "[d]irectors may satisfy their obligations under the rule by reviewing summaries of compliance programs prepared by the chief compliance officer," which should "familiarize the directors with the salient features of the programs (including programs of the service providers) and provide them with a good understanding of how the compliance programs address particularly significant compliance risks." Investment Company Act Release No. 26299.

The Compliance Programs of the Trusts and Their Series

29. During the relevant period, the Trustees adopted and approved a compliance manual ("Compliance Manual") for the Trusts, which provided a written description of the Trusts' overall compliance program. Pursuant to a consulting agreement, NLCS provided its CCO services to the Trusts and their respective series through which NLCS was responsible for administering their compliance programs in conformity with the requirements of Rule 38a-1.

30. The Compliance Manual included the Trusts' policies and procedures for board approval of each service provider's compliance program. In tracking the requirements of Rule 38a-1(a)(2), the Compliance Manual instructed that the board's approval of the compliance programs of a fund's service providers must be based on a finding by the board that the providers' compliance programs are reasonably designed to prevent violations of the federal securities laws.

The Compliance Manual also instructed that the Trusts' CCO should provide the board with materials upon which the board could approve the service providers' compliance programs.

31. In satisfying the "materials" requirement as noted in paragraph 30, above, the Compliance Manual stated that the CCO could provide the board with the compliance manuals, policies, procedures and practices of each fund service provider for the board's own review or, as an alternative:

[s]ummaries of Compliance Programs prepared by the Chief Compliance Officer, legal counsel or other persons familiar with the Compliance Programs. The summaries should familiarize directors with the salient features of the Compliance Programs (including Compliance Programs of Fund Service Providers) and provide them with a good understanding of how the Compliance Programs address particularly significant compliance risks.

This quoted language of the Compliance Manual tracked the statement included within the Commission's adopting release for Rule 38a-1 as noted in paragraph 28, above. Furthermore, the Compliance Manual placed specific responsibility for implementing the Trusts' policies and procedures related to the board's approval of service providers' compliance programs upon the Trustees and the Trusts' CCO. The Trustees adopted the policies and procedures as outlined in the Trusts' Compliance Manual for each series that was added to the Trusts during the relevant period (the "Series' Compliance Manuals").

32. Despite the Series' Compliance Manuals, which delineated the alternative materials upon which the Trustees could rely when approving the compliance programs of the series' service providers, NLCS and the Trustees followed a different process for obtaining the Trustees' approval of the compliance programs of the series' advisers. Specifically, the Trustees' approval of the advisers' compliance programs during the relevant period was based primarily on a brief written statement prepared by NLCS at the conclusion of its compliance review, indicating that the advisers' compliance manuals were "sufficient and in use" and also indicating that the code of ethics and proxy voting policies were "compliant." This written statement was accompanied by a verbal representation by an NLCS representative at the relevant board meeting that the adviser's policies and procedures were adequate. However, the written statement and oral representation by NLCS did not constitute an adequate summary that familiarized the Trustees with the salient features of the advisers' compliance programs and that provided the Trustees sufficient understanding of how the programs addressed particularly significant risks.

33. Accordingly, by virtue of this deviation from the Series' Compliance Manuals, NLCS and the Trustees did not ensure that the series implemented their policies and procedures concerning the items upon which the Trustees could rely when the Trustees approved the compliance programs of the series' advisers.

Violations

The Trustees Caused Violations of Section 34(b) of the Investment Company Act

Certain Series' Shareholder Reports

34. Section 34(b) of the Investment Company Act makes it unlawful for any person to make any untrue statement of a material fact in a document filed or transmitted pursuant to the Investment Company Act or the keeping of which is required pursuant to Section 31(a). The same section makes it unlawful to omit to state from any such document any fact necessary in order to prevent the statements made therein, in light of the circumstances under which they were made, from being materially misleading. As noted in paragraph 20, above, the Trustees knew that fund shareholder reports are required to disclose the material factors considered, and conclusions reached, by the Trustees in deciding to approve or renew a fund's advisory contract. The Trustees further understood that their meeting minutes should document their consideration of, and conclusions reached with respect to, such material factors, and that the "Trustees should review the minutes to confirm that they accurately reflect Board discussions." As described in paragraph 24, above, certain board minutes reviewed and approved by the Trustees contained boilerplate language and materially untrue or misleading statements concerning the material factors and conclusions that formed, at least in part, the basis for the Trustees' renewal or approval of certain advisory contracts. These minutes were then used by GFS to draft the required disclosures within the applicable series' shareholder reports, which also included the materially untrue or misleading disclosures concerning the Trustees' Section 15(c) evaluation process. Accordingly, the Trustees were a cause of those series' violations of Section 34(b) of the Investment Company Act.

The Corresponding Board Minutes

35. Section 31(a) of the Investment Company Act requires registered investment companies to maintain and preserve such records as prescribed by Commission rules and regulations. Rule 31a-1(b)(4) thereunder requires each registered investment company to maintain minute books of directors' meetings. In connection with each meeting, the Trustees understood that their meeting minutes should document their consideration of the material factors considered, and conclusions reached, in deciding to approve or renew a fund's advisory contract, and that the "Trustee should review the minutes to confirm that they accurately reflect Board discussions." Accordingly, the Trustees also caused violations of Section 34(b) of the Investment Company Act by approving certain board minutes, as noted in paragraph 24, above, that were materially untrue or misleading.

NLCS and the Trustees Caused Certain Series' Violations of Rule 38a-1(a)(1) under the Investment Company Act by Failing to Ensure that those Series Implemented Their Policies and Procedures

36. Rule 38a-1(a)(1) under the Investment Company Act requires a fund to adopt and implement written policies and procedures reasonably designed to prevent violation of the federal securities laws by the fund, including policies and procedures that provide for the oversight of

compliance by the fund's investment adviser. As described above, the Series' Compliance Manuals required NLCS, which provided its CCO services to the series, to furnish the Trustees with materials upon which the Trustees could rely in order to approve the policies and procedures of the series' advisers. Such materials were to include either: (1) copies of the advisers' policies and procedures for the Trustees' review; or (2) a summary of the advisers' compliance programs prepared by NLCS that familiarized the Trustees with the salient features of the compliance programs and that provided the Trustees with a good understanding of how the advisers' compliance programs addressed particularly significant risks. However, this policy of the series was not implemented as the Trustees instead relied primarily upon a written statement prepared by NLCS at the conclusion of its compliance review, noting that the advisers' compliance manuals were "sufficient and in use" and also indicating that the code of ethics and proxy voting policies and procedures were "compliant," along with a representation by NLCS at the relevant board meeting that the advisers' policies and procedures were adequate. Accordingly, NLCS and the Trustees caused certain series' violations of Rule 38a-1(a)(1) since NLCS and the Trustees failed to ensure that the series implemented their own policies and procedures concerning the items upon which the Trustees could rely in approving the compliance manuals of the series' advisers.

GFS Caused Certain Series' Violations of Section 31(a) of the Investment Company Act and Rule 31a-2(a)(6) Thereunder

37. As noted above, Section 31(a) of the Investment Company Act requires registered investment companies to maintain and preserve such records as prescribed by Commission rules and regulations. Rule 31a-2(a)(6) thereunder pertains to the specific recordkeeping requirement regarding an investment company's Section 15(c) files. Specifically, the Rule requires each investment company to "[p]reserve for a period of not less than six years . . . any documents or other written information considered by the directors of the investment company pursuant to Section 15(c) of the Act in approving the terms or renewal of a contract[.]" As a result of the conduct described in paragraph 25, above, GFS caused certain series' violations of Section 31(a) of the Investment Company Act and Rule 31a-2(a)(6) thereunder by failing to ensure, as the fund administrator, that these series maintained and preserved copies of all documents considered by the Trustees in approving or renewing the advisory contracts to those series.

GFS Caused Certain Series' Violations of Section 30(e) of the Investment Company Act and Rule 30e-1 Thereunder

38. Section 30(e) of the Investment Company Act and Rule 30e-1 thereunder require management investment companies to send shareholders semi-annual and annual reports that contain such information as the Commission may require by rule or regulation. Form N-1A is used by open-end management investment companies, and was designed by the Commission "to provide investors with information that will assist them in making a decision about investing in an investment company." Item 27(d)(6) of Form N-1A requires that, if a fund's board approved any investment advisory contract during the fund's most recent fiscal half-year, the next such report must contain a discussion, in reasonable detail, concerning "the material factors and the conclusions with respect thereto that formed the basis for the board's approval." As a result of the conduct described in paragraph 26, above, GFS caused certain series' violations of Section 30(e) of

the Investment Company Act and Rule 30e-1 thereunder by failing to ensure, as the responsible party, that the series' shareholder reports issued during the relevant period contained the discussion required by Item 27(d)(6) of Form N-1A.

Undertakings

Respondents have agreed to the following undertakings:

39. Independent Compliance Consultant. Respondents have undertaken:

- a. to hire, within 60 days of the Order, an Independent Compliance Consultant not unacceptable to the staff of the Commission. Respondents shall require the Independent Compliance Consultant to review: (i) the compliance procedures applicable to the advisory contract review process, disclosure, recordkeeping and reporting obligations as described in paragraphs 14-26, above; and (ii) the compliance procedures applicable to the compliance programs of the Trusts and their applicable series described in paragraphs 27-33, above. The Independent Compliance Consultant's compensation and expenses as outlined in paragraph 39.e. of this Order shall be borne exclusively by Respondents or any of their affiliates. Under no circumstances will such compensation and expenses be borne by the Trusts or their respective series. Respondents shall cooperate fully with the Independent Compliance Consultant and shall provide the Independent Compliance Consultant with access to any of their files, books, records and personnel as reasonably requested for review; provided, however, that Respondents need not provide access to materials as to which Respondents may assert a valid claim of the attorney-client privilege. The Independent Compliance Consultant shall maintain the confidentiality of any materials and information provided by Respondents, except to the extent it is included in the Report described below;
- b. to require that, at the conclusion of the review, which in no event shall be more than 180 days after the date of the Order, the Independent Compliance Consultant shall submit a Report to Respondents and the staff of the Commission. The Report shall address the issues described in paragraph 39.a. of these undertakings, and shall include a description of the review performed, the conclusions reached, the Independent Compliance Consultant's recommendation for changes in or improvements to policies and procedures of Respondents or the Trusts concerning the issues described in paragraph 39.a. of these undertakings and a procedure for implementing the recommended changes in or improvements to the procedures;
- c. to adopt all recommendations contained in the Report of the Independent Compliance Consultant; provided, however, that within 30 days after

receipt of the Report, Respondents shall in writing advise the Independent Compliance Consultant and the staff of the Commission of any recommendations that they consider to be unnecessary or inappropriate. With respect to any recommendation that Respondents consider unnecessary or inappropriate, Respondents need not adopt that recommendation at that time but shall propose in writing an alternative policy, procedure or system designed to achieve the same objective or purpose;

- d. that as to any recommendation with respect to the policies and procedures of Respondents or the Trusts on which Respondents and the Independent Compliance Consultant do not agree, such parties shall attempt in good faith to reach an agreement within 60 days after Respondents' receipt of the Independent Compliance Consultant's Report. In the event Respondents and the Independent Compliance Consultant are unable to agree on an alternative proposal acceptable to the staff of the Commission, Respondents will abide by the determinations of the Independent Compliance Consultant; provided, however, that Respondents may petition the Commission staff for relief from the recommendation;
- e. that Respondents (i) shall not have the authority to terminate the Independent Compliance Consultant without the prior written approval of the staff of the Commission before the completion of the Report; (ii) shall compensate the Independent Compliance Consultant, and persons engaged to assist the Independent Compliance Consultant, for services rendered pursuant to the Order at their reasonable and customary rates; (iii) shall not be in and shall not have an attorney-client relationship with the Independent Compliance Consultant and shall not seek to invoke the attorney-client or any other doctrine or privilege to prevent the Independent Compliance Consultant from transmitting any information, reports, or documents to the staff of the Commission;
- f. require the Independent Compliance Consultant to enter into an agreement that provides that for the period of engagement and for a period of two years from completion of the engagement, the Independent Compliance Consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with Respondents or the Trusts, or any of their present or former affiliates, directors, officers, employees, or agents acting in their capacity. The agreement will also provide that the Independent Compliance Consultant will require that any firm with which he/she is affiliated or of which he/she is a member, and any person engaged to assist the Independent Compliance Consultant in performance of his/her duties under this Order shall not, without prior written consent of the staff of the Commission, enter into any employment, consultant, attorney-client, auditing or other professional relationship with Respondents or the Trusts,

or any of their present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two years after the engagement;

- g. to certify, in writing, compliance with the undertakings according to the timelines set forth above. The certification shall identify the undertakings, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and Respondents agree to provide such evidence. The certification and supporting material shall be submitted to Noel M. Franklin, with a copy to the Office of Chief Counsel of the Enforcement Division, no later than sixty (60) days from the date of the completion of the undertakings; and
- h. to preserve for a period of not less than five (5) years from the date of the Order, the first two years in an easily accessible place, any record of their compliance with the undertakings set forth in this paragraph.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondents' Offer.

Accordingly, pursuant to Section 9(f) of the Investment Company Act, it is hereby ORDERED that:

- A. Respondent NLCS cease and desist from committing or causing any violations and any future violations of Rule 38a-1 under the Investment Company Act;
- B. Respondent GFS cease and desist from committing or causing any violations and any future violations of Sections 30(e) and 31(a) of the Investment Company Act and Rules 30e-1 and 31a-2(a)(6) thereunder;
- C. Respondents Miola, Bryan, Hertl, Lanzen, and Taylor cease and desist from committing or causing any violations and any future violations of Section 34(b) of and Rule 38a-1(a)(1) under the Investment Company Act;
- D. Respondents GFS and NLCS shall, within 10 days of the entry of this Order, each pay a civil money penalty in the amount of \$50,000 to the United States Treasury. If timely payments are not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717. Payment must be made in one of the following ways:

(1) Respondents may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or

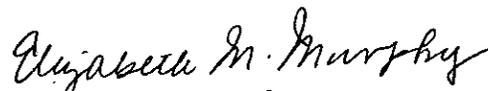
(2) Respondents may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Respondent's name as Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Julie K. Lutz, Esq., Associate Director, Denver Regional Office, Securities and Exchange Commission, 1801 California Street, Suite 1500, Denver, Colorado 80202; and

E. Respondents shall comply with the undertakings enumerated in paragraph 39, above.

By the Commission.


Elizabeth M. Murphy
Secretary

*Commissioner Walter
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3600 / May 3, 2013

INVESTMENT COMPANY ACT OF 1940
Release No. 30504 / May 3, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-11317

In the Matter of

PUTNAM INVESTMENT
MANAGEMENT, LLC,

Respondent.

**ORDER MODIFYING
ORDER MAKING FINDINGS AND
IMPOSING PARTIAL RELIEF,
INCLUDING A FINAL CENSURE,
REMEDIAL UNDERTAKINGS
AND A CEASE-AND-DESIST
ORDER PURSUANT TO
SECTIONS 203(e) AND 203(k) OF
THE INVESTMENT ADVISERS
ACT OF 1940 AND SECTIONS 9(b)
AND 9(f) OF THE INVESTMENT
COMPANY ACT OF 1940**

I.

On October 28, 2003, the United States Securities and Exchange Commission ("Commission") instituted administrative and cease-and desist proceedings pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act") and Sections 9(b) and 9(f) of the Investment Company Act of 1940 ("Investment Company Act") against Putnam Investment Management, LLC ("Putnam" or "Respondent"). On November 13, 2003, the Commission entered an order making findings and imposing partial relief, including a final censure, remedial undertakings and a cease-and-desist order pursuant to Sections 203(e) and 203(k) of the Advisers Act and Sections 9(b) and 9(f) of the Investment Company Act ("2003 Order").¹

¹ See Advisers Act Rel. No. 2192, Admin. Proc. File No. 3-11317 (November 13, 2003).

II.

Putnam consented to the issuance of the 2003 Order. Among other things, the 2003 Order required Putnam to cease and desist from further violations of the federal securities laws and directed Putnam to comply with various undertakings.

III.

Putnam has submitted an Amended Offer of Settlement ("Offer") proposing to relieve it of the obligations, as of the various dates set forth in the Offer, to continue to: (1) require each Putnam fund to hold a meeting of shareholders not less than every fifth calendar year to elect a Board of Trustees in accordance with paragraph III.36.d of the 2003 Order; (2) require all Putnam employees to hold any investments they may make in Putnam funds for a minimum of 90 calendar days in accordance with paragraph IV.C.2 of the 2003 Order; (3) require all Putnam investment employees to hold any investments they may make in Putnam funds for a minimum of one year in accordance with paragraph IV.C.3 of the 2003 Order; (4) maintain an Internal Compliance Controls Committee in accordance with paragraph IV.D.6.b of the 2003 Order; and (5) undergo a compliance review by a third party at least once every other year in accordance with paragraph IV.G of the 2003 Order. Solely for purposes of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Putnam consents to the entry of this Order Modifying Order Making Findings and Imposing Partial Relief, Including a Final Censure, Remedial Undertakings and a Cease-and-Desist Order Pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 and Sections 9(b) and 9(f) of the Investment Company Act of 1940 ("Order"), as set forth below.

IV.

The Commission deems it appropriate and in the public interest to modify the 2003 Order as agreed to in Putnam's Offer.

Accordingly, IT IS HEREBY ORDERED that:

- A. Paragraph III.36.d of the 2003 Order is modified as follows:

Commencing in 2004 and not less than every fifth calendar year thereafter until at least March 31, 2013, each Putnam fund will hold a meeting of shareholders at which the board of Trustees will be elected.

- B. Paragraph IV.C.2 of the 2003 Order is modified as follows:

Until at least March 31, 2013, Putnam shall require all Putnam employees to hold any investments they may make in Putnam funds, excluding taxable and tax-

exempt money market funds and other short term domestic fixed income funds designed to permit short term investment, for a minimum of 90 calendar days. Putnam's Code of Ethics Oversight Committee may grant exceptions to this 90-day holding period as a result of death, disability or other special circumstances (such as automatic investment and withdrawal programs and periodic rebalancing), all as determined from time to time by such Committee. Putnam shall ensure that any exceptions from the 90-day holding period granted by Putnam's Code of Ethics Oversight Committee are reported to the independent Trustees of the Putnam funds with such frequency as such Trustees request. Putnam shall add the foregoing holding period requirement to the Code of Ethics maintained by Putnam pursuant to Rule 17j-1 under the Investment Company Act.

C. Paragraph IV.C.3 of the 2003 Order is modified as follows:

Until at least March 31, 2013, Putnam shall require all Putnam investment employees to hold any investments they may make in Putnam funds or in other registered funds for which Putnam acts as an investment adviser for which they have sole or shared supervisory or portfolio management responsibility, excluding taxable and tax-exempt money market funds and other short term domestic fixed income funds designed to permit short term investment, for a minimum of one year. Putnam's Code of Ethics Oversight Committee may grant exceptions to this one-year holding period as a result of death, disability or other special circumstances (such as automatic investment and withdrawal programs and periodic rebalancing), all as determined from time to time by such Committee. Putnam shall ensure that any exceptions from the one-year holding period granted by Putnam's Code of Ethics Oversight Committee are reported to the independent Trustees of the Putnam funds with such frequency as such Trustees request. Putnam shall add the foregoing holding period requirement to the Code of Ethics maintained by Putnam pursuant to Rule 17j-1 under the Investment Company Act.

For purposes of the foregoing undertaking, "Putnam investment employee" includes all employees of Putnam's Investment Division, all other employees who, in connection with their regular duties, have access to information regarding portfolio holdings, valuations and transactions, and members of the immediate family of all such employees who share the same household as the Putnam investment employee or for whom the Putnam investment employee has investment discretion ("family member"), any trust in which a Putnam investment employee or family member is a trustee with investment discretion and in which such Putnam investment employee or any family member are collectively beneficiaries, any closely-held entity (such as a partnership, limited liability company or corporation) in which a Putnam investment employee and his or her family members hold a controlling interest and with respect to which they have investment discretion, and any account (including any retirement, pension, deferred compensation or similar account) in which a Putnam investment employee or family member has a substantial economic interest and over which

said Putnam investment employee or family member exercise investment discretion.

D. Paragraph IV.D.6.b of the 2003 Order is modified as follows:

Putnam shall establish and, until at least December 31, 2013, maintain an Internal Compliance Controls Committee to be chaired by Putnam's Chief Compliance Officer, which Committee shall have as its members senior executives of Putnam's operating businesses. Notice of all meetings of the Internal Compliance Controls Committee shall be given to the independent staff of the Trustees of the Putnam funds, who shall be invited to attend and participate in such meetings. The Internal Compliance Controls Committee shall review compliance issues throughout the business of Putnam, endeavor to develop solutions to those issues as they may arise from time to time, and oversee implementation of those solutions. The Internal Compliance Controls Committee shall provide reports on internal compliance matters to the Audit Committee of the Trustees of the Putnam funds with such frequency as the independent Trustees of such funds may instruct, and in any event at least quarterly. Putnam shall also provide to the Audit Committee of Marsh & McLennan Companies, Inc. the same reports of the Code of Ethics Oversight Committee and the Internal Compliance Controls Committee that it provides to the Audit Committee of the Putnam funds.

E. Paragraph IV.G of the 2003 Order is modified as follows:

Periodic Compliance Review. Commencing in 2005, and at least once every other year thereafter until at least December 31, 2013, Putnam shall undergo a compliance review by a third party, who is not an interested person, as defined in the Investment Company Act, of Putnam. At the conclusion of the review, the third party shall issue a report of its findings and recommendations concerning Putnam's supervisory, compliance, and other policies and procedures designed to prevent and detect breaches of fiduciary duty, breaches of the Code of Ethics and federal securities law violations by Putnam and its employees in connection with their duties and activities on behalf of and related to the Putnam funds. Each such report shall be promptly delivered to Putnam's Internal Compliance Controls Committee and to the Audit Committee of the board of Trustees of each Putnam fund.

F. All other provisions of the 2003 Order remain in effect.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3599 / May 3, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15314

In the Matter of

RUSSELL K. CANNON,

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 203(f) OF THE
INVESTMENT ADVISERS ACT OF 1940,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Russell K. Cannon ("Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

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III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Cannon was the sole founder, member and employee of RKC Capital, LLC ("RKC") and was the controlling member of RKC Management, LLC ("RKC Management"). Cannon formed the RKC Matador Fund, LLC ("Matador"), and through RKC and RKC Management, was the controlling member and manager of Matador. RKC had individual clients that invested in Matador. Before forming RKC, Cannon had previously been a registered representative with Merrill Lynch and Smith Barney. Cannon, 40 years old, is a resident of North Salt Lake, Utah.

2. On April 26, 2013, a final judgment was entered by consent against Cannon, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933 ("Securities Act"), Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and Sections 206(1), (2) and (4) of the Advisers Act and Rule 206(4)-8 thereunder, in the civil action entitled Securities and Exchange Commission v. RKC Capital Management, et al., Civil Action Number 2:12-cv-00408-EJF, in the United States District Court for the District of Utah.

3. The Commission's complaint alleged that Cannon engaged in fraudulent practices by, among other things, employing a manipulative trading practice called "marking the close" of a stock that, at times, comprised over 50% of Matador's assets, and by, at times, instructing Matador's fund administrator to price that stock above the month end closing price for several months and at times when the price of the stock was declining. As a result of those and other practices, Matador was overvalued during certain periods, from at least November 2007 through July 2011, and its performance returns were, therefore, at times, overstated.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Cannon's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 203(f) of the Advisers Act that Respondent Cannon be, and hereby is barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization with the right to apply for reentry after two (2) years to the appropriate self-regulatory organization, or if there is none, to the Commission.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any

disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: **Jill M. Peterson**
Assistant Secretary

*Commissioner Walter
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9401 / May 3, 2013

SECURITIES EXCHANGE ACT OF 1934
Release No. 69506 / May 3, 2013

INVESTMENT ADVISERS ACT OF 1940
Release No. 3601 / May 3, 2013

INVESTMENT COMPANY ACT OF 1940
Release No. 30505 / May 3, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15024

In the Matter of

WALTER V. GERASIMOWICZ,
MEDITRON ASSET
MANAGEMENT, LLC,
MEDITRON MANAGEMENT
GROUP, LLC

Respondents.

ORDER MAKING FINDINGS AND
IMPOSING REMEDIAL SANCTIONS AND A
CEASE-AND-DESIST ORDER PURSUANT
TO SECTION 8A OF THE SECURITIES ACT
OF 1933, SECTION 21C OF THE
SECURITIES EXCHANGE ACT OF 1934,
SECTIONS 203(e), 203(f) AND 203(k) OF THE
INVESTMENT ADVISERS ACT OF 1940,
AND SECTION 9(b) OF THE INVESTMENT
COMPANY ACT OF 1940 AND ORDERING
CONTINUATION OF PROCEEDINGS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest to enter this Order Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act"), and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") and Ordering Continuation of Proceedings

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against Walter V. Gerasimowicz ("Gerasimowicz"), Meditron Asset Management, LLC ("MAM"), and Meditron Management Group, LLC ("MMG") (collectively, "Respondents").¹

II.

Respondents have submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933, Section 21C of the Securities Exchange Act of 1934, Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company Act of 1940 and Ordering Continuation of Proceedings ("Order"), as set forth below.

III.

On the basis of this Order and Respondents' Offer, the Commission finds that:

Summary

1. This matter involves misconduct by MAM, a registered investment adviser, its sole owner and principal, Gerasimowicz, and MMG, an unregistered investment adviser wholly owned by Gerasimowicz, for misappropriating and misusing client assets and repeatedly making material misrepresentations and omissions to clients.
2. From at least September 2009 through September 2011, Gerasimowicz, MAM and MMG diverted approximately \$2.65 million from their client, the Meditron Fundamental Value/Growth Fund, LLC ("Meditron Fund" or "Fund"), to prop up SMC Electrical Contracting Inc. ("SMC"), a private contracting company controlled by Gerasimowicz that is currently in Chapter 11 bankruptcy proceedings.
3. Gerasimowicz, MAM and MMG repeatedly lied or failed to disclose to Fund investors the dramatic deviations from the Fund's stated investment strategy and deviations from the Fund's disclosed valuation policy. Gerasimowicz and MAM also failed to disclose the material conflict of interest posed by their own investments of approximately \$2 million in SMC.

¹ On September 14, 2012, the Commission instituted administrative and cease-and-desist proceedings pursuant to Section 8A of the Securities Act of 1933, Section 21C of the Securities Exchange Act of 1934, Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company Act of 1940 against Respondents.

4. Gerasimowicz also misrepresented MAM's regulatory assets under management at \$1.1 billion in published articles authored by Gerasimowicz and made available on Respondents' website.

5. MAM, aided and abetted by Gerasimowicz, violated the custody rule applicable to registered investment advisers by failing to distribute annual audited financial statements to Meditron Fund investors within the rule's prescribed time periods.

Respondents

6. **Gerasimowicz**, age 60, is a resident of New York, New York. He is the Chairman, Chief Executive Officer, Chief Compliance Officer, and sole owner of Respondent MAM, an investment adviser registered with the Commission, and is the sole owner of Respondent MMG, an unregistered investment adviser, through which he manages the Meditron Fund. Gerasimowicz is also the founder and operating manager of Meditron Real Estate Partners, LLC ("MREP"), a private company, and serves as Chairman of the Board of Directors of SMC, a private contracting company owned by MREP.

7. **MAM** is a New York limited liability company and registered investment adviser with its principal place of business in New York, New York. MAM has been registered with the Commission since April 9, 2003 and is wholly owned by Gerasimowicz. MAM claimed to have approximately \$50 million in regulatory assets under management in its March 24, 2012 Form ADV filing, and claimed that approximately ten percent of its advisory clients also have invested in the Meditron Fund.

8. **MMG** is a Delaware limited liability company, formed on March 14, 2003, and an unregistered investment adviser with its principal place of business in New York, New York. MMG is named as the Meditron Fund's manager in the Fund's offering documents and is wholly owned by Gerasimowicz. MMG has no bank or brokerage accounts in its name, and advisory fees for managing the Meditron Fund are paid to MAM and, through MAM, to Gerasimowicz.

Other Relevant Entities

9. **Meditron Fund**, a Delaware limited liability company formed on March 14, 2003, is a hedge fund managed by Gerasimowicz, MMG and MAM. The Fund had approximately thirteen investors, several of whom are also MAM advisory clients, and claimed to have \$4.2 million in assets under management as of MAM's Form ADV filing on March 24, 2012. The Meditron Fund has no board of directors or investment committee, and Gerasimowicz controls the Fund's bank and brokerage accounts. The Fund's custodian was Goldman Sachs Execution & Clearing ("Goldman") until approximately July 2010, and is currently Charles Schwab & Co., Inc.

10. **MREP**, a Delaware limited liability company, was formed by Gerasimowicz on June 28, 2004 as a vehicle for potential investments in real estate ventures. Gerasimowicz is the operating manager and MREP has no other employees. In 2007, MREP functioned as a vehicle

for Gerasimowicz, the Meditron Fund, and certain individual MAM advisory clients to co-invest in SMC, which is MREP's sole investment.

11. SMC, a New York corporation, is a private contracting company with its principal place of business in New York, New York. SMC is owned by MREP. Gerasimowicz serves as the Chairman of the Board of Directors of SMC. On September 30, 2011, SMC filed a petition for relief under Chapter 11 of the Bankruptcy Code in the Bankruptcy Court for the Southern District of New York.

Meditron Fund Offering and Related Disclosures

12. Meditron Fund investors received the Fund's Private Placement Memorandum ("PPM"), Operating Agreement, and subscription documents, as well as a one-page document detailing the Fund's historical monthly and annual performance returns:

13. The PPM stated that the Fund's investment objective was to "seek to outperform the S&P 500 Index through the purchase of undervalued securities and their subsequent sale upon reaching price appreciation targets. The Fund's portfolio is normally comprised of 15 to 50 stocks with expected fair values considerably greater than their current market prices." The PPM also disclosed that the "Fund's portfolio may be heavily weighted in small and mid-cap issues, and is not necessarily composed of stocks which comprise the S&P 500." The PPM represented that the Fund would maintain "a diversified portfolio of long and short positions" with "controlled risk diversification of investments" and "positions will often be hedged selectively to reduce market risk and volatility."

14. The PPM represented that the Fund's manager would select investments by using a "proprietary quantitative stock selection methodology centered upon fair value calculations" and that the Fund's manager would also consider "other fundamental data such as corporate earnings and growth potential." The PPM also represented that the manager of the Fund would "compute[] weekly fair values of the securities." The PPM required the Fund manager to value the Fund's publicly-traded securities based on market prices, or in the absence of such prices, based on prices "reasonably assigned by the Manager."

15. Although the Fund was obligated to pay Gerasimowicz and MMG an annual 1% management fee as well as an incentive allocation of 20% of annual net profits (along with payment for "investment-related expenses, such as brokerage commissions, clearing fees, interest, custodial fees, and similar expenses," and "[o]rganizational expenses (including legal and accounting fees)"), these management fees were actually paid to Gerasimowicz and MAM.

16. While the Operating Agreement provided that any member or manager "may engage in and possess interests in other business ventures of any and every type and description," it limited the ability of the Meditron Fund to transact business with any member or manager to circumstances where "the terms of those transactions are no less favorable than those the [Fund] could obtain from unrelated third parties."

The SMC Acquisition

17. In 2007, Gerasimowicz began raising capital through the offer and sale of limited partnership interests in MREP for the purpose of investing in SMC. Respondents caused the Meditron Fund to invest \$200,000 in MREP in June 2007. During the same period, Gerasimowicz recommended and caused seven individual MAM advisory clients to purchase MREP limited partnership interests totaling \$750,000, and Gerasimowicz personally invested \$50,000 in MREP in May 2007.

18. In July 2007, Gerasimowicz caused MREP to invest \$1 million in SMC in exchange for a 50% ownership interest in SMC.

19. In approximately September 2008, SMC fired its President and CEO. In connection with his termination, the President and CEO agreed to allow MREP to acquire his 50% ownership interest in SMC at no additional cost, and MREP became the sole equity owner of the company.

Misappropriation and Misuse of Meditron Fund Assets

20. Beginning at least by the fall of 2008, SMC experienced financial difficulties and Gerasimowicz and MAM began to prop up SMC using their own funds. Between approximately October 2008 and September 2011, when SMC filed for bankruptcy, Gerasimowicz and MAM provided over \$2 million in funding to SMC. Neither Gerasimowicz nor MAM disclosed these investments in SMC to the Meditron Fund or to Fund investors.

21. Beginning in approximately September 2009, Respondents began siphoning off Meditron Fund assets for the benefit of SMC. Between September 2009 and September 2011 (the "relevant period"), Gerasimowicz directed at least 36 separate transfers of Meditron Fund assets, totaling approximately \$2.65 million, either to SMC or directly to SMC's creditors in order to provide SMC with working capital.

22. In order to obtain the money to make these transfers, Gerasimowicz sold publicly-traded, liquid securities held by the Meditron Fund. Using the proceeds, between September 2009 and June 2010, Respondents directed six separate transfers, totaling \$1.025 million, from the Meditron Fund's brokerage account at Goldman, directly to SMC or for its benefit. In the letters of authorization provided to Goldman, Gerasimowicz represented that the monies paid for the purchase of the following securities:

- World Trade Center Memorial Development Bond at 12%
- Erasmus High School Bond at 9%
- Brooklyn High School Bond at 9%
- Brooklyn PS 225K Bond at 8%

23. The letters of authorization list the recipient of the funds as either SMC or MREP, which subsequently transferred the funds to SMC.

24. The \$1.025 million transferred from the Meditron Fund's Goldman account, together with the Fund's 2007 \$200,000 investment in SMC through MREP, represented approximately 29% of the Fund's assets as of June 30, 2010.

25. In return for the six transfers between September 2009 and June 2010, the Meditron Fund received four promissory notes issued by SMC (the "Notes"). The first Note was issued on December 20, 2009, for \$500,000 at a 12% annual interest rate. The second Note was issued on March 1, 2010 for \$100,000 at a 9% annual interest rate. The third Note was issued on June 6, 2010 for \$225,000 at a 6% annual interest rate. The fourth Note was issued on June 23, 2010 for \$200,000 at an 8% annual interest rate. All four Notes were issued for a five-year term and required no interest or principal payments until the end of that term. To date, SMC has made no payments on the Notes, the first of which comes due in December 2014.

26. Between approximately September 2010 and September 2011, and on at least 30 separate occasions, Respondents diverted a total of approximately \$1.63 million of Meditron Fund assets, either to SMC or for its benefit.

27. The approximately \$2.65 million transferred from the Meditron Fund to SMC between September 2009 and September 2011 represented approximately 80% of the Fund's assets as of December 31, 2011.

28. In making these "investments," Respondents failed to perform the type of disciplined, quantitative-based investment selection strategy as promised in the PPM, or to take any other steps to protect the Meditron Fund's interests in the SMC-related transactions.

29. Gerasimowicz or MAM also did not assess whether the terms obtained by the Fund were "no less favorable than those the [Fund] could obtain from unrelated third parties," as required by the Fund's Operating Agreement. As a matter of fact, however, SMC was unable to acquire funding on these terms from unrelated third parties. To the contrary, SMC was unable to obtain unrelated third-party financing unless Gerasimowicz agreed to personally guarantee repayment. Furthermore, when SMC did manage to obtain a short-term loan for \$190,000 from a friend of Gerasimowicz in February 2009, the firm paid an annualized interest rate of approximately 60%, significantly more than the 6%-12% range that Gerasimowicz unilaterally set for the Fund's Notes.

30. Investors continued to purchase membership interests in the Meditron Fund during the relevant period after Respondents began deviating from the Fund's strategy and funneling Fund assets to SMC.

31. Several of MAM's advisory clients also invested in the Meditron Fund.

32. On September 30, 2011, SMC filed a petition for relief under Chapter 11 of the Bankruptcy Code in the Bankruptcy Court for the Southern District of New York. According to SMC's bankruptcy financials, SMC's net worth is negative and the business is insolvent with liabilities of between \$8-\$10 million and net assets of approximately \$6-\$7 million including accounts receivable.

33. SMC's bankruptcy filing lists the Meditron Fund as a creditor holding an unsecured, nonpriority claim of \$2.5 million against SMC for loans provided from 2007 through 2011.

34. Despite SMC's bankruptcy and the fact that secured and other creditor claims totaling \$3.2 million take priority over the Fund's claims, Respondents continued to value the Fund's SMC Notes and loans at cost.

Misrepresentations and Omissions to Fund Investors

35. During the relevant period, Respondents solicited potential investors by means of material misrepresentations and omissions. The Fund's PPM represented that the Fund maintained a "diversified portfolio," employed "controlled risk diversification" of investments, and hedged positions to "reduce market risk and volatility." According to the PPM, the Fund's investment objective is to "seek to outperform the S&P 500 Index through the purchase of undervalued securities and their subsequent sale upon reaching price appreciation targets. The Fund's portfolio is normally comprised of 15 to 50 stocks with expected fair values considerably greater than their current market prices."

36. Although the PPM was originally issued in 2003, several years before the Fund first invested in SMC, investors continued to purchase membership interests in the Fund after Respondents began diverting Fund assets to SMC, and Respondents continued to provide potential investors with this same PPM, which misrepresented the Fund's investment strategy.

37. Respondents misrepresented and failed to disclose the fundamental change in the Fund's investment strategy represented by the investment of the majority of its assets in SMC, a private company that ultimately filed for bankruptcy.

38. Respondents misrepresented and failed to disclose to those MAM advisory clients who invested in the Meditron Fund the deviations from the Fund's stated investment strategy and valuation processes as well as conflicts of interest resulting from their own economic interests in SMC.

39. During the relevant period, Gerasimowicz prepared and sent quarterly newsletters on MMG stationery to Meditron Fund investors. Each newsletter misrepresented to investors that generally Fund investments comprised between one and three percent of the Fund's portfolio on an individual basis; that the Fund was well diversified both in terms of individual position as well as across market sectors; and that the Fund's risk was comparable to bonds and lower than the overall market. Each quarterly newsletter also listed the Fund's "Top Ten Long Portfolio

Positions.” None of the listed positions ever represented more than five percent of the Fund’s overall portfolio. Despite the Fund’s rapidly increasing and concentrated SMC position, the quarterly newsletters never disclosed the Fund’s SMC investment.

40. During the relevant period, Gerasimowicz prepared and sent quarterly account statements on MAM stationery to Meditron Fund investors, listing the investor’s capital contribution(s), the investor’s net asset value (“NAV”) at the end of the quarter, the Fund’s quarterly return, and the S&P 500 quarterly return. The statements provided no information about specific portfolio investments, or about the Fund’s investment in SMC.

41. Contrary to Gerasimowicz’s representations to Fund investors, including those MAM advisory clients invested in the Fund, and contrary to the information provided to them in the offering documents, quarterly newsletters and account statements, Respondents misappropriated approximately \$2.65 million of Meditron Fund assets to provide operating capital for SMC.

42. Fund investors received no written disclosures concerning the 2010 diversion of assets and the Fund’s rapidly increasing SMC position (approximately 40% of portfolio as of 2010 year-end) until at least December 2011, in the 2010 audited financial statements, by which time Respondents had diverted approximately 80% of the Fund’s portfolio to SMC. Even this disclosure was only made to a subset of Fund investors, as some investors never received the 2010 audited financial statements and thus received no written disclosures concerning the Fund’s SMC position. No written disclosures have been made concerning the 2011 diversion of Fund assets to SMC.

43. The Fund’s audited financial statements claimed that the Fund employed a fair value methodology (pursuant to ASC 820) to value its investments. Respondents rendered these disclosures false and misleading by failing to disclose that they never performed any valuation to value the Fund’s SMC position, nor did they “reasonably assign” a valuation to the SMC position as required under the PPM. In fact, no valuation analysis was performed on the Fund’s SMC investments. As reflected in the 2010 audited financial statements, Respondents continued to value these investments at cost despite having no reasonable basis for doing so as SMC’s financial condition worsened and the company assumed increasing levels of debt. Respondents continued to take management fees from the Fund based on the inflated NAV.

44. Gerasimowicz did not disclose SMC’s September 2011 bankruptcy filing in his December 7, 2011 management representation letter provided to the auditor in connection with the audit of the Fund’s 2010 financial statements. The failure to disclose the bankruptcy as a “subsequent event” in the notes to the 2010 audited financial statements is a material omission about an event that impaired a significant asset of the Fund.

Misrepresentations Concerning Assets Under Management

45. Gerasimowicz misrepresented MAM’s assets under management in articles he wrote for *Worth Magazine*, which advertises itself as a wealth management magazine for high

net worth individuals. Specifically, Gerasimowicz authored ten separate magazine articles, dating from April 2010 to November 2011, which misrepresented MAM's assets under management at \$1.1 billion. These articles were published in *Worth Magazine* and made available and accessible by hyperlinks on Respondents' website.

Failure to Comply with Advisers Act Custody Rule

46. During the relevant period, Meditron Fund investors did not receive quarterly account statements from the Fund's qualified custodian. Instead, investors received quarterly account statements from Respondents.

47. During the relevant period, MAM was not subject to an annual surprise examination by an independent public accountant.

48. During the relevant period, Gerasimowicz, MMG and MAM did not distribute annual, audited financial statements prepared in accordance with generally accepted accounting principles ("GAAP") and audited by an independent public accountant that is registered with, and subject to regular inspection by, the Public Company Accounting Oversight Board ("PCAOB") to all Meditron Fund investors within 120 days of the end of its fiscal year.

49. The Fund's 2008 audited financial statements were not completed until August 1, 2010. The Fund's 2009 audited financial statements were not completed until March 30, 2011. The Fund's 2010 audited financial statements were not completed until December 7, 2011.

Violations

50. As a result of the conduct described above, Respondents willfully violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which prohibit fraudulent conduct in the offer or sale of securities and in connection with the purchase or sale of securities.

51. As a result of the conduct described above, Respondents willfully violated Sections 206(1), (2), and (4) of the Advisers Act and Rule 206(4)-8 thereunder, which prohibit fraudulent conduct by an investment adviser.

52. As a result of the conduct described above, Gerasimowicz willfully aided and abetted and caused MAM's and MMG's violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Section 206(4) of the Advisers Act and Rule 206(4)-8 thereunder.

53. As a result of the conduct described above, MAM willfully violated, and Gerasimowicz willfully aided and abetted and caused MAM's violations of, Section 206(4) of the Advisers Act, which prohibits fraudulent conduct by an investment adviser, and Rules 206(4)-1 and 206(4)-2 thereunder, which provide that it shall constitute a fraudulent, deceptive, or manipulative act, practice, or course of business within the meaning of Section 206(4) for an

investment adviser to, respectively, (i) directly or indirectly, publish, circulate, or distribute any advertisement which contains any untrue statement of a material fact, or which is otherwise false or misleading; or (ii) have custody of client funds or securities unless a qualified custodian maintains those funds and securities and, for pooled investment vehicles, the adviser distributes annual audited financial statements prepared in accordance with GAAP and audited by an independent public accountant registered with, and subject to regular inspection by, the PCAOB to all members or other beneficial owners of the pooled investment vehicle within 120 days of the end of its fiscal year.

IV.

Pursuant to this Order, Respondents agree that disgorgement and third tier civil penalties are appropriate, and further agree to additional proceedings in this proceeding to determine the amount of such disgorgement and civil penalties, plus prejudgment interest if ordered, pursuant to Section 8A(e) of the Securities Act, Section 21B of the Exchange Act, Sections 203(i) and 203(j) of the Advisers Act and Section 9(d) of the Investment Company Act. In connection with such additional proceedings: (a) Respondents agree that they will be precluded from arguing that they did not violate the federal securities laws described in this Order; (b) Respondents agree that they may not challenge the validity of this Order; (c) solely for the purposes of such additional proceedings, the findings of this Order shall be accepted as and deemed true by the hearing officer; and (d) the hearing officer may determine the issues raised in the additional proceedings on the basis of affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence.

V.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondents' Offer, and to continue the proceedings to determine the amount of disgorgement and civil penalties.

Accordingly, pursuant to Section 8A of the Securities Act, Section 21C of the Exchange Act, Sections 203(e), 203(f) and 203(k) of the Advisers Act, and Section 9(b) of the Investment Company Act, it is hereby ORDERED that:

A. Respondents cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Sections 206(1), 206(2), and 206(4) of the Advisers Act and Rules 206(4)-1, 206(4)-2, and 206(4)-8 promulgated thereunder.

B. Respondent Gerasimowicz be, and hereby is:

barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and

prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter.

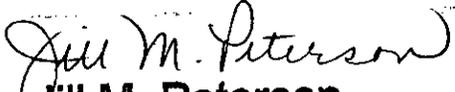
C. Any reapplication for association by Respondent Gerasimowicz will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondents, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

D. Respondent MAM is censured.

E. Respondents shall pay disgorgement and third tier civil penalties, in amounts to be determined by additional proceedings.

By the Commission.

Elizabeth M. Murphy
Secretary


By: **Jill M. Peterson**
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 69516 / May 6, 2013

Report under Section 21(a) of the Exchange Act

*Report of Investigation in the Matter of the City of Harrisburg, Pennsylvania Concerning the Potential Liability of Public Officials with Regard to Disclosure Obligations in the Secondary Market*¹

The Commission today instituted a settled cease-and-desist proceeding against the City of Harrisburg, Pennsylvania ("Harrisburg" or "the City") for its violations of Section 10(b) of the Securities Exchange Act ("Exchange Act") and Rule 10b-5 thereunder.² As a result of an investigation conducted by the staff of the Division of Enforcement, the Commission found that certain public statements made during a two-year period misrepresented and omitted to state material information regarding Harrisburg's deteriorating financial condition and credit ratings downgrades, thereby violating the antifraud provisions of the Exchange Act. During the same period, Harrisburg, a near-bankrupt city under state receivership, did not provide to the public current and accurate information regarding the City's financial condition, including annual financial information or notices in accordance with its written undertakings pursuant to Rule 15c2-12 of the Exchange Act.

Based upon information obtained during the investigation, the Commission deems it appropriate that it issue this Report of Investigation pursuant to Section 21(a) of the Exchange Act to address the obligations of public officials³ relating to their secondary market disclosures for municipal securities. Public officials should be mindful that their public statements, whether written or oral, may affect the total mix of information available to investors, and should understand that these public statements, if they are materially misleading or omit material information, can lead to potential liability under the antifraud provisions of the federal securities laws.

As the Commission stated in its 1994 interpretive guidance ("Interpretive Guidance") concerning the obligations of participants in the municipal securities markets under the antifraud provisions of the federal securities laws, when information about a municipal issuer is "reasonably expected to reach investors and the trading markets, those disclosures are subject to the antifraud provisions."⁴ Given this potential for liability, as the Commission stated in the Interpretive Guidance, "in order to minimize the risk of misleading investors, municipal issuers should establish practices and procedures to identify and timely disclose, in a manner designed to inform the trading market, material information reflecting on the creditworthiness of the issuer."⁵

In 1996, two years after its Interpretive Guidance, the Commission issued a Report of Investigation in the Matter of County of Orange, California ("Orange County Report") to emphasize the responsibilities of public officials under the federal securities laws relating to

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primary offerings of municipal securities and related disclosure documents.⁶ Unlike many primary offering disclosure documents, statements by public officials that reach the secondary market may not be subject to the same comprehensive review with respect to the disclosure standards of the federal securities laws. Nevertheless, public officials may have liability under the antifraud provisions of the federal securities laws for such statements. Therefore, the statements of those public officials who may be viewed as having knowledge regarding the financial condition and operations of a municipal issuer should be carefully evaluated to assure that they are not materially false or misleading. The Commission's July 2012 Municipal Market Report also addressed this issue, recommending that issuers and other municipal market participants follow and further develop voluntary industry initiatives to enhance disclosure policies and procedures for both primary offering and ongoing disclosures. Such initiatives may include the adoption of issuer disclosure committees and training programs.⁷

In this case, among other things, public officials who worked within the City's administration ("City Administrators") publicly released statements and financial information that omitted or misstated material information about Harrisburg's financial condition, including its credit ratings and payments made by the City on debt it guaranteed for a resource recovery facility. The financial information and other statements, publicly available on Harrisburg's website at the time, included the City's 2007 and 2008 Comprehensive Annual Financial Reports ("CAFR"), 2009 Budget and Transmittal Letter, 2009 State of the City Address and its Mid-Year Fiscal Report for 2009. For example, City Administrators submitted Harrisburg's 2008 CAFR, which omitted to include a downgrade by Moody's Investor Services, Inc. of the City's general obligation debt from Baa2 to Ba2. City Administrators also released a 2009 Budget that did not include funds for debt guarantee payments for the resource recovery facility, although \$2.1 million had informally been set aside in anticipation of having to make those payments. In another instance, City Administrators released a Mid-Year Fiscal Report for 2009 without reference to the \$2.3 million in guarantee payments made by the City for a resource recovery facility. In addition, an annual public address given by a Harrisburg public official omitted to state the amount of resource recovery facility debt the City would likely have to repay from its General Fund, and the impact the repayment was having on Harrisburg's finances. Harrisburg public officials failed to take measures, appropriate under the circumstances, to ensure that their financial information and other statements were not materially misleading.

The misstatements and omissions in this case were not the result of an isolated incident but were recurrent and stretched from one fiscal year into the next. From January 2009 through March 2011, at a time of increased public interest in Harrisburg's financial condition, and despite having entered into multiple written undertakings, Harrisburg failed to submit annual financial information, audited financial statements, notices of failure to provide required annual financial information and material event notices. Investors may be more likely to rely upon statements from public officials where written undertakings made pursuant to Rule 15c2-12 have not been fulfilled and required continuing disclosures are not available through the Municipal Securities Rulemaking Board's Electronic Municipal Market Access ("EMMA") system.⁸

The statements by the Harrisburg public officials were part of, and could have altered, the total mix of information available to the market. There is a substantial likelihood that a reasonable investor

would consider the financial condition of the City important in making an investment decision, and there were no other disclosures made by the City as part of the total mix of information available to enable investors to consider other information. These public officials' statements were the principal source of significant, current information about the issuer of the security and thus could reasonably be expected to influence investors and the secondary market. Because statements are evaluated for antifraud purposes in light of the circumstances in which they are made, the lack of other disclosures by the municipal entity may increase the risk that municipal officials' public statements may be misleading or may omit material information.

Given this potential for liability, public officials who make public statements concerning the municipal issuer should consider taking steps to reduce the risk of misleading investors. At a minimum, they should consider adopting policies and procedures that are reasonably designed to result in accurate, timely, and complete public disclosures; identifying those persons involved in the disclosure process; evaluating other public disclosures that the municipal securities issuer has made, including financial information and other statements, prior to public dissemination; and assuring that responsible individuals receive adequate training about their obligations under the federal securities laws. Public officials may also look to Commission enforcement actions or Commission guidance in developing the disclosure policies, procedures and controls that they choose to establish. Public officials may choose to identify and implement other practices or procedures that they believe are appropriate to meet their obligations under the federal securities laws. Harrisburg has since instituted formal and tailored written policies and procedures with respect to public statements regarding financial information and other statements and its written undertakings pursuant to Rule 15c2-12 of the Exchange Act.

By the Commission.

¹ Section 21(a) of the Exchange Act authorizes the Commission to investigate "whether any person has violated, is violating, or is about to violate" the federal securities laws. "The Commission is authorized . . . to publish information concerning such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of" the federal securities laws. This report does not allege a violation by any public officials currently or formerly associated with Harrisburg of Section 10(b) or Rule 10b-5 of the Exchange Act and the Commission has not charged such public officials with any violations of the federal securities laws. This Report also does not constitute factual findings or an adjudication of any issue addressed herein.

² In the Matter of the City of Harrisburg, Pennsylvania, Exchange Act Release No. 34-69515 (May 6, 2013). Harrisburg consented to the issuance of the Order without admitting or denying the findings therein.

³ In this Report, the term "public official" means elected officials, appointed officials, and employees, or their functional equivalents, of any State, municipality, political subdivision or any agency or instrumentality thereof.

⁴ See Statement of the Commission Regarding Disclosure Obligations of Municipal Securities Issuers and Others, Exchange Act Release No. 34-33741 (March 9, 1994) ("Interpretive Guidance") at 12-13.

⁵ *Id.* at 13.

⁶ Report of Investigation in the Matter of County of Orange, California as it Relates to the Conduct of the Members of the Board of Supervisors, Exchange Act Release No. 36761 (January 24, 1996).

⁷ Municipal Market Report at 141-42.

⁸ See <http://emma.msrb.org/>

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 69515 / May 6, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15316

In the Matter of

THE CITY OF HARRISBURG,
PENNSYLVANIA

Respondent.

ORDER INSTITUTING CEASE-AND-DESIST
PROCEEDINGS PURSUANT TO SECTION 21C OF THE
SECURITIES EXCHANGE ACT OF 1934, MAKING
FINDINGS, AND IMPOSING A CEASE-AND-DESIST
ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act") against the City of Harrisburg, Pennsylvania ("Harrisburg" or "Respondent" or "City").

II.

In anticipation of the institution of these proceedings, Harrisburg has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Harrisburg consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order ("Order"), as set forth below.

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III.

On the basis of this Order and Harrisburg's Offer, the Commission finds¹ that:

Summary

1. This matter involves Harrisburg's violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder in connection with material misstatements and omissions made by Harrisburg in its public statements and financial information, during a multi-year period where the City also failed to comply with written undertakings executed by the City in the form of Continuing Disclosure Certificates ("Continuing Disclosure Certificates"). These undertakings were a prerequisite to the underwriting of primary offerings of municipal securities subject to Rule 15c2-12 of the Exchange Act.² Pursuant to the Continuing Disclosure Certificates, the City agreed to provide certain ongoing financial information and notices for the benefit of bondholders. Harrisburg is a near-bankrupt city under state receivership largely by virtue of approximately \$260 million³ in outstanding debt it guaranteed for upgrades and repairs to a municipal Resource Recovery Facility ("RRF"), owned by The Harrisburg Authority ("Authority"). As of March 15, 2013, Harrisburg has found it necessary, on three occasions, to withhold approximately \$13.9 million in general obligation debt service payments in order to have sufficient cash flow to meet essential services in the City.

2. For over two years, from January 2009 through March 2011 (the "relevant time period"), because Harrisburg did not submit annual financial information, audited financial statements, notices of failure to provide required annual financial information and notices of material events ("financial information and notices") pursuant to its Continuing Disclosure Certificates, Harrisburg's financial information and notices available to the market were incomplete and outdated. During the relevant time period, Harrisburg's most recent annual financial

¹ The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

² Rule 15c2-12 prohibits, among other things and subject to certain exemptions, any broker, dealer or municipal securities dealer, when acting as an underwriter in a primary offering of municipal securities, from purchasing or selling municipal securities unless they have reasonably determined that the issuer of municipal securities, or an obligated person, has undertaken in a written agreement or contract for the benefit of holders of such securities to provide financial information and notices with information repositories known as Nationally Recognized Municipal Securities Information Repositories ("NRMSIRs"). An "obligated person" generally means any person or entity (including an issuer of separate securities) that is committed by contract or other arrangement to support payment of all or part of the obligations on the municipal securities being offered. On December 5, 2008, the Commission amended Rule 15c2-12 to require underwriters to reasonably determine that issuers or obligated persons undertake to submit documents with the Municipal Securities Rulemaking Board ("MSRB") instead of NRMSIRs and state information depositories (as of July 2009).

³ This figure does not include the approximately \$25 million loan due from the Authority to Covanta Energy, Inc., the operator of the RRF.

information that was publicly available was for its year ended December 31, 2008.⁴ That document, issued almost a year later on December 23, 2009, contained material misrepresentations and omissions regarding Harrisburg's financial condition and its credit ratings. As a result of Harrisburg's multi-year failure to provide financial information and notices as Harrisburg had agreed pursuant to its Continuing Disclosure Certificates, investors and the trading markets did not have certain information regarding the City's financial condition and had to seek out other public statements made by Harrisburg for current information on the City's finances. Those public statements misrepresented and omitted to state material information regarding Harrisburg's deteriorating financial condition and credit ratings downgrades resulting from the RRF debt guarantees.

3. During the relevant time period, Harrisburg had approximately \$43 million in outstanding general obligation debt and constituted an obligated person for approximately \$455 million of outstanding debt it guaranteed for several of its component units, including the Authority, the Harrisburg Parking Authority ("HPA"), and the Harrisburg Redevelopment Authority ("HRA"). Harrisburg entered into at least six separate Continuing Disclosure Certificates in connection with its general obligation and the RRF bond offerings. Pursuant to these Continuing Disclosure Certificates, Harrisburg agreed to provide financial information and notices, including, but not limited to, principal and interest payment delinquencies, and changes in bond ratings.⁵ Beginning in July 2009, Harrisburg was obligated under its Continuing Disclosure Certificates to submit this information to a central repository maintained by the MSRB, known as the Electronic Municipal Market Access ("EMMA") system.

4. Harrisburg had not submitted annual financial information or audited financial statements in accordance with its Continuing Disclosure Certificates since submitting its 2007 Comprehensive Annual Financial Report ("CAFR") to a NRMSIR in January 2009.⁶ Harrisburg's CAFR⁷ for the year ended December 31, 2007, completed on December 29, 2008 ("2007 CAFR"), was submitted to a NRMSIR on January 30, 2009. The City's CAFR for the year ended December 31, 2008 ("2008 CAFR") was completed on December 23, 2009. Although it was publicly

⁴ Harrisburg submitted its CAFR for the year ended December 31, 2009 to EMMA on August 6, 2012. The CAFR for the year ended December 31, 2010 was submitted to EMMA on December 20, 2012. The CAFR for 2011 is still outstanding.

⁵ In contrast to the Continuing Disclosure Certificates entered into by the City for its general obligation bonds, the RRF bonds only required the City to submit annual financial information and relieved the City of any obligation to submit material event notices.

⁶ Pursuant to the terms of its Continuing Disclosure Certificates, Harrisburg was required to submit annual financial information within 270 days after the end of its December 31st fiscal year end and until July 1, 2009 was required to file with all NRMSIRs. Harrisburg submitted its CAFR for the year ended December 31, 2009 to EMMA on August 6, 2012. The CAFR for the year ended December 31, 2010 was submitted to EMMA on December 20, 2012. The CAFR for 2011 is still outstanding.

⁷ A CAFR is a set of government financial statements of a state, municipal or other governmental entity that complies with generally accepted accounting principles ("GAAP").

available on the City's website at the time,⁸ the 2008 CAFR was never submitted to EMMA.⁹ Moreover, the 2007 and 2008 CAFRs contained material misrepresentations and omissions with respect to Harrisburg's credit ratings and the potential impact of the RRF debt on the City's financial health. Harrisburg also did not submit material event notices regarding its failure to submit annual financial information or its credit rating downgrades until March 29, 2011, after the Commission had commenced its investigation.

5. At a time of increased interest in its financial health by virtue of the Authority's deteriorating financial condition, Harrisburg failed to comply with its Continuing Disclosure Certificates for over two years, which could have created a risk that investors would purchase or sell securities in the secondary market on the basis of incomplete and outdated information. This resulted in investors having to seek out other public statements the City made regarding its fiscal situation during the relevant time period. However, little information concerning the City's fiscal situation was publicly available.¹⁰ Among the information publicly available, and routinely posted to Harrisburg's website at the time, were Harrisburg's 2009 Budget and Transmittal Letter, the 2009 State of the City Address, and its Mid-Year Fiscal Report for 2009. Those public statements materially misstated and failed to disclose material information regarding Harrisburg's financial condition and credit ratings.

Respondent and Related Entity

6. The City of Harrisburg is the capital of the Commonwealth of Pennsylvania, with the power to issue municipal securities. Harrisburg is the ninth largest city in Pennsylvania with a population of approximately 48,000 and annual revenues of approximately \$55 million.

7. The Harrisburg Authority is a municipal authority under the provisions of Pennsylvania's Municipality Authorities Act, 53 Pa. C.S.A. § 5601, et seq., with the power to issue debt. The Authority provides water and sewer services to the citizens of Harrisburg. The Authority also owns the RRF, a plant located in Harrisburg that converts solid waste to energy. The RRF is primarily used to dispose of solid waste generated within Harrisburg and various other municipalities located in Dauphin County, Pennsylvania.

⁸ Harrisburg significantly revised its website in May 2011. The revised Harrisburg website no longer includes historical financial information or prior year public statements made by Harrisburg or its officials.

⁹ Harrisburg erroneously submitted its 2008 CAFR with a former NRMSIR on March 2, 2010. As previously discussed, all financial information and notices were to be submitted to EMMA on or after July 2, 2009.

¹⁰ During the relevant time period, the Authority had not issued annual financial information since its audited financial statements for the year ended December 31, 2008. These audited financial statements were issued on December 3, 2009 and submitted to EMMA on March 9, 2010. The Authority submitted its audited financial statements to EMMA for 2009 and 2010 on December 28, 2011 and December 4, 2012, respectively. The Authority, on behalf of itself and Harrisburg, submitted to EMMA various material event notices reflecting its financial difficulties, including unscheduled draws on its debt service reserve funds. The material event notices submitted by the Authority did not disclose the impact of those events on Harrisburg's financial condition.

Harrisburg's Financial Crisis

8. Harrisburg's RRF began operations in 1972. Harrisburg sold the RRF to the Authority in 1993, but continued to operate the facility. In 1998, the Authority issued \$56 million of bonds to refinance the then-existing RRF debt guaranteed by Harrisburg.¹¹ Two years later, in 2000, the Authority issued another \$25 million in bonds, also guaranteed by Harrisburg, to partially refinance outstanding RRF debt and fund ongoing operating costs and equipment, among other things.¹² In 2002, the Authority issued \$17 million of RRF debt, also guaranteed by Harrisburg, primarily for working capital needs.¹³ The RRF was shut down for repairs in 2003 pursuant to a consent order by the Environmental Protection Agency ("EPA"). From 2003 to 2007, the Authority undertook a major retrofit of the RRF to bring it into compliance with EPA standards. In 2003, to finance this work and refinance existing debt, the Authority issued an additional \$201 million in bonds, all guaranteed by Harrisburg. In the event Harrisburg is unable to pay under its primary guarantee, \$111 million of the 2003 Authority bonds were further secured by a secondary guarantee from Dauphin County.¹⁴

9. As a result of a series of delays and cost overruns in completing the retrofit work, the Authority turned over RRF operations to a private company in January 2007. During 2007, the Authority did not have sufficient revenues to make its RRF debt service payments. As a result, beginning in June 2007, Harrisburg paid about \$4 million of the approximately \$12 million of the Authority's RRF debt service payments for 2007.¹⁵ As secondary guarantor, Dauphin County

¹¹ In particular, on August 1, 1998, the Authority issued \$56 million of its Guaranteed Resource Recovery Facility Refunding Revenue Bonds, Series A through D of 1998, of which approximately \$11 million was outstanding as of December 31, 2007. At closing, Harrisburg executed a Guaranty Agreement with respect to the principal of and interest on the bonds as well as a Continuing Disclosure Certificate.

¹² On December 1, 2000, the Authority issued \$25 million of its Guaranteed Resource Recovery Facility Refunding Revenue Bonds, Series A and B of 2000. This issuance was refunded in 2003. At closing, Harrisburg executed a Guaranty Agreement with respect to the principal of and interest on the bonds as well as a Continuing Disclosure Certificate.

¹³ On August 15, 2002, the Authority issued \$17 million of its Guaranteed Federally Taxable Resource Recovery Facility Subordinate Variable Rate Revenue Notes, Series A of 2002, of which approximately \$16 million was outstanding as of December 31, 2007. At closing, Harrisburg executed a Guaranty Agreement with respect to the principal of and interest on the bonds and a Continuing Disclosure Certificate.

¹⁴ The Authority issued \$76 million of its Guaranteed Federally Taxable Resource Recovery Facility Subordinate Refunding Revenue Bonds, Series A, B, and C of 2003 on June 4, 2003 and \$125 million of its Guaranteed Resource Recovery Facility Revenue Bonds, Series D-1 and D-2 and Guaranteed Federally Taxable Resource Recovery Facility Revenue Bonds E and F of 2003 on December 1, 2003, all of which was outstanding as of December 31, 2007. At closing, Harrisburg executed Guaranty Agreements with respect to the principal of and interest on the bonds and two separate Continuing Disclosure Certificates. Dauphin County executed secondary Guaranty Agreements with respect to Series D-1, D-2, and E in the event Harrisburg fails to pay under its Guaranty Agreement.

¹⁵ The Authority, on behalf of itself and Harrisburg, submitted material event notices to the NRMSIRs regarding these guarantee payments.

made another \$3 million in RRF debt service payments that Harrisburg was unable to make. In December 2007, the Authority privately placed an additional \$30 million of debt which Harrisburg again guaranteed (the "2007 Notes").¹⁶ Dauphin County is also secondary guarantor on the 2007 Notes. The proceeds of the 2007 Notes were applied by the Authority to, among other things, provide the new RRF operator additional funds to complete the retrofit, make the RRF's 2008 debt service payments, and reimburse Harrisburg and Dauphin County for the guarantee payments previously made on RRF debt during 2007. The 2007 Notes did not provide any additional working capital for the RRF beyond 2008. By December 2007, Harrisburg was responsible for approximately \$260 million of outstanding debt for the RRF through its primary guarantees. Dauphin County serves as a secondary guarantor on approximately \$141 million of that RRF debt.

10. In addition to its RRF debt, by December 2007, Harrisburg had guaranteed approximately \$110 million of HPA bonds and about \$85 million of HRA bonds. Moreover, Harrisburg had outstanding \$43 million of general obligation debt.¹⁷ The City's outstanding obligations from both its general obligation bonds and the primary guarantees to its various component units totaled approximately \$498 million as of December 31, 2007, which represented about eight times the City's annual general fund revenues of \$61 million for 2007.

11. At various times from mid-2008 through 2009, the Authority and its financial advisors provided information to Harrisburg City Council and City administrators regarding the RRF's deteriorating financial condition. Specifically, from at least May 2008 through August 2009, various presentations and reports from the Authority's financial advisors to Harrisburg officials and City Council provided projections regarding the difficult financial situation facing the Authority absent additional capital or additional revenues. In its August 2008 presentation to Harrisburg's Public Works Committee, the advisors projected the RRF would have a budget deficit of almost \$13 million in 2009. In a September 2008 presentation to Harrisburg officials, the Authority's financial advisors indicated that the Authority would only have approximately \$3 million available to cover an estimated RRF debt service of \$16 million in 2009.

12. By late 2008, it was clear to Harrisburg's administration and the City Council that the Authority would not have sufficient revenues to meet its debt service obligations for 2009 and beyond without a significant rate increase for waste disposal at the RRF. A November 2008 report prepared by the Authority's financial advisors showed the RRF's projected debt service for 2009 increasing to \$18 million.

¹⁶ In late 2007, the Authority privately placed \$30 million of Guaranteed Resource Recovery Facility Limited Obligation Notes, Series C of 2007 and Guaranteed Federally Taxable Resource Recovery Facility Limited Obligation Notes, Series D of 2007. At closing, Harrisburg executed Guaranty Agreements with respect to the principal of and interest on these bonds. Dauphin County executed secondary Guaranty Agreements with respect to the bonds in the event Harrisburg failed to pay under its Guaranty Agreements.

¹⁷ On December 30, 1997, Harrisburg borrowed \$52 million original issue amount of its General Obligation Refunding Bonds, Series D and F of 1997, Capital Appreciation Bonds, of which approximately \$43 million was outstanding as of December 31, 2007, with an accreted obligation value of approximately \$74 million. At closing, Harrisburg executed a Continuing Disclosure Certificate for the bonds.

13. On December 2, 2008, the Authority sought a rate increase from \$63.75 to \$165 per ton for waste originating outside of the City but within Dauphin County.¹⁸ A few days later, Dauphin County challenged the rate increase in court. The matter went to binding arbitration and Dauphin County prevailed on February 18, 2009. The Authority received only a minimal rate increase of \$1.58 per ton. By this point, without the requested waste disposal rate increase, the Authority and its advisors projected that the Authority was unlikely to meet its future RRF debt service payments. As primary guarantor, Harrisburg ultimately became responsible for the almost \$18 million of Authority debt service payments to be paid in 2009, as well as approximately \$64 million of Authority debt service payments in 2010.¹⁹

Harrisburg Has Not Submitted Financial Information and Notices

14. During the relevant time period, Harrisburg did not submit financial information and notices pursuant to its Continuing Disclosure Certificates. In addition, much of Harrisburg's publicly available financial information was incomplete and outdated, with its most recent CAFR dating back to 2008.

15. Under the City's Continuing Disclosure Certificates, if Harrisburg is unable to provide annual financial information within 270 days of its fiscal year end, it agreed to submit a notice to EMMA (or previously one of the NRMSIRs) referencing its failure to timely provide such information. Harrisburg did not submit such a notice with respect to its 2008 CAFR. Harrisburg submitted its CAFR for the year ended December 31, 2009 to EMMA on August 6, 2012. The CAFR for the year ended December 31, 2010 was submitted to EMMA on December 20, 2012. Harrisburg's CAFR for 2011 is still outstanding. Harrisburg did not submit such notices regarding the lack of its annual financial information in EMMA until March 29, 2011.

16. The City agreed in its Continuing Disclosure Certificates to provide disclosure, in a timely manner, for eleven different categories of material events, including but not limited to, principal and interest payment delinquencies, rating changes, unscheduled draws on debt service reserves reflecting financial difficulties, and failure to provide annual financial information as required. Harrisburg did not submit in a timely manner the material event notices regarding its credit rating downgrades by Moody's.

¹⁸ The Authority also sought a rate increase from the City. As a result, Harrisburg's disposal rates increased from \$58 to \$232 annually for residential property and \$84.50 to \$338 annually for nonresidential property. The City's increase alone was insufficient to address the RRF's mounting debt problems, generating only approximately \$5.5 million annually in additional revenues.

¹⁹ The approximately \$64 million due in 2010 includes \$35 million for principal repayment of the 2007 Notes in December 2010 and replenishment of the RRF debt service reserve fund draws in 2009.

Harrisburg Made Material Misrepresentations and Omissions Concerning Its Financial Health

A. Harrisburg's 2007 and 2008 CAFRs

17. Harrisburg's 2007 CAFR omitted the \$4 million in guarantee payments that the City had paid on the RRF debt during 2007. The Authority repaid Harrisburg in December 2007 when it issued the 2007 Notes. This omission was material because it could have signaled to Harrisburg investors and potential investors that the Authority was having significant financial difficulties as early as 2007.

18. On October 28, 2009, Moody's Investor Services, Inc. ("Moody's") downgraded Harrisburg's general obligation bonds from Baa2 to Ba2, citing in its report the difficulties Harrisburg had in paying its RRF debt as the primary reason for the downgrade. In its 2008 CAFR submitted in December 2009, Harrisburg omitted the downgrade by Moody's.

19. Also in the 2008 CAFR, Harrisburg noted in its Management's Discussion and Analysis section that "[t]here is a high degree of uncertainty regarding the Authority's ability to operate at capacity in order to sustain their [RRF] debt service obligation. The City has had to honor those guarantees at various times during 2009." This statement was misleading because by December 2009, the extent of the Authority's financial difficulties was not uncertain. Harrisburg knew that the Authority had not obtained its waste disposal rate increase and that, as a result, the Authority would not have sufficient revenues to meet its debt service obligations for 2009 and beyond. While the 2008 CAFR's Subsequent Events footnote stated that the Authority lost its arbitration with Dauphin County and listed the various payments made by Harrisburg as guarantor on behalf of the Authority, it failed to disclose the resulting impact of those payments on Harrisburg's financial condition. Only a month before the 2008 CAFR was submitted, Harrisburg publicly issued and posted on its website a proposed 2010 budget seeking to include the approximately \$64 million in debt service for the Authority's RRF debt, including repayment of the 2007 Notes. That proposed budget was ultimately not adopted and the City's final budget did not include monies earmarked for RRF debt service payments in 2010.

B. Harrisburg's Public Statements

20. On November 25, 2008, the Harrisburg administration submitted a proposed 2009 Budget to City Council, which was approved on December 22, 2008 ("2009 Budget"). The 2009 Budget included \$63 million of general fund expenditures. At the time, Harrisburg's 2009 Budget and its accompanying transmittal letter were accessible on Harrisburg's website. By the time the 2009 Budget was passed, Harrisburg was aware of the Authority's projected budget deficits and that Dauphin County was challenging the rate increase. As a result, the Authority was unlikely to have sufficient revenues to pay its 2009 debt service obligations. Harrisburg's 2009 Budget, as adopted, did not include funds for debt guarantee payments for the RRF, raising questions as to whether it would fulfill its obligations under those guarantees. Nevertheless, at the beginning of the year, Harrisburg administration officials informally set aside \$2.1 million of its surplus reserves in anticipation of potentially having to make those guarantee payments.

21. The 2009 Budget also misstated Harrisburg's credit as being rated "Aaa" by Moody's based upon its insurance. By December 2008, Moody's had announced its downgrade of Harrisburg's general obligation credit rating to Baa1.

22. On April 9, 2009, Harrisburg's Mayor at the time gave the annual State of the City Address ("2009 Address"). At the time, the 2009 Address was accessible on Harrisburg's website and styled as an "annual report on the progress of Pennsylvania's Capital City and the largest municipality in our region." In the 2009 Address, the former Mayor only discussed the RRF as a situation that was an "additional challenge" and an "issue that can be resolved." The 2009 address was misleading because it omitted to state the amount of RRF debt the City would likely have to repay from its General Fund, and the impact that repayment obligation was already having on Harrisburg's finances. By April 2009, Harrisburg had already made \$1.8 million in guarantee payments on the RRF debt. In addition, by this time, Harrisburg knew that the Authority had failed to secure the requested rate increase, making it likely that Harrisburg would have to repay \$260 million of RRF debt as guarantor.

23. Between December 2008, when Harrisburg's 2009 Budget was made public, and April 2009, when Harrisburg's Mayor made his 2009 Address, \$28 million of bonds issued or guaranteed by Harrisburg traded without investors having the benefit of material information regarding Harrisburg's financial condition.

24. Harrisburg filed its Mid-Year Fiscal Report for 2009 ("2009 Mid-Year") on August 14, 2009. The 2009 Mid-Year was designed to provide a snapshot on budget-to-actual figures for Harrisburg approximately at the middle of the year. At the time, the 2009 Mid-Year was accessible on Harrisburg's website. The 2009 Mid-Year did not reference any of the guarantee payments the City had made on the RRF debt, which at this point totaled \$2.3 million, or 7% of its General Fund expenditures to the mid-year point. Between April 2009, when the Mayor made his 2009 Address, and August 2009, when Harrisburg's 2009 Mid-Year was issued, another \$24 million of bonds issued or guaranteed by Harrisburg traded without investors having the benefit of material information regarding Harrisburg's financial condition.

25. By the end of 2009, Harrisburg had made about \$5.6 million of RRF debt service payments under its guarantee obligations. This information was material, in part because, it represented approximately 9% of Harrisburg's projected General Fund expenditures as of December 31, 2009. The omission also did not alert investors or potential investors of the fact that Harrisburg had been using its surplus reserves to make guarantee payments.

26. Between August 2009, when Harrisburg filed its 2009 Mid-Year, and December 2009, when Harrisburg issued its 2008 CAFR, another \$35 million of bonds issued or guaranteed by Harrisburg traded without investors having the benefit of material information regarding Harrisburg's financial condition.

27. Between December 2008 and December 2009, a total of \$87 million bonds issued or guaranteed by Harrisburg traded without investors having the benefit of material information regarding Harrisburg's financial condition. Consequently, material information was not available for investors to consider while making their investment decisions or evaluating appropriate prices for the bonds.

28. On February 11, 2010, Moody's downgraded Harrisburg's general obligation bonds again to a rating of B2, with a negative outlook. For the second time, Moody's cited the difficulties Harrisburg faced in paying its RRF debt as the primary reason for the downgrade. Harrisburg did not disclose Moody's February 2010 downgrade until March 29, 2011.

State Declares Harrisburg a Fiscal Emergency

29. For several years, Harrisburg has been exploring various options to close its budget gap and address its RRF debt issue. On October 1, 2010, Harrisburg filed a Petition for Determination of Municipal Financial Distress under Pennsylvania's Municipalities Financial Recovery Act of 1987 ("Act 47"). Harrisburg was accepted into the Act 47 program on December 15, 2010. The Act 47 program allowed Harrisburg to obtain assistance from the Commonwealth of Pennsylvania in developing a financial recovery plan. A Municipal Financial Recovery Act Recovery Plan ("the Recovery Plan") was submitted by the Act 47 coordinator to Harrisburg on June 13, 2011. According to the Recovery Plan, "[t]he City of Harrisburg is facing a direct, immediate and grave financial crisis. The financial crisis is so severe that the City teeters uncomfortably on the verge of bankruptcy that could be triggered at any moment by parties outside its control." Harrisburg's City Council rejected the Recovery Plan in July 2011.

30. On March 29, 2011, Harrisburg submitted a material event notice to EMMA (the "March 29th Notice"). In the March 29th Notice, Harrisburg disclosed, among other things, (1) its rating change by Moody's; (2) the unscheduled debt service draws on the RRF bonds; (3) its failure to fulfill its guarantee obligations; and (4) its Act 47 petition.

31. On October 11, 2011, Harrisburg's City Council filed a voluntary Chapter 9 bankruptcy petition. The bankruptcy petition was dismissed by the bankruptcy court on November 23, 2011 on the basis that the bankruptcy was barred by Pennsylvania state law and had not been authorized by the Mayor. The bankruptcy court's dismissal was appealed by the City Council on December 10, 2011. The appeal was rejected by the district court on February 1, 2012.

32. On October 20, 2011, Pennsylvania's governor signed legislation authorizing the State to declare fiscal emergency in Harrisburg. On November 18, 2011, a receiver was appointed under this legislation to implement a Recovery Plan and take control of the City's finances. On March 27, 2012, a Dauphin County court appointed a second receiver to oversee the day-to-day operations of the RRF. The State-appointed Harrisburg receiver resigned on March 30, 2012. A new State-appointed Harrisburg receiver was confirmed on May 24, 2012.

33. Harrisburg has missed approximately \$13.9 million in general obligation debt service payments as of March 2013. On March 11, 2013, Harrisburg submitted a material event notice to EMMA indicating that it would not be making its March 15th general obligation debt service payments in the amounts of \$2,700,000 and \$2,505,000, for its General Obligation Refunding Bonds, Series D and F of 1997, respectively. On March 9, 2012, Harrisburg submitted a material event notice to EMMA indicating that it would not be making its March 15th general obligation debt service payments in the amounts of \$2,735,000 and \$2,530,000, for its General Obligation Refunding Bonds, Series D and F of 1997, respectively. On September 14, 2012, Harrisburg submitted a material event notice to EMMA indicating that it would not be making its September 15th general obligation debt service payments in the amounts of \$1,765,000 and \$1,635,000, for its General Obligation Refunding Bonds, Series D and F of 1997, respectively.

Harrisburg Enhances Its Disclosure Process

34. During the relevant time period, Harrisburg did not have policies and procedures in place to ensure that the financial information it was releasing to the public was accurate in all material respects. Harrisburg also did not have any policies and procedures in place to ensure that it was complying with its Continuing Disclosure Certificates.

35. With the assistance of counsel, Harrisburg has enhanced its disclosure process by instituting formal written policies and procedures with respect to public statements regarding financial information made by the City and its compliance with its Continuing Disclosure Certificates ("Disclosure Policy"). In its Disclosure Policy, among other things, Harrisburg has designated the City's Business Administrator as the individual responsible for filing Harrisburg's annual financial information and notices with EMMA. The Business Administrator is required to provide the Mayor, City officials and the City Council with written confirmation that the financial information and notices have been submitted to EMMA. In addition, Harrisburg has implemented annual training for City employees involved in the disclosure process to ensure compliance with the Disclosure Policy and to provide an overview of the City's obligations under the federal securities laws. This annual training will be conducted by the City's Business Administrator. City employees receiving the training will provide written certification that they have completed the training and have reviewed, understood and will comply with the Disclosure Policy. No later than 14 days after the end of each fiscal year, the Business Administrator must certify that he has conducted the annual training.

36. Harrisburg has also committed to submitting a copy of its Disclosure Policy, together with any amendments, on EMMA and placing it on the City's public website. In addition, any securities offering for which the City is an issuer or obligated person will now also include a certification by the Business Administrator that the information set forth therein regarding the City does not contain any untrue statement of material fact or omit to state any material fact necessary to make the information contained in the offering document not misleading. Finally, Harrisburg has agreed to disclose the terms of this Order on EMMA and in the preliminary and final offering documents of any future securities offerings for which the City is an issuer or obligated person within five years from the date of this Order.

Legal Discussion

37. Harrisburg and other municipal securities issuers are subject to the antifraud provisions of the federal securities laws, which include Exchange Act Section 10(b) and Rule 10b-5. Section 10(b) of the Exchange Act and Rule 10b-5 thereunder prohibit misrepresentations or omissions of material fact in connection with the purchase or sale of any security. This provision prohibits the making of any untrue statement of material fact or omitting to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading in connection with the purchase or sale of securities. A fact is material if there is a substantial likelihood that its disclosure would be considered significant by a reasonable investor. This requirement is fulfilled if there is a substantial likelihood that the information would have been viewed by the reasonable investor as having significantly altered the "total mix" of information available. Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1987); TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

38. Section 10(b) of the Exchange Act and Rule 10b-5 thereunder also require a showing that defendants or respondents acted with scienter. Aaron v. SEC, 446 U.S. 680, 701-02 (1980). The scienter requirement for antifraud violations may be satisfied by a showing of recklessness. In re Advanta Corp. Sec. Litig., 180 F.3d 525, 535 (3d Cir. 1999). Recklessness has been defined as "extreme departure from the standards of ordinary care, and which represents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." McLean v. Alexander, 599 F.2d 1190, 1197 (3d Cir. 1979) (quoting Sunstrand Corp. v. Sun Chem. Corp., 553 F.2d 1033, 1045 (7th Cir. 1976)).

39. Municipal issuers have an obligation to make sure that information that is released to the public that is reasonably expected to reach investors and the trading markets, even if not specifically published for that purpose, does not violate the antifraud provisions.²⁰ In its 1994 Interpretive Guidance, the Commission reminds issuers that without a "mechanism for disseminating information about the municipal issuer to the market as a whole...investors purchasing municipal securities in the secondary market risk doing so on the basis of incomplete and outdated information. Since access by market participants to current and reliable information is uneven and inefficient, municipal issuers presently face a risk of misleading investors through public statements that may not be intended to be the basis of investment decisions, but nevertheless may be reasonably expected to reach the securities markets."²¹

Violations

40. Harrisburg made material misrepresentations and omissions in its 2007 and 2008 CAFRs, 2009 Budget and Transmittal Letter, 2009 State of the City Address and its Mid-Year Fiscal Report for 2009, regarding Harrisburg's credit ratings and the potential impact of the RRF

²⁰ See Statement of the Commission Regarding Disclosure Obligations of Municipal Securities Issuers and Others, Exchange Act Release No. 34-33741 (March 9, 1994) ("1994 Interpretive Guidance").

²¹ See 1994 Interpretive Guidance, page 13.

debt on the City's financial health. As a result of this reckless conduct, Harrisburg violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

Remedial Efforts

41. In determining to accept Harrisburg's Offer, the Commission considered the cooperation afforded the Commission staff during the investigation and remedial acts taken by Harrisburg, referenced in paragraphs 35 and 36.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Harrisburg's Offer.

ACCORDINGLY, pursuant to Section 21C of the Exchange Act, it is hereby ORDERED that Harrisburg shall cease and desist from committing or causing any violations and any future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

By the Commission.

Elizabeth M. Murphy
Elizabeth M. Murphy
Secretary

*Commissioner Walter
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 69514 / May 6, 2013

INVESTMENT ADVISERS ACT OF 1940
Release No. 3602 / May 6, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15315

In the Matter of

Matthew C. Devlin,

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 15(b) OF THE
SECURITIES EXCHANGE ACT OF 1934
AND SECTION 203(f) OF THE
INVESTMENT ADVISERS ACT OF 1940,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Matthew C. Devlin ("Respondent" or "Devlin").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, Respondent consents to the Commission's jurisdiction over him and the subject matter of these proceedings and to the entry of this Order

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Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Devlin, age 38, is a resident of New York, New York. From at least 2000 through 2008, Devlin was a registered representative associated with Lehman Brothers, Inc. ("Lehman"), a registered broker-dealer and investment adviser.

2. On October 19, 2012, a judgment was entered by consent against Devlin, permanently enjoining him from future violations of Sections 10(b) and 14(e) of the Exchange Act [15 U.S.C. §§ 78j(b) and 78n(e)] and Exchange Act Rules 10b-5 and 14e-3 [17 C.F.R. § 240.10b-5 and 240.14e-3] in the civil action entitled Securities and Exchange Commission v. Devlin, et al., Civil Action Number 08-CV-11001, in the United States District Court for the Southern District of New York.

3. The Commission's Complaint alleged that from March 2004 through July 2008, Devlin, then a registered representative at Lehman in New York City, engaged in an illegal insider trading scheme in which he traded on and tipped at least four of his clients and friends with material, nonpublic information he had obtained in breach of a duty of trust and confidence. The Complaint alleged that Devlin misappropriated confidential nonpublic information about 13 upcoming corporate transactions from his wife, a partner in the New York City Office of an international public relations firm which was working on the deals. The Complaint alleged that, based on the information provided by Devlin, his clients and friends purchased the common stock and/or options of the following companies: Invision Technologies, Inc., Eon Labs, Inc., Mylan Laboratories, Inc., Abgenix, Inc., Aztar Corp., Veritas DGC, Inc., Mercantile Bankshares, Corp., Alcan, Inc., Ventana Medical Systems, Inc., Pharmion, Corp., Take-Two-Interactive Software, Inc., Rohm and Haas Co. and Anheuser-Busch Co. The Complaint alleged that at the time Devlin tipped others about these companies, each company was confidentially engaged in a significant transaction that involved a merger, tender offer, or stock repurchase. The Complaint further alleged that Devlin received cash and other benefits from his friends and business associates for providing them the inside information.

4. On December 16, 2008, Devlin pled guilty to four counts of conspiracy to commit securities fraud in violation of Title 18 United States Code, Section 371 and one count of securities fraud in violation of Title 15, United States Code, Sections 78ff and 78j(b) before the United States District Court for the Southern District of New York, in United States v. Devlin, 08 CR 01307 (WHP). On March 23, 2012, a judgment in the criminal case was entered against Devlin. He was sentenced to three years of probation and ordered to pay a fine of \$10,000 and a special assessment of \$500 and to forfeit \$23,000 of proceeds traceable to the commission of the offenses.

5. The five-count criminal information to which Devlin pled guilty alleged, *inter alia*, that from March 2004 through August 2008, Devlin misappropriated material, nonpublic information about 13 upcoming corporate transactions in breach of a duty of trust and confidence from his wife who was employed by an international communications firm that was working on the deals. Devlin provided the material, nonpublic information to his Lehman clients and friends who used it to trade and reap hundreds of thousands of dollars of unlawful profits. Devlin's tippees gave him thousands of dollars in cash and other items of value in return for his inside information. In connection with that plea, Respondent admitted that:

- (a) Respondent obtained material, nonpublic information from his wife's firm;
- (b) Respondent provided the material, nonpublic information to other individuals so they could trade securities;
- (c) The individuals to whom Respondent provided the material, nonpublic information knew Respondent had obtained the information illegally from his wife's firm;
- (d) Respondent received money and other benefits from the individuals to whom he had provided the material, nonpublic information; and
- (e) Respondent knew his conduct was illegal and wrong.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Devlin's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act and Section 203(f) of the Advisers Act that Matthew C. Devlin be, and hereby is barred from association with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent, and barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary


By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9402 / May 7, 2013

SECURITIES EXCHANGE ACT OF 1934
Release No. 69530 / May 7, 2013

INVESTMENT COMPANY ACT OF 1940
Release No. 30508 / May 7, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15318

In the Matter of

ZIAD K. ABDELNOUR,

Respondent.

**ORDER INSTITUTING
ADMINISTRATIVE AND CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 8A OF THE SECURITIES ACT
OF 1933, SECTIONS 15(b) AND 21C OF
THE SECURITIES EXCHANGE ACT OF
1934, AND SECTION 9(b) OF THE
INVESTMENT COMPANY ACT OF 1940,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS AND A CEASE-
AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") against Respondent Ziad K. Abdelnour ("Respondent" or "Abdelnour").

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II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Sections 15(b) and 21C of the Securities Exchange Act of 1934, and Section 9(b) of the Investment Company Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

SUMMARY

1. This matter concerns a scheme by registered representative Abdelnour to offer and sell fictitious "prime bank" securities. From at least September 2009 to April 2011 (the "Relevant Period"), Abdelnour, acting through Blackhawk Partners, Inc. ("Blackhawk"), a purported private equity "family office," solicited investors to invest in trading programs that purportedly yielded returns of up to 600% in as little as seven days, with no risk. None of this was true, however. Abdelnour, a long-time registered representative with an MBA from one of the top business schools, attempted to sell the programs by means of representations on Blackhawk's website and in emails to prospective investors that he knew, or was reckless in not knowing, were false, and he continued to do so even after receipt of a Commission subpoena.

2. Although Abdelnour did not succeed in selling any of the fictitious securities, as a result of his fraud, Abdelnour willfully violated Sections 17(a)(1) and (3) of the Securities Act, and by engaging in unregistered broker-dealer activity, he violated Section 15(a) of the Exchange Act.

RESPONDENT

3. **Abdelnour**, age 52, is, and was at all relevant times, the president, chief executive officer and, together with his wife, co-owner of Blackhawk, a New York, New York-based unregistered private equity "family office." Abdelnour is currently, and has been almost continuously since at least 1986, in the securities industry, and holds Series 7 and 63 licenses. He was registered for most of the Relevant Period, first with the firm with which he is currently associated and was previously associated from March 2002 until approximately November 2009, and then with a different registered broker-dealer from September 2010 until March 2011. Abdelnour is a resident of New York, New York.

ABDELNOUR'S SCHEME

4. Abdelnour, through Blackhawk, purports to trade commodities and provide financial consulting services to wealthy clients seeking private equity investment opportunities, and to prepare business plans for clients and advise them on how to attract investors.

5. Blackhawk's website extolls Abdelnour's credentials, including his Master's Degree in Business Administration from The Wharton School, University of Pennsylvania, and his long career as an investment professional. The website also touts Blackhawk's sophisticated "team." In fact, however, Blackhawk is Abdelnour, and it is Abdelnour who created or selected all of the material that appeared on Blackhawk's website or was otherwise provided to prospective clients during the Relevant Period.

6. During the Relevant Period, Abdelnour also offered to sell participations in fictitious investment programs, referred to on Blackhawk's website and in emails as "private placement programs" or "trading programs" (collectively, "private placement programs"), involving a chain of purported "intermediaries" and finders. According to Abdelnour, these programs involved the use of investors' monies that would be loaned or otherwise made available to one or more "top 25 world banks." The banks would then use the investors' monies as collateral for loans that the banks would use to fund their trading of "bank instruments," including "medium term notes" and "MTNs."

7. Beginning in at least January 2010, Abdelnour used blogs on Blackhawk's website to offer the private placement programs. He also solicited at least two investors by emailing materials about the private placement programs to finders, who, like Abdelnour, were to receive a percentage of the investor's profits.

8. On Blackhawk's website, Abdelnour described the private placement programs offered by Blackhawk as geared towards high net worth individuals or entities, requiring a minimum investment ranging from \$10 million to \$100 million, and running in duration from one day to forty weeks. The website touted the programs' returns as "historically [] in the hundreds of percentage points" and ranging from 50% to 100% per week, and represented that investor principal would not be at risk.

9. According to the website, the "rules" governing private placement programs required secrecy and "for[bade] the contracting parties from discussing any aspect of the transaction for a number of years." The website provided that if anyone participating in the private placement programs disclosed the existence of the programs, or tried to contact the bank with questions, the individual ran the risk of being "blacklisted." The website also discouraged prospective investors from heeding Commission and FBI warnings about private placement programs, stating:

WARNING ON SCAMS

It is very common to find on the internet so many web-sites, or message boards/links to so-called official documents, or reports of the "Financial Authorities" warning the public that this business 'does not exist' and any of these offers are always scams. The reports in question could have been written by the SEC, FBI, ICC or any of the regulatory authorities. . . .

You should all understand that most people that work at banks, securities houses, accountant firms, etc., have no insight into this kind of trading, and they are very eager to listen and comply with everything by the authorities. So if SEC, FBI and others say that this is all a scam, then they believe so.

For all you nay-Sayers and disbelievers out there who are looking for evidence that this kind of trading exist[s]; try to learn and understand monetary history and banking and you will understand that this can, in fact, work- in theory. You don't have to run around and try to find evidence, because unless you have USD10M to test it for yourself, then you need to rely upon others who are vouching. So we suggest that you find out the truth yourself, without listening to what others are saying.

10. Abdelnour represented through the website that Blackhawk had successfully participated in the private placement programs, and in emails that he sent to finders, he represented that Blackhawk was the "Authority in th[e] business."

11. In addition, in emails that Abdelnour sent to finders and potential investors beginning in at least September 2009, he represented that investments in the private placement programs would return up to 400% per week, and that in certain instances, returns of up to 100% were possible in one day programs and returns of up to 600% could be achieved in as little seven days.

12. Abdelnour also represented to finders and potential investors that funds invested in the private placement programs would be pooled to "build a larger trade base[]."

13. Abdelnour, a long-time investment professional, knew or recklessly disregarded that the representations he made about the private placement programs on Blackhawk's website and in documents he provided to potential investors were false. Neither Abdelnour nor Blackhawk had in fact engaged in any private placement programs, which did not exist. Accordingly, he knew that his representations about Blackhawk's experience and expertise in this area were false. And he knew or recklessly disregarded that his representations about the programs themselves were false. Those representations were inherently implausible, and Abdelnour was offering programs premised on a fictitious "secret" banking system and transactions that he knew, or was reckless in not knowing, did not exist.

14. In addition, as a registered representative of a broker-dealer during part of the Relevant Period, Abdelnour had a duty reasonably to investigate the truth of the representations he made concerning the private placement programs. Abdelnour, however, failed to conduct due diligence on the private placement programs and thus, made representations about the programs that he knew, or was reckless in not knowing, were false.

15. Abdelnour continued to negotiate at least one transaction involving the private placement programs until January 2011 – after receipt of a Commission subpoena in December 2010. The transaction was aborted by the prospective investor after it became apparent that the account with his principal would have a co-signatory, thus allowing the co-signatory to access the account and placing the investor's funds at risk. Although the transaction was terminated, Abdelnour continued to tout the programs until at least April 2011.

16. As a result of the conduct described above, Abdelnour willfully violated Sections 17(a)(1) and (3) of the Securities Act, which prohibit fraudulent conduct in the offer or sale of securities.

17. Abdelnour also willfully violated Section 15(a) of the Exchange Act by attempting to induce the purchase of securities without being registered with the Commission as a broker or dealer.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Abdelnour's Offer.

Accordingly, pursuant to Section 8A of the Securities Act, Sections 15(b) and 21C of the Exchange Act, and Section 9(b) of the Investment Company Act, it is hereby ORDERED that:

A. Respondent Abdelnour cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Securities Act and Section 15(a) of the Exchange Act.

B. Respondent Abdelnour be, and hereby is:

barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization;

prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter; and

barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who

engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock,

with the right to apply for reentry after five (5) years to the appropriate self-regulatory organization, or if there is none, to the Commission.

C. Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

D. Respondent shall pay civil penalties in the amount of \$25,000 to the United States Treasury. Payment shall be made in the following installments: \$10,000 by no later than 21 days after the entry of this Order; \$7500 by no later than November 1, 2013 and \$7500 by no later than May 1, 2014. If any payment is not made by the date required by this Order, the entire outstanding balance of civil penalties, plus any additional interest accrued pursuant to 31 U.S.C. 3717, shall be due and payable immediately, without further application. Payment must be made in one of the following ways:

(1) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or

(2) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Abdelnour as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Leslie Kazon, Assistant Regional Director, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, Suite 400, New York, New York 10281.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

9(a) of the Act (Investment Company Act Release No. 30462) until the Commission takes final action on the application for a permanent order. The notice gave interested persons an opportunity to request a hearing and stated that an order disposing of the application would be issued unless a hearing was ordered. No request for a hearing has been filed, and the Commission has not ordered a hearing.

The matter has been considered and it is found that the conduct of Applicants has been such as not to make it against the public interest or protection of investors to grant the permanent exemption from the provisions of section 9(a) of the Act.

Accordingly,

IT IS ORDERED, pursuant to section 9(c) of the Act, on the basis of the representations contained in the application filed by RBS plc, et al. (File No. 812-14148), that Covered Persons be and hereby are permanently exempted from the provisions of section 9(a) of the Act, operative solely as a result of a guilty plea, described in the application, entered by the United States District Court for the District of Connecticut on April 12, 2013.

By the Commission.



Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3604 / May 9, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15320

In the Matter of

SPYRIDON ADONDAKIS,

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 203(f) OF THE
INVESTMENT ADVISERS ACT OF 1940,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Spyridon Adondakis ("Adondakis" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, Respondent consents to the Commission's jurisdiction over him and the subject matter of these proceedings and to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

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1. Adondakis, age 41, resides in Manhattan Beach, California. From 2006 to 2010, Adondakis was employed as a research analyst at Level Global Investors, L.P., an unregistered investment adviser with offices in Greenwich Connecticut and New York. In February 2011, Level Global began liquidation of the hedge funds under its management.

2. On January 18, 2012, the Commission filed a civil action against Adondakis in SEC v. Adondakis et al., Civil Action No. 12-CV-0409 (S.D.N.Y.). On March 8, 2013, the Court entered an order permanently enjoining Adondakis, by consent, from future violations of Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5 thereunder, and Section 17(a) of the Securities Act of 1933.

3. The Commission's complaint alleged that, in connection with the purchase or sale of securities, Adondakis knew, recklessly disregarded, or should have known, that material non-public information he received from multiple tippers was disclosed or misappropriated in breach of a fiduciary duty, or similar relationship of trust and confidence. The Commission's complaint further alleged that Adondakis provided the material non-public information to others at Level Global, who used that information to execute, and cause others to execute, securities transactions.

4. On April 25, 2011, Adondakis pleaded guilty to one count of securities fraud and one count of conspiracy to commit securities fraud and in violation of 15 U.S.C. §§ 78j(b) and 78ff and 18 U.S.C. § 371 before the United States District Court for the Southern District of New York, in United States v. Spyridon Adondakis, 11-CR-360-JFK-1.

5. The counts of the criminal information to which Adondakis pleaded guilty alleged, inter alia, that Adondakis conspired with others to commit securities fraud by obtaining material non-public information for the purpose of executing securities transactions on the basis of that information, and that he did so knowingly and willingly.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Adondakis's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 203(f) of the Advisers Act that Respondent Adondakis be, and hereby is:

barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially

waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3606 / May 9, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15322

In the Matter of

JESSE TORTORA,

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 203(f) OF THE
INVESTMENT ADVISERS ACT OF 1940,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Jesse Tortora ("Tortora" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, Respondent consents to the Commission's jurisdiction over him and the subject matter of these proceedings and to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

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1. Tortora, age 35, resides in Pembroke Pines, Florida. From August 2007 to April 2010, Tortora was employed as a research analyst at Diamondback Capital Management, LLC, a registered investment adviser based in Stamford, Connecticut.

2. On January 18, 2012, the Commission filed a civil action against Tortora in SEC v. Adondakis et al., Civil Action No. 12-CV-0409 (S.D.N.Y.). On March 8, 2013, the Court entered an order permanently enjoining Tortora, by consent, from future violations of Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5 thereunder, and Section 17(a) of the Securities Act of 1933.

3. The Commission's complaint alleged that, in connection with the purchase or sale of securities, Tortora knew, recklessly disregarded, or should have known, that material non-public information he received from multiple tippers was disclosed or misappropriated in breach of a fiduciary duty, or similar relationship of trust and confidence, and Tortora is liable for the trading by Diamondback because he directly or indirectly caused Diamondback to place trades and/or unlawfully tipped inside information to Diamondback.

4. On May 18 2011, Tortora pleaded guilty to one count of securities fraud and one count of conspiracy to commit securities fraud and in violation of 15 U.S.C. §§ 78j(b) and 78ff and 18 U.S.C. § 371 before the United States District Court for the Southern District of New York, in United States v. Jesse Tortora, 11-CR-430-WHP-1.

5. The counts of the criminal information to which Tortora pleaded guilty alleged, inter alia, that Tortora, and others, participated in a scheme to defraud by executing securities trades based on material nonpublic information that had been disclosed or misappropriated in violation of duties of trust and confidence, and that he unlawfully, willfully and knowingly did so, directly and indirectly, by use of the means and instrumentalities of interstate commerce, and of the mails, and of the facilities of national securities exchanges, in connection with the purchase and sale of securities.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Tortora's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 203(f) of the Advisers Act that Respondent Tortora be, and hereby is:

barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of

factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3605 / May 9, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15321

In the Matter of

JON HORVATH,

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 203(f) OF THE
INVESTMENT ADVISERS ACT OF 1940,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Jon Horvath ("Horvath" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, Respondent consents to the Commission's jurisdiction over him and the subject matter of these proceedings and to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

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1. Horvath, age 43, resides in San Francisco, California. From September 2006 to September 2012, Horvath was employed as a research analyst in the New York office of Sigma Capital Management, LLC, an investment adviser based in Stamford, Connecticut that is an affiliate through ownership of S.A.C. Capital Advisors, L.P. S.A.C. Capital Advisors, L.P. registered with the Commission in 2012 but was an unregistered investment adviser at the time of Horvath's employment at Sigma Capital.

2. On January 18, 2012, the Commission filed a civil action against Horvath in SEC v. Adondakis et al., Civil Action No. 12-CV-0409 (S.D.N.Y.). On March 8, 2013, the Court entered an order permanently enjoining Horvath, by consent, from future violations of Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5 thereunder, and Section 17(a) of the Securities Act of 1933.

3. The Commission's complaint alleged that, in connection with the purchase or sale of securities, Horvath knew, recklessly disregarded, or should have known, that material non-public information he received from multiple tipplers was disclosed or misappropriated in breach of a fiduciary duty, or similar relationship of trust and confidence, and Horvath is liable for the trading by Sigma Capital because he directly or indirectly caused Sigma Capital to place trades and/or unlawfully tipped inside information to Sigma Capital.

4. On September 28, 2012, Horvath pleaded guilty to two counts of securities fraud and one count of conspiracy to commit securities fraud and in violation of 15 U.S.C. §§ 78j(b) and 78ff and 18 U.S.C. § 371 before the United States District Court for the Southern District of New York, in United States v. Jon Horvath, 12-CR-121-RJS-3.

5. The counts of the criminal indictment to which Horvath pleaded guilty alleged, inter alia, that Horvath, and others, participated in a scheme to defraud by executing securities trades based on material nonpublic information that had been disclosed or misappropriated in violation of duties of trust and confidence, and that he unlawfully, willfully and knowingly did so, directly and indirectly, by use of the means and instrumentalities of interstate commerce, and of the mails, and of the facilities of national securities exchanges, in connection with the purchase and sale of securities.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Horvath's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 203(f) of the Advisers Act that Respondent Horvath be, and hereby is:

barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3604 / May 9, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15320

In the Matter of

SPYRIDON ADONDAKIS,

Respondent.

**ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 203(f) OF THE
INVESTMENT ADVISERS ACT OF 1940,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Spyridon Adondakis ("Adondakis" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, Respondent consents to the Commission's jurisdiction over him and the subject matter of these proceedings and to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

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1. Adondakis, age 41, resides in Manhattan Beach, California. From 2006 to 2010, Adondakis was employed as a research analyst at Level Global Investors, L.P., an unregistered investment adviser with offices in Greenwich Connecticut and New York. In February 2011, Level Global began liquidation of the hedge funds under its management.

2. On January 18, 2012, the Commission filed a civil action against Adondakis in SEC v. Adondakis et al., Civil Action No. 12-CV-0409 (S.D.N.Y.). On March 8, 2013, the Court entered an order permanently enjoining Adondakis, by consent, from future violations of Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5 thereunder, and Section 17(a) of the Securities Act of 1933.

3. The Commission's complaint alleged that, in connection with the purchase or sale of securities, Adondakis knew, recklessly disregarded, or should have known, that material non-public information he received from multiple tippers was disclosed or misappropriated in breach of a fiduciary duty, or similar relationship of trust and confidence. The Commission's complaint further alleged that Adondakis provided the material non-public information to others at Level Global, who used that information to execute, and cause others to execute, securities transactions.

4. On April 25, 2011, Adondakis pleaded guilty to one count of securities fraud and one count of conspiracy to commit securities fraud and in violation of 15 U.S.C. §§ 78j(b) and 78ff and 18 U.S.C. § 371 before the United States District Court for the Southern District of New York, in United States v. Spyridon Adondakis, 11-CR-360-JFK-1.

5. The counts of the criminal information to which Adondakis pleaded guilty alleged, inter alia, that Adondakis conspired with others to commit securities fraud by obtaining material non-public information for the purpose of executing securities transactions on the basis of that information, and that he did so knowingly and willingly.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Adondakis's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 203(f) of the Advisers Act that Respondent Adondakis be, and hereby is:

barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially

waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3607 / May 9, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15323

In the Matter of

SANDEEP GOYAL,

Respondent.

**ORDER INSTITUTING
PROCEEDINGS PURSUANT TO
SECTION 203(f) OF THE INVESTMENT
ADVISERS ACT OF 1940, MAKING
FINDINGS, AND IMPOSING REMEDIAL
SANCTIONS**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Sandeep Goyal ("Goyal" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, Respondent consents to the Commission's jurisdiction over him and the subject matter of these proceedings and to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

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1. Goyal, age 40, resides in Princeton, New Jersey. From July 2007 to January 2012, Goyal was employed as a research analyst at Neuberger Berman LLC, a registered investment adviser based in New York, New York.

2. On January 18, 2012, the Commission filed a civil action against Goyal in SEC v. Adondakis et al., Civil Action No. 12-CV-0409 (S.D.N.Y.). On March 8, 2013, the Court entered an order permanently enjoining Goyal, by consent, from future violations of Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5 thereunder, and Section 17(a) of the Securities Act of 1933.

3. The Commission's complaint alleged that, in connection with the purchase or sale of securities, Goyal knew, recklessly disregarded, or should have known, that material non-public information he received from an employee of Dell, Inc. was disclosed or misappropriated in breach of a fiduciary duty, or similar relationship of trust and confidence, and that Goyal disclosed that material nonpublic information to an individual who worked for a hedge fund with the knowledge that the hedge fund would use that information in connection with its securities trades.

4. On November 3, 2011, Goyal pleaded guilty to one count of securities fraud and one count of conspiracy to commit securities fraud and in violation of 15 U.S.C. §§ 78j(b) and 78ff and 18 U.S.C. § 371 before the United States District Court for the Southern District of New York, in United States v. Sandeep Goyal, 11-cr-935-KBF-1.

5. The counts of the criminal information to which Goyal pleaded guilty alleged, inter alia, that Goyal, and others, participated in a scheme to defraud by executing securities trades based on material nonpublic information that had been disclosed or misappropriated in violation of duties of trust and confidence, and that he unlawfully, willfully and knowingly did so, directly and indirectly, by use of the means and instrumentalities of interstate commerce, and of the mails, and of the facilities of national securities exchanges, in connection with the purchase and sale of securities.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Goyal's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 203(f) of the Advisers Act that Respondent Goyal be, and hereby is:

barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any

disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Elizabeth M. Murphy
Secretary

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-69557; File No. SR-NSCC-2013-803)

May 10, 2013

Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing and No Objection to Advance Notice to Renew Its Existing Credit Facility

Pursuant to Section 806(e)(1) of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, entitled the Payment, Clearing, and Settlement Supervision Act of 2010¹ (“Clearing Supervision Act”) and Rule 19b-4(n)(1)(i) under the Securities Exchange Act of 1934,² notice is hereby given that on April 22, 2013, National Securities Clearing Corporation (“NSCC”) filed with the Securities and Exchange Commission (“Commission”) advance notice SR-NSCC-2013-803 (“Advance Notice”) as described in Items I, II and III below, which Items have been prepared primarily by NSCC. This publication serves as solicitation of comments on the Advance Notice from interested persons and as notice of no objection to the Advance Notice.

I. Clearing Agency’s Statement of the Terms of Substance for the Advance Notice

NSCC is renewing its 364-day syndicated, revolving credit facility (“Renewal”), as described in additional detail below.

II. Clearing Agency’s Statement of the Purpose of, and Statutory Basis for, the Advance Notice

In its filing with the Commission, NSCC included statements concerning the purpose of and basis for the Advance Notice and discussed any comments it received on the Advance Notice. The text of these statements may be examined at the places specified in Item IV below. NSCC has

¹ 12 U.S.C. 5465(e)(1).

² 17 CFR 240.19b-4(n)(1)(i).

prepared summaries, set forth in sections A and B below, of the most significant aspects of such statements.³

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Advance Notice

Description of Change

As part of its liquidity risk management regime, NSCC maintains a 364-day committed, revolving line of credit with a syndicate of commercial lenders ("Credit Facility"), which is renewed every year. Under the existing Credit Facility, NSCC may borrow up to \$7.43 billion of an aggregate commitment of \$9.33 billion.⁴ The terms and conditions of the Renewal are specified in the Twelfth Amended and Restated Revolving Credit Agreement to be dated as of May 14, 2013, among NSCC, DTC, the lenders party thereto, and JPMorgan Chase Bank, N.A. as the administrative agent, and are substantially the same as the terms and conditions of the existing Credit Facility agreement dated as of May 15, 2012 among the same parties. However, the aggregate commitments being sought under the Renewal increased to \$16 billion. As of April 19, 2013, NSCC and DTC had received aggregate commitments of \$10.121 billion towards the Renewal, of which all but \$1.9 billion would be the commitments to NSCC as a borrower.

This agreement and its substantially similar predecessor agreements have been in place since the introduction of same-day funds settlement at NSCC because NSCC requires same-day liquidity resources to cover the failure-to-settle of its largest Member or affiliated family of Members. If a Member defaults on its end-of-day settlement obligations, NSCC may borrow

³ The Commission has modified the text of the summaries prepared by NSCC.

⁴ The Credit Facility provides for both The Depository Trust Company ("DTC") and NSCC as borrowers, with an aggregate commitment of \$1.9 billion for DTC and the amount of any excess aggregate commitment for NSCC. The borrowers are not jointly and severally liable and each lender has a ratable commitment to each borrower. DTC and NSCC have separate collateral to secure their separate borrowings.

under the Credit Facility to enable it, if necessary, to fund settlement among non-defaulting Members. Any borrowing would be secured principally by (i) securities deposited by Members in NSCC's Clearing Fund (i.e., the Eligible Clearing Fund Securities, as defined in Rule 4 of NSCC Rules and Procedures,⁵ pledged by Members to NSCC in lieu of cash Clearing Fund deposits); and (ii) securities cleared through NSCC's Continuous Net Settlement System that were intended for delivery to the defaulting Member upon payment of its net settlement obligation. NSCC's Clearing Fund, which operates as its default fund, addresses potential exposure through a number of risk-based component charges calculated and assessed daily. As integral parts of NSCC's risk management structure, NSCC believes that the Credit Facility and the Clearing Fund together help NSCC to have sufficient liquidity to complete end-of-day money settlement.

Anticipated Effect on and Management of Risk

NSCC believes that the Credit Facility is a cornerstone of NSCC risk management, and its renewal is critical to the NSCC risk management infrastructure. The Renewal does not otherwise affect or alter the management of risk at NSCC.

(B) Clearing Agency's Statement on Comments on the Advance Notice Received from Members, Participants, or Others

No written comments were solicited or received with respect to the Advance Notice.

III. Date of Effectiveness of the Advance Notice and Timing for Commission Action

The clearing agency may implement the proposed change pursuant to Section 806(e)(1)(G) of the Clearing Supervision Act if it has not received an objection to the proposed change within 60 days of the later of (i) the date that the Commission received the advance

⁵ See NSCC Rules and Procedures, Rule 4 (http://dtcc.com/legal/rules_proc/nscc_rules.pdf).

notice or (ii) the date the Commission receives any further information it requested for consideration of the notice.⁶ The clearing agency shall not implement the proposed change if the Commission has any objection to the proposed change.⁷

The Commission may extend the period for review by an additional 60 days if the proposed change raises novel or complex issues, subject to the Commission providing the clearing agency with prompt written notice of the extension.⁸ A proposed change may be implemented in less than 60 days from the date of receipt of the advance notice, or the date the Commission receives any further information it requested, if the Commission notifies the clearing agency in writing that it does not object to the proposed change and authorizes the clearing agency to implement the proposed change on an earlier date, subject to any conditions imposed by the Commission.⁹ The clearing agency shall post notice on its website of proposed changes that are implemented.¹⁰

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the advance notice is consistent with the Clearing Supervision Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or

⁶ 12 U.S.C. 5465(e)(1)(G).

⁷ 12 U.S.C. 5465(e)(1)(F).

⁸ 12 U.S.C. 5465(e)(1)(H).

⁹ 12 U.S.C. 5465(e)(1)(I).

¹⁰ 17 CFR 240.19b-4(n)(4)(i).

- Send an e-mail to rule-comments@sec.gov. Please include File No. SR-NSCC-2013-803 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File No. SR-NSCC-2013-803. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the advance notice that are filed with the Commission, and all written communications relating to the advance notice between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filings also will be available for inspection and copying at the principal office of NSCC and on NSCC's website at http://dtcc.com/downloads/legal/rule_filings/2013/nscc/SR-NSCC-2013-803.pdf.

All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-NSCC-2013-803 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

V. Commission Findings and Notice of No Objection

Although Title VIII does not specify a standard of review for advance notices, the Commission believes that the stated purpose of Title VIII is instructive.¹¹ The stated purpose of Title VIII is to mitigate systemic risk in the financial system and promote financial stability by, among other things, promoting uniform risk management standards for systemically-important financial market utilities (“FMU”)¹² and providing an enhanced role for the Board of Governors of the Federal Reserve System (“Board of Governors”) in the supervision of risk management standards for systemically-important FMUs.¹³

Section 805(a)(2) of the Clearing Supervision Act authorizes the Commission to prescribe risk management standards for the payment, clearing, and settlement activities of designated clearing entities and financial institutions engaged in designated activities for which it is the supervisory agency or the appropriate financial regulator.¹⁴ Section 805(b) of the Clearing Supervision Act states that the objectives and principles for the risk management standards prescribed under Section 805(a) shall be to:

- promote robust risk management;
- promote safety and soundness;
- reduce systemic risks; and

¹¹ 12 U.S.C. 5461(b).

¹² NSCC was designated as a systemically important FMU by the Financial Stability Oversight Council (“FSOC”) on July 18, 2012. FSOC 2012 Annual Report, Appendix A, <http://www.treasury.gov/initiatives/fsoc/Documents/2012%20Annual%20Report.pdf>.

¹³ 12 U.S.C. 5461(b).

¹⁴ 12 U.S.C. 5464(a)(2).

- support the stability of the broader financial system.¹⁵

The Commission adopted risk management standards under Section 805(a)(2) of the Clearing Supervision Act on October 22, 2012 (“Clearing Agency Standards”).¹⁶ The Clearing Agency Standards became effective on January 2, 2013 and require registered clearing agencies to establish, implement, maintain, and enforce written policies and procedures that are reasonably designed to meet certain minimum requirements for their operations and risk management practices on an ongoing basis.¹⁷ As such, it is appropriate for the Commission to review advance notices against the objectives and principles for risk management standards as described in Section 805(b), as well as the applicable Clearing Agency Standards promulgated under Section 805(a).

The Advance Notice is a proposal to enter into a renewed Credit Facility, as described above, which is designed to help mitigate the risk that NSCC would be under collateralized in the event of a defaulting Member. Consistent with Section 805(b) of the Clearing Supervision Act,¹⁸ the Commission believes the proposal promotes robust risk management, as well as the safety and soundness of NSCC’s operations, while reducing systemic risks and supporting the stability of the broader financial system, by maintaining a cornerstone to NSCC’s risk management system in a line of credit, in preparation for a possible Member default.

¹⁵ 12 U.S.C. 5464(b).

¹⁶ Release No. 34-68080 (Oct. 22, 2012), 77 FR 66219 (Nov. 2, 2012).

¹⁷ The Clearing Agency Standards are substantially similar to the risk management standards established by the Board of Governors governing the operations of designated FMUs that are not clearing entities and financial institutions engaged in designated activities for which the Commission or the Commodity Futures Trading Commission is the Supervisory Agency. See Financial Market Utilities, 77 FR 45907 (Aug. 2, 2012).

¹⁸ See 12 U.S.C. 5464(b).

Additionally, Commission Rule 17Ad-22(d)(11) regarding default procedures,¹⁹ adopted as part of the Clearing Agency Standards,²⁰ requires that registered clearing agencies “establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable ... establish default procedures that ensure that the clearing agency can take timely action to contain losses and liquidity pressures and to continue meeting its obligations in the event of a participant default.”²¹ Here, as described above, the renewed Credit Facility should help NSCC continue to meet its respective obligations in a timely fashion, in the event of a Member default, thereby helping to contain losses and liquidity pressures from that default.

Finally, Commission Rule 17Ad-22(b)(1) regarding measurement and management of credit exposure,²² also adopted as part of the Clearing Agency Standards,²³ requires a central counterparty (“CCP”), of which NSCC is one, to establish, implement, maintain and enforce written policies and procedures reasonably designed to measure its credit exposures to its participants at least once a day and limit its exposures to potential losses from defaults by its participants under normal market conditions so that the operations of the CCP would not be disrupted and non-defaulting participants would not be exposed to losses that they cannot anticipate or control.²⁴ Here, as described above, NSCC’s proposal to enter into a renewed

¹⁹ 17 CFR 240.17Ad-22(d)(11).

²⁰ Release No. 34-68080 (Oct. 22, 2012), 77 FR 66219 (Nov. 2, 2012).

²¹ 17 CFR 240.17Ad-22(d)(11).

²² 17 CFR 240.17Ad-22(b)(1).

²³ Release No. 34-68080 (Oct. 22, 2012), 77 FR 66219 (Nov. 2, 2012).

²⁴ 17 CFR 240.17Ad-22(b)(1).

Credit Facility should help to minimize disruption to its CCP operations, thereby limiting its and non-defaulting Members' exposures to potential losses from a defaulting Member.

As described in Item III above, Section 806(e)(1)(G) of the Clearing Supervision Act provides that a designated FMU may implement a change contained in an advance notice if it has not received an objection to the proposed change within the applicable 60 day period.²⁵ However, Section 806(e)(1)(I) allows the Commission to issue a non-objection prior to the 60th day.²⁶ If the Commission chooses to issue a non-objection prior to the 60th day, it must notify the designated FMU in writing that it does not object and authorize implementation of the change on an earlier date.²⁷ If the Commission chooses to object prior to the 60th day, it must similarly notify the designated FMU.²⁸

In its filing with the Commission, NSCC requested that the Commission notify NSCC, under Section 806(e)(1)(I) of the Clearing Supervision Act, that the Commission has no objection to the Advance Notice no later than Friday, May 10, 2013, two business days before the existing Credit Facility is set to expire on Tuesday, May 14, 2013, to ensure that there is no period of time that NSCC operates without the Credit Facility.

For the reasons stated above, the Commission does not object to the Advance Notice.

²⁵ See 12 U.S.C. 5465(e)(1)(G).

²⁶ 12 U.S.C. 5465(e)(1)(I).

²⁷ Id.

²⁸ 12. U.S.C. 5465(e)(1)(E).

VI. Conclusion

IT IS THEREFORE NOTICED, pursuant to Section 806(e)(1)(I) of the Clearing Supervision Act,²⁹ that the Commission DOES NOT OBJECT to the change described in advance notice SR-NSCC-2013-803 and that NSCC be and hereby is AUTHORIZED to implement the change as of the date of this notice.

By the Commission.

Kevin M. O'Neill
Kevin M. O'Neill
Deputy Secretary

²⁹

12 U.S.C. 5465(e)(1)(I).

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-69556; File No. SR-DTC-2013-802)

May 10, 2013

Self-Regulatory Organizations; The Depository Trusts Company; Notice of Filing and No Objection to Advance Notice to Renew Its Existing Credit Facility

Pursuant to Section 806(e)(1) of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, entitled the Payment, Clearing, and Settlement Supervision Act of 2010¹ (“Clearing Supervision Act”) and Rule 19b-4(n)(1)(i) under the Securities Exchange Act of 1934,² notice is hereby given that on April 22, 2013, The Depository Trust Company (“DTC”) filed with the Securities and Exchange Commission (“Commission”) advance notice SR-DTC-2013-802 (“Advance Notice”) as described in Items I, II and III below, which Items have been prepared primarily by DTC. This publication serves as solicitation of comments on the Advance Notice from interested persons and as notice of no objection to the Advance Notice.

I. Clearing Agency’s Statement of the Terms of Substance for the Advance Notice

DTC is renewing its 364-day syndicated, revolving credit facility (“Renewal”), as described in additional detail below.

II. Clearing Agency’s Statement of the Purpose of, and Statutory Basis for, the Advance Notice

In its filing with the Commission, DTC included statements concerning the purpose of and basis for the Advance Notice and discussed any comments it received on the Advance Notice. The text of these statements may be examined at the places specified in Item IV below. DTC has

¹ 12 U.S.C. 5465(e)(1).

² 17 CFR 240.19b-4(n)(1)(i).

prepared summaries, set forth in sections A and B below, of the most significant aspects of such statements.³

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Advance Notice

Description of Change

As part of its liquidity risk management regime, DTC maintains a \$1.9 billion, 364-day committed, revolving line of credit with a syndicate of commercial lenders ("Credit Facility"), which is renewed every year. The terms and conditions of the Renewal are specified in the Twelfth Amended and Restated Revolving Credit Agreement to be dated as of May 14, 2013, among DTC, National Securities Clearing Corporation ("NSCC"),⁴ the lenders party thereto, and JPMorgan Chase Bank, N.A. as the administrative agent, and are substantially the same as the terms and conditions of the existing Credit Facility agreement dated as of May 15, 2012 among the same parties. Although the aggregate commitments being sought under the Renewal increased to \$16 billion, the commitments to DTC as a borrower will remain at \$1.9 billion as provided in the existing Credit Facility agreement. As of April 19, 2013, NSCC and DTC had received aggregate commitments of \$10.121 billion towards the Renewal.

This agreement and its substantially similar predecessor agreements have been in place since the introduction of same-day funds settlement at DTC because DTC requires same-day liquidity resources to cover the failure-to-settle of its largest Participant or affiliated family of Participants. If a Participant fails to satisfy its end-of-day net settlement obligation, DTC may

³ The Commission has modified the text of the summaries prepared by DTC.

⁴ The Credit Facility provides for both DTC and NSCC as borrowers, with an aggregate commitment of \$1.9 billion for DTC and the amount of any excess aggregate commitment for NSCC. The borrowers are not jointly and severally liable and each lender has a ratable commitment to each borrower. DTC and NSCC have separate collateral to secure their separate borrowings.

borrow under the Credit Facility to enable it, if necessary, to fund settlement among non-defaulting Participants. Any borrowing would be secured principally by securities that were intended to be delivered to the defaulting Participant upon payment of its net settlement obligation and securities previously designated by the defaulting Participant as collateral, as well as the portion of the Participant's deposit to the Participants Fund held as DTC Series A Preferred Stock.⁵ The Credit Facility is built into DTC's primary risk management controls (i.e., the net debit cap and collateral monitor), which require that the end-of-day net funds settlement obligation of a Participant is fully collateralized and cannot exceed DTC's liquidity resources.

Anticipated Effect on and Management of Risk

DTC believes that the Credit Facility is a cornerstone of DTC risk management and its renewal is critical to the DTC risk management infrastructure. The Renewal does not otherwise affect or alter the management of risk at DTC.

(B) Clearing Agency's Statement on Comments on the Advance Notice Received from Members, Participants, or Others

No written comments were solicited or received with respect to the Advance Notice.

III. Date of Effectiveness of the Advance Notice and Timing for Commission Action

The clearing agency may implement the proposed change pursuant to Section 806(e)(1)(G) of the Clearing Supervision Act if it has not received an objection to the proposed change within 60 days of the later of (i) the date that the Commission received the advance

⁵ DTC maintains a Participants Fund to which each Participant is required to make a cash deposit, based on its historic settlement activity, which is partially allocated to an investment in shares of DTC Series A Preferred Stock up to 25% of the Participant's required cash amount. The cash portion of the Participants Fund additionally provides a liquidity resource for settlement and, to the extent invested in securities, repurchase agreements or deposits may be pledged to support a borrowing. See DTC's Rules, By-laws, Organization Certificate, Rules 4 and 4(A) (http://dtcc.com/legal/rules_proc/dtc_rules.pdf).

notice or (ii) the date the Commission receives any further information it requested for consideration of the notice.⁶ The clearing agency shall not implement the proposed change if the Commission has any objection to the proposed change.⁷

The Commission may extend the period for review by an additional 60 days if the proposed change raises novel or complex issues, subject to the Commission providing the clearing agency with prompt written notice of the extension.⁸ A proposed change may be implemented in less than 60 days from the date of receipt of the advance notice, or the date the Commission receives any further information it requested, if the Commission notifies the clearing agency in writing that it does not object to the proposed change and authorizes the clearing agency to implement the proposed change on an earlier date, subject to any conditions imposed by the Commission.⁹ The clearing agency shall post notice on its website of proposed changes that are implemented.¹⁰

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the advance notice is consistent with the Clearing Supervision Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or

⁶ 12 U.S.C. 5465(e)(1)(G).

⁷ 12 U.S.C. 5465(e)(1)(F).

⁸ 12 U.S.C. 5465(e)(1)(H).

⁹ 12 U.S.C. 5465(e)(1)(I).

¹⁰ 17 CFR 240.19b-4(n)(4)(i).

- Send an e-mail to rule-comments@sec.gov. Please include File No. SR-DTC-2013-802 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File No. SR-DTC-2013-802. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the advance notice that are filed with the Commission, and all written communications relating to the advance notice between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filings also will be available for inspection and copying at the principal office of DTC and on DTC's website at http://dtcc.com/downloads/legal/rule_filings/2013/dtc/SR-DTC-2013-802.pdf.

All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-DTC-2013-802 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

V. Commission Findings and Notice of No Objection

Although Title VIII does not specify a standard of review for advance notices, the Commission believes that the stated purpose of Title VIII is instructive.¹¹ The stated purpose of Title VIII is to mitigate systemic risk in the financial system and promote financial stability by, among other things, promoting uniform risk management standards for systemically-important financial market utilities (“FMU”)¹² and providing an enhanced role for the Board of Governors of the Federal Reserve System (“Board of Governors”) in the supervision of risk management standards for systemically-important FMUs.¹³

Section 805(a)(2) of the Clearing Supervision Act authorizes the Commission to prescribe risk management standards for the payment, clearing, and settlement activities of designated clearing entities and financial institutions engaged in designated activities for which it is the supervisory agency or the appropriate financial regulator.¹⁴ Section 805(b) of the Clearing Supervision Act states that the objectives and principles for the risk management standards prescribed under Section 805(a) shall be to:

- promote robust risk management;
- promote safety and soundness;
- reduce systemic risks; and

¹¹ 12 U.S.C. 5461(b).

¹² DTC was designated as a systemically important FMU by the Financial Stability Oversight Council (“FSOC”) on July 18, 2012. FSOC 2012 Annual Report, Appendix A, <http://www.treasury.gov/initiatives/fsoc/Documents/2012%20Annual%20Report.pdf>.

¹³ 12 U.S.C. 5461(b).

¹⁴ 12 U.S.C. 5464(a)(2).

- support the stability of the broader financial system.¹⁵

The Commission adopted risk management standards under Section 805(a)(2) of the Clearing Supervision Act on October 22, 2012 (“Clearing Agency Standards”).¹⁶ The Clearing Agency Standards became effective on January 2, 2013 and require registered clearing agencies to establish, implement, maintain, and enforce written policies and procedures that are reasonably designed to meet certain minimum requirements for their operations and risk management practices on an ongoing basis.¹⁷ As such, it is appropriate for the Commission to review advance notices against the objectives and principles for risk management standards as described in Section 805(b), as well as the applicable Clearing Agency Standards promulgated under Section 805(a).

The Advance Notice is a proposal to enter into a renewed Credit Facility, as described above, which is designed to help mitigate the risk that DTC would be under collateralized in the event that a Participant would fail to satisfy its end-of-day net settlement obligation. Consistent with Section 805(b) of the Clearing Supervision Act,¹⁸ the Commission believes the proposal promotes robust risk management, as well as the safety and soundness of DTC’s operations, while reducing systemic risks and supporting the stability of the broader financial system, by

¹⁵ 12 U.S.C. 5464(b).

¹⁶ Release No. 34-68080 (Oct. 22, 2012), 77 FR 66219 (Nov. 2, 2012).

¹⁷ The Clearing Agency Standards are substantially similar to the risk management standards established by the Board of Governors governing the operations of designated FMUs that are not clearing entities and financial institutions engaged in designated activities for which the Commission or the Commodity Futures Trading Commission is the Supervisory Agency. See Financial Market Utilities, 77 FR 45907 (Aug. 2, 2012).

¹⁸ See 12 U.S.C. 5464(b).

maintaining a cornerstone to DTC's risk management system in a Credit Facility, in preparation for a possible failure-to-settle by a Participant.

Additionally, Commission Rule 17Ad-22(d)(11) regarding default procedures,¹⁹ adopted as part of the Clearing Agency Standards,²⁰ requires that registered clearing agencies "establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable ... establish default procedures that ensure that the clearing agency can take timely action to contain losses and liquidity pressures and to continue meeting its obligations in the event of a participant default."²¹ Here, as described above, the renewed Credit Facility should help DTC continue to meet its respective obligations in a timely fashion, in the event that a Participant fails-to-settle, thereby helping to contain losses and liquidity pressures from that failure.

As described in Item III above, Section 806(e)(1)(G) of the Clearing Supervision Act provides that a designated FMU may implement a change contained in an advance notice if it has not received an objection to the proposed change within the applicable 60 day period.²² However, Section 806(e)(1)(I) allows the Commission to issue a non-objection prior to the 60th day.²³ If the Commission chooses to issue a non-objection prior to the 60th day, it must notify the designated FMU in writing that it does not object and authorize implementation of the

¹⁹ 17 CFR 240.17Ad-22(d)(11).

²⁰ Release No. 34-68080 (Oct. 22, 2012), 77 FR 66219 (Nov. 2, 2012).

²¹ 17 CFR 240.17Ad-22(d)(11).

²² See 12 U.S.C. 5465(e)(1)(G).

²³ 12 U.S.C. 5465(e)(1)(I).

change on an earlier date.²⁴ If the Commission chooses to object prior to the 60th day, it must similarly notify the designated FMU.²⁵

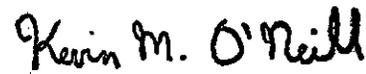
In its filing with the Commission, DTC requested that the Commission notify DTC, under Section 806(e)(1)(I) of the Clearing Supervision Act, that the Commission has no objection to the Advance Notice no later than Friday, May 10, 2013, two business days before the existing Credit Facility is set to expire on Tuesday, May 14, 2013, to ensure that there is no period of time that DTC operates without the Credit Facility.

For the reasons stated above, the Commission does not object to the Advance Notice.

VI. Conclusion

IT IS THEREFORE NOTICED, pursuant to Section 806(e)(1)(I) of the Clearing Supervision Act,²⁶ that the Commission DOES NOT OBJECT to the change described in advance notice SR-DTC-2013-802 and that DTC be and hereby is AUTHORIZED to implement the change as of the date of this notice.

By the Commission.



Kevin M. O'Neill
Deputy Secretary

²⁴ Id.

²⁵ 12. U.S.C. 5465(e)(1)(E).

²⁶ 12 U.S.C. 5465(e)(1)(I).

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 232, 239, 249, 269, 274

[Release Nos. 33-9403; 34-69568; 39-2490; IC-30515]

Adoption of Updated EDGAR Filer Manual

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (the Commission) is adopting revisions to the Electronic Data Gathering, Analysis, and Retrieval System (EDGAR) Filer Manual and related rules to reflect updates to the EDGAR system. The revisions are being made primarily to implement the new Form 13F online application and to support US GAAP 2013 Taxonomy. The EDGAR system is scheduled to be upgraded to support this functionality on May 20, 2013.

EFFECTIVE DATE: [Insert date of publication in the Federal Register.] The incorporation by reference of the EDGAR Filer Manual is approved by the Director of the Federal Register as of [Insert date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: In the Division of Investment Management, for questions concerning Form 13F contact Judith Gechter at (202) 551-6860; in the Division of Risk, Strategy, and Financial Innovation for questions concerning XBRL Taxonomies contact Matthew Carruth at (202) 551-2033; and in the Office of Information Technology, contact Vanessa Anderson at (202) 551-8800.

SUPPLEMENTARY INFORMATION: We are adopting an updated EDGAR Filer Manual, Volume I, Volume II, and Volume III. The Filer Manual describes the technical formatting

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requirements for the preparation and submission of electronic filings through the EDGAR system.¹

It also describes the requirements for filing using EDGARLink Online and the Online Forms/XML website.

The revisions to the Filer Manual reflect changes within Volume I entitled EDGAR Filer Manual, Volume I: "General Information," Version 15 (May 2013), Volume II entitled EDGAR Filer Manual, Volume II: "EDGAR Filing," Version 23 (May 2013), and Volume III entitled EDGAR Filer Manual Volume III: "N-SAR Supplement" Version 2 (August 2011).² The updated manual will be incorporated by reference into the Code of Federal Regulations.

The Filer Manual contains all the technical specifications for filers to submit filings using the EDGAR system. Filers must comply with the applicable provisions of the Filer Manual in order to assure the timely acceptance and processing of filings made in electronic format.³ Filers may consult the Filer Manual in conjunction with our rules governing mandated electronic filing when preparing documents for electronic submission.⁴

The EDGAR system will be upgraded to Release 13.1 on May 20, 2013 and will introduce the following changes: EDGAR will be updated to implement the new Form 13F online application. Form 13F will no longer be available on the EDGARLink Online application. Form 13F may only be filed using the new online version of the form available on the EDGAR Filing

¹ We originally adopted the Filer Manual on April 1, 1993, with an effective date of April 26, 1993. Release No. 33-6986 (April 1, 1993) [58 FR 18638]. We implemented the most recent update to the Filer Manual on January 14, 2013. See Release No. 33-9382 (January 23, 2013) [77 FR 54806].

² EDGAR Filer Manual Volume III: "N-SAR Supplement" Version 2 (August 2011) was previously removed in preparation of conversion of the DOS based Form N-SAR application to an online application. See Release No 33-9303. The Commission is no longer pursuing this conversion as comprehensive enhancements to the form are being considered.

³ See Rule 301 of Regulation S-T (17 CFR 232.301).

⁴ See Release No. 33-9382 (January 23, 2013) [78 FR 4766] in which we implemented EDGAR Release 13.0. For additional history of Filer Manual rules, please see the cites therein.

website or constructed by filers according to the new 'EDGAR Form 13F XML Technical Specification' document. The submission form types 13F-HR, 13-HR/A, 13F-NT, and 13-NT/A will be accessible by selecting the 'File Form 13F' link on the EDGAR Filing Website.

Instructions to file the online version of Form 13F are included in two new sections of Chapter 9 (Preparing and Transmitting Online Submissions) of the "EDGAR Filer Manual, Volume II: EDGAR Filing" to guide filers through the filing process. These sections will replace Appendix G, Form 13F Special Electronic Filing Instructions.

EDGAR will be upgraded to support the US GAAP 2013 Taxonomy. In addition EDGAR will no longer provide support for the US GAAP 2011 Taxonomy. Please see a complete listing of supported standard taxonomies on the Commission's public website (<http://www.sec.gov/info/edgar/edgartaxonomies.shtml>).

The Commission is no longer pursuing its existing project to modify the method of filing Form N-SAR from a DOS-based application to an online (XML) application. The draft Form N-SAR XML Technical Specification document will be removed from the website and the references to the new application will be removed from the EDGAR Filer Manual. Filers should continue to use the DOS-based application to create Form N-SAR submissions and the EDGAR Filer Manual, Volume III: "N-SAR Supplement" as comprehensive enhancements to the form are being considered. Please see "Notice to EDGAR Form N-SAR Filers" posted on the Commission's public website's "Information for EDGAR Filers" page (<http://www.sec.gov/info/edgar.shtml>) for additional information.

Along with the adoption of the Filer Manual, we are amending Rule 301 of Regulation S-T to provide for the incorporation by reference into the Code of Federal Regulations of today's revisions. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51.

You may obtain paper copies of the updated Filer Manual at the following address: Public Reference Room, U.S. Securities and Exchange Commission, 100 F Street, NE, Room 1543, Washington DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. We will post electronic format copies on the Commission's website; the address for the Filer Manual is <http://www.sec.gov/info/edgar.shtml>.

Since the Filer Manual and the corresponding rule changes relate solely to agency procedures or practice, publication for notice and comment is not required under the Administrative Procedure Act (APA).⁵ It follows that the requirements of the Regulatory Flexibility Act⁶ do not apply.

The effective date for the updated Filer Manual and the rule amendments is [Insert date of publication in the Federal Register]. In accordance with the APA,⁷ we find that there is good cause to establish an effective date less than 30 days after publication of these rules. The EDGAR system upgrade to Release 13.1 is scheduled to become available on May 20, 2013. The Commission believes that establishing an effective date less than 30 days after publication of these rules is necessary to coordinate the effectiveness of the updated Filer Manual with the system upgrade.

Statutory Basis

We are adopting the amendments to Regulation S-T under Sections 6, 7, 8, 10, and 19(a) of the Securities Act of 1933,⁸ Sections 3, 12, 13, 14, 15, 23, and 35A of the Securities Exchange

⁵ 5 U.S.C. 553(b).

⁶ 5 U.S.C. 601- 612.

⁷ 5 U.S.C. 553(d)(3).

⁸ 15 U.S.C. 77f, 77g, 77h, 77j, and 77s(a).

Act of 1934,⁹ Section 319 of the Trust Indenture Act of 1939,¹⁰ and Sections 8, 30, 31, and 38 of the Investment Company Act of 1940.¹¹

List of Subjects in 17 CFR Part 232

Incorporation by reference, Reporting and recordkeeping requirements, Securities.

TEXT OF THE AMENDMENT

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 232 - REGULATION S-T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

1. The authority citation for Part 232 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 77z-3, 77sss(a), 78c(b), 78l, 78m, 78n, 78o(d), 78w(a), 78ll, 80a-6(c), 80a-8, 80a-29, 80a-30, 80a-37, and 7201 et seq.; and 18 U.S.C. 1350.

2. Section 232.301 is revised to read as follows:

§232.301 EDGAR Filer Manual.

Filers must prepare electronic filings in the manner prescribed by the EDGAR Filer Manual, promulgated by the Commission, which sets out the technical formatting requirements for electronic submissions. The requirements for becoming an EDGAR Filer and updating company data are set forth in the updated EDGAR Filer Manual, Volume I: "General Information,"

⁹ 15 U.S.C. 78c, 78l, 78m, 78n, 78o, 78w, and 78ll.

¹⁰ 15 U.S.C. 77sss.

¹¹ 15 U.S.C. 80a-8, 80a-29, 80a-30, and 80a-37.

Version 15 (May 2013). The requirements for filing on EDGAR are set forth in the updated EDGAR Filer Manual, Volume II: "EDGAR Filing," Version 23 (May 2013). Additional provisions applicable to Form N-SAR filers are set forth in the EDGAR Filer Manual, Volume III: "N-SAR Supplement," Version 2 (August 2011). All of these provisions have been incorporated by reference into the Code of Federal Regulations, which action was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. You must comply with these requirements in order for documents to be timely received and accepted. You can obtain paper copies of the EDGAR Filer Manual from the following address: Public Reference Room, U.S. Securities and Exchange Commission, 100 F Street, NE, Room 1543, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. Electronic copies are available on the Commission's website. The address for the Filer Manual is <http://www.sec.gov/info/edgar.shtml>. You can also inspect the document at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to: http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.

By the Commission.



Elizabeth M. Murphy
Secretary

May 14, 2013

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 69580 / May 15, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15325

In the Matter of

Benda Pharmaceutical, Inc. and
China Shuangjii Cement Ltd.,

Respondents.

ORDER INSTITUTING
ADMINISTRATIVE
PROCEEDINGS AND NOTICE
OF HEARING PURSUANT TO
SECTION 12(j) OF THE
SECURITIES EXCHANGE ACT
OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against the Respondents named in the caption.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Benda Pharmaceutical, Inc. ("BPMA")¹ (CIK No. 705868) is a void Delaware corporation located in Wuhan, Hubei Province, China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). BPMA is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2010. As of May 9, 2013, the common stock of BPMA was quoted on OTC Link (formerly "Pink Sheets") operated by OTC Markets Group Inc. ("OTC Link"), had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. China Shuangji Cement Ltd. ("CSGJ") (CIK No. 1375494) is a void Delaware corporation located in Zhaoyuan City, Shandong Province, China with a class of securities

¹The short form of each issuer's name is also its stock symbol.

registered with the Commission pursuant to Exchange Act Section 12(g). CSGJ is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2010. As of May 9, 2013, the common stock of CSGJ was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

3. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission, have repeatedly failed to meet their obligations to file timely periodic reports, and failed to heed delinquency letters sent to them by the Division of Corporation Finance requesting compliance with their periodic filing obligations or, through their failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

4. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports, and Rule 13a-13 requires domestic issuers to file quarterly reports.

5. As a result of the foregoing, Respondents failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II hereof are true and, in connection therewith, to afford the Respondents an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that Respondents shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If Respondents fail to file the directed Answers, or fail to appear at a hearing after being duly notified, the Respondents, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents, may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

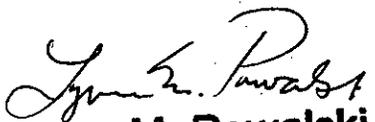
This Order shall be served forthwith upon Respondents personally or by certified, registered, or Express Mail, or by other means permitted by the Commission Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Secretary


By: Lynn M. Powalski
Deputy Secretary

*Commissioner Aguilar
Commissioner Gallagher
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3608 / May 15, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15327

In the Matter of

WESLEY W. WANG,

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 203(f) OF THE
INVESTMENT ADVISERS ACT OF 1940,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Wesley W. Wang ("Wang" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, Respondent consents to the Commission's jurisdiction over him and the subject matter of these proceedings and to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

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III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Wang, age 39, is a resident of Berkeley, California. From 2005 through 2008, Wang was a consultant to Trellus Management Company, LLC ("Trellus"), a New York-based hedge fund investment adviser. Wang worked as equity analyst for Trellus and provided it with research and stock recommendations.

2. On July 13, 2012, Wang pled guilty to two counts of conspiracy to commit securities fraud in violation of 18 U.S.C. § 371 before the United States District Court for the Southern District of New York in United States v. Wesley Wang, 12 CR 541.

3. The counts of the criminal information to which Wang pled guilty alleged, inter alia, that Wang, and others, participated in a scheme to defraud by sharing material, nonpublic information regarding certain public companies' quarterly earnings and other material financial and business information for the purpose of executing securities trades based in whole or in part on such information. The information alleged that Wang obtained material nonpublic information regarding, inter alia, Cisco Systems, Inc., that had been disclosed in violation of duties of trust and confidence, and provided that information to other individuals at the hedge fund adviser where he worked with the expectation that it would be used to execute securities transactions.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Wang's Offer.

Accordingly, it is hereby ORDERED:

Pursuant to Section 203(f) of the Advisers Act, that Respondent Wang be, and hereby is barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary


By: Lynn M. Powalski
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

May 15, 2013

In the Matter of

Griffin Mining, Inc.,
Power Sports Factory, Inc.,
Star Energy Corp.,
TransNet Corp.,
Valcom, Inc., and
Vibe Records, Inc.,

File No. 500-1

ORDER OF SUSPENSION OF
TRADING

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Griffin Mining, Ltd. because it has not filed any periodic reports since it filed an amended registration statement on December 7, 1998.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Power Sports Factory, Inc. because it has not filed any periodic reports since the period ended March 31, 2010.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Star Energy Corp. because it has not filed any periodic reports since the period ended September 30, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of TransNet Corp. because it has not filed any periodic reports since the period ended March 31, 2011.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Valcom, Inc. because it has not filed any periodic reports since the period ended June 30, 2011.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Vibe Records, Inc. because it has not filed any periodic reports since the period ended September 30, 2010.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EDT on May 15, 2013, through 11:59 p.m. EDT on May 29, 2013.

By the Commission.

Elizabeth M. Murphy
Secretary


By: Lynn M. Powalski
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 69582 / May 15, 2013

ADMINISTRATIVE PROCEEDING

File No. 3-15326

In the Matter of

**Griffin Mining, Ltd.,
Power Sports Factory, Inc.,
Star Energy Corp.,
TransNet Corp.,
Valcom, Inc., and
Vibe Records, Inc.,**

Respondents.

**ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
AND NOTICE OF HEARING
PURSUANT TO SECTION 12(j) OF
THE SECURITIES EXCHANGE ACT
OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents Griffin Mining, Ltd., Power Sports Factory, Inc., Star Energy Corp., TransNet Corp., Valcom, Inc., and Vibe Records, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Griffin Mining, Ltd. (CIK No. 1070762) is a Bermuda company located in London, England with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Griffin Mining is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-F/A registration statement on December 7, 1998, which reported a net loss of over \$3.7 million for the fiscal year ended February 31, 1997. As of May 9, 2013, the company's stock (symbol "GFMIF") was quoted on OTC Link (previously, "Pink Sheets") operated

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by OTC Markets Group, Inc. ("OTC Link"), had four market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. Power Sports Factory, Inc. (CIK No. 1001065) is a dissolved Minnesota corporation located in Philadelphia, Pennsylvania with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Power Sports Factory is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended March 31, 2010, which reported a net loss of over \$253,000 for the prior three months. As of May 9, 2013, the company's stock (symbol "PSPF") was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. Star Energy Corp. (CIK No. 1104671) is a revoked Nevada corporation located in New York, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Star Energy is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2008, which reported a net loss of over \$2.5 million for the prior nine months. As of May 9, 2013, the company's stock (symbol "SERG") was quoted on OTC Link, had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. TransNet Corp. (CIK No. 99313) is a delinquent Delaware corporation located in Somerville, New Jersey with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). TransNet is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended March 31, 2011, which reported a net loss of over \$1.3 million for the prior nine months. As of May 9, 2013, the company's stock (symbol "TRNT") was quoted on OTC Link, had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

5. Valcom, Inc. (CIK No. 1013453) is a void Delaware corporation located in Boonton Township, New Jersey with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Valcom is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q/A for the period ended June 30, 2011. On July 16, 2007, Valcom filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Central District of California, and the case was terminated on June 8, 2012. As of May 9, 2013, the company's stock (symbol "VLCO") was quoted on OTC Link, had twelve market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

6. Vibe Records, Inc. (CIK No. 1222792) is a revoked Nevada corporation located in East Moriches, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Vibe Records is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the period ended September 30, 2010, which reported a net loss of over \$1.2 million for the prior year. As of May 9, 2013, the company's stock (symbol "VBRE") was quoted on OTC Link, had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

7. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission, have repeatedly failed to meet their obligations to file timely periodic reports, and failed to heed delinquency letters sent to them by the Division of Corporation Finance requesting compliance with their periodic filing obligations or, through their failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

8. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports, and Rule 13a-13 requires domestic issuers to file quarterly reports.

9. As a result of the foregoing, Respondents failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and/or 13a-13 thereunder.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II hereof are true and, in connection therewith, to afford the Respondents an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that Respondents shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If Respondents fail to file the directed Answers, or fail to appear at a hearing after being duly notified, the Respondents, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents, may be deemed in default and the proceedings may be determined against them upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon Respondents personally or by certified, registered, or Express Mail, or by other means permitted by the Commission Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Secretary


Lynn M. Powalski
By: Lynn M. Powalski
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 69578 / May 15, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15324

In the Matter of

**Avani International Group, Inc.,
Birch Mountain Resources Ltd.,
Capital Reserve Canada Ltd.,
Dynasty Gaming, Inc.
(n/k/a Blue Zen Memorial Parks, Inc.),
IXI Mobile, Inc.,
Laureate Resources & Steel Industries, Inc.
Millennium Energy Corp.,
Shannon International, Inc., and
Welwind Energy International Corporation,**

Respondents.

**ORDER INSTITUTING
ADMINISTRATIVE
PROCEEDINGS AND NOTICE
OF HEARING PURSUANT TO
SECTION 12(j) OF THE
SECURITIES EXCHANGE ACT
OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against the Respondents named in the caption.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Avani International Group, Inc. ("AVIT")¹ (CIK No. 1048701) is a revoked Nevada corporation located in West Vancouver, British Columbia, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). AVIT is delinquent in its periodic filings with the Commission, having not filed any periodic reports since

¹The short form of each issuer's name is also its stock symbol.

it filed a Form 10-Q for the period ended September 30, 2010, which reported a net loss of \$77,056 for the prior nine months. As of May 9, 2013, the common stock of AVIT was quoted on OTC Link (formerly "Pink Sheets") operated by OTC Markets Group Inc. ("OTC Link"), had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. Birch Mountain Resources Ltd. ("BHMNF") (CIK No. 1006224) is an Alberta corporation located in Calgary, Alberta, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). BHMNF is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-F for the period ended December 31, 2007, which reported a net loss of \$24,508,112 Canadian for the prior year. As of May 9, 2013, the common shares of BHMNF were quoted on OTC Link, had six market makers, and were eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. Capital Reserve Canada Ltd. ("CRSVF") (CIK No. 1230622) is an Alberta corporation located in Edmonton, Alberta with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). CRSVF is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-F for the period ended December 31, 2009, which reported a net loss of \$1,101,073 Canadian for the prior year. As of May 9, 2013, the common stock of CRSVF was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. Dynasty Gaming, Inc. (n/k/a Blue Zen Memorial Parks, Inc.) ("DNYFF") (CIK No. 1349507) is a Quebec corporation located in Montreal, Quebec, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). DNYFF is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-F for the period ended December 31, 2007, which reported a net loss of \$6,258,444 Canadian for the prior year. As of May 9, 2013, the common shares of DNYFF were quoted on OTC Link, had seven market makers, and were eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

5. IXI Mobile, Inc. ("IXMO") (CIK No. 1319644) is a void Delaware corporation located in Rishon Le-Zion, Israel with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). IXMO is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 2008, which reported a net loss of \$20,045,000 for the prior six months. As of May 9, 2013, the common stock of IXMO was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

6. Laureate Resources & Steel Industries, Inc. ("LRRS") (CIK No. 1343011) is a Nevada corporation located in Dubai, United Arab Emirates with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). LRRS is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the period ended August 31, 2009, which reported a net loss of \$1,435,685 for the prior

year. As of May 9, 2013, the common stock of LRRS was quoted on OTC Link, had four market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

7. Millennium Energy Corp. ("MLME") (CIK No. 1384034) is a revoked Nevada corporation located in Athens Greece with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). MLME is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2009, which reported a net loss of \$61,849 for the prior nine months. As of May 9, 2013, the common stock of MLME was quoted on OTC Link, had three market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

8. Shannon International, Inc. ("SHIR") (CIK No. 1081047) is a permanently revoked Nevada corporation located in Dartmouth, Nova Scotia, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). SHIR is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-KSB for the period ended September 30, 2006, which reported a net loss of \$2,271,053 for the prior year. As of May 9, 2013, the common stock of SHIR was quoted on OTC Link, had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

9. Welwind Energy International Corporation ("WWEI") (CIK No. 1052671) is a void Delaware corporation located in Maple Ridge, British Columbia, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). WWEI is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2010, which reported a net loss from continuing operations of \$386,758 for the prior nine months. As of May 9, 2013, the common stock of WWEI was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

10. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission, have repeatedly failed to meet their obligations to file timely periodic reports, and failed to heed delinquency letters sent to them by the Division of Corporation Finance requesting compliance with their periodic filing obligations or, through their failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

11. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports, and Rule 13a-13 requires domestic issuers to file quarterly reports.

12. As a result of the foregoing, Respondents failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and/or 13a-13 thereunder.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II hereof are true and, in connection therewith, to afford the Respondents an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that Respondents shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If Respondents fail to file the directed Answers, or fail to appear at a hearing after being duly notified, the Respondents, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents, may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon Respondents personally or by certified, registered, or Express Mail, or by other means permitted by the Commission Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Secretary

Lynn M. Powalski
By: Lynn M. Powalski
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

May 15, 2013

In the Matter of

**Avani International Group, Inc.,
Birch Mountain Resources Ltd.,
Capital Reserve Canada Ltd.,
Dynasty Gaming, Inc.
(n/k/a Blue Zen Memorial Parks, Inc.),
IXI Mobile, Inc.,
Laureate Resources & Steel Industries, Inc.
Millennium Energy Corp.,
Shannon International, Inc., and
Welwind Energy International Corporation,**

File No. 500-1

**ORDER OF SUSPENSION OF
TRADING**

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Avani International Group, Inc. because it has not filed any periodic reports since the period ended September 30, 2010.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Birch Mountain Resources Ltd. because it has not filed any periodic reports since the period ended December 31, 2007.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Capital Reserve Canada Ltd. because it has not filed any periodic reports since the period ended December 31, 2009.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Dynasty Gaming, Inc. (n/k/a Blue Zen Memorial Parks, Inc.) because it has not filed any periodic reports since the period ended December 31, 2007.

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It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of IXI Mobile, Inc. because it has not filed any periodic reports since the period ended June 30, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Laureate Resources & Steel Industries, Inc. because it has not filed any periodic reports since the period ended August 31, 2009.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Millennium Energy Corp. because it has not filed any periodic reports since the period ended September 30, 2009.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Shannon International, Inc. because it has not filed any periodic reports since the period ended September 30, 2006.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Welwind Energy International Corp. because it has not filed any periodic reports since the period ended September 30, 2010.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EDT on May 15, 2013, through 11:59 p.m. EDT on May 29, 2013.

By the Commission.


By: **Lynn M. Powalski**
Deputy Secretary

Elizabeth M. Murphy
Secretary

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-69603; File No. SR-OCC-2013-802)

May 17, 2013

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing of an Advance Notice to Change the Expiration Date For Most Option Contracts to the Third Friday of the Expiration Month Instead of the Saturday Following the Third Friday

Pursuant to Section 806(e)(1) of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”),¹ entitled the Payment, Clearing, and Settlement Supervision Act of 2010 (“Clearing Supervision Act”)² and Rule 19b-4(n)(1)(i)³ of the Securities Exchange Act of 1934 (“Exchange Act”), notice is hereby given that on April 17, 2013, The Options Clearing Corporation (“OCC”) filed with the Securities and Exchange Commission (“Commission”) the advance notice, which concerns a proposed rule change, as described in Items I and II below, which Items have been substantially prepared by the clearing agency.⁴ The Commission is publishing this notice to solicit comments on the advance notice from interested persons.

¹ Pub. L. 111-203, 124 Stat.1376 (2010).

² 12 U.S.C. 5465(e)(1).

³ 17 CFR 240.19b-4(n)(1)(i).

⁴ OCC also filed the proposals contained in this advance notice as a proposed rule change, under Section 19(b)(1) of the Exchange Act and Rule 19b-4 thereunder, seeking Commission approval to permit OCC to change its rules to reflect the proposed changes in this advance notice. 15 U.S.C. 78s(b)(1); 17 CFR 240.19b-4; See Exchange Act Release No. 69480 (April 30, 2013) (SR-OCC-2013-04).

I. Clearing Agency's Statement of the Terms of Substance of the Advance Notice

This advance notice concerns a proposed rule change which would allow OCC to change the expiration date for most option contracts to the third Friday of the expiration month instead of the Saturday following the third Friday.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change and Advance Notice

In its filing with the Commission, the clearing agency included statements concerning the purpose of and basis for the proposed rule change and advance notice and discussed any comments it received on the proposed rule change and advance notice. The text of these statements may be examined at the places specified in Item IV below. The clearing agency has prepared summaries, set forth in sections (A), (B), (C), and (D) below, of the most significant aspects of such statements.⁵

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, Proposed Rule Change and the Advance Notice

Most option contracts ("Standard Expiration Contracts") currently expire at the "expiration time" (11:59 pm Eastern Time) on the Saturday following the third Friday of the specified expiration month ("Expiration Date").⁶ The purpose of this proposed rule change is to change the Expiration Date for Standard Expiration Contracts to the third Friday of the expiration month. (The expiration time would continue to be 11:59 pm Eastern Time on the Expiration Date.) The proposed change would apply only to Standard Expiration Contracts expiring after February 1, 2015, and OCC does not propose to change the Expiration Date for any outstanding option contract. The proposed

⁵ The Commission has modified slightly the text of the summaries prepared by the clearing agency.

⁶ See the definition of "expiration time" in Article I of OCC's By-Laws.

change will apply only to series of option contracts opened for trading after the effective date of this proposed rule change and having Expiration Dates later than February 1, 2015. Option contracts having non-standard expiration dates ("Non-standard Expiration Contracts") will be unaffected by this proposed rule change.⁷

In order to provide a smooth transition to the Friday expiration, OCC would, beginning June 21, 2013, move the expiration exercise procedures to Friday for all Standard Expiration Contracts even though the contracts would continue to expire on Saturday. After February 1, 2015, virtually all Standard Expiration Contracts will actually expire on Friday. The only Standard Expiration Contracts that will expire on a Saturday after February 1, 2015 are certain options that were listed prior to the effectiveness of this rule change, and a limited number of options that may be listed prior to necessary systems changes of the options exchanges, which are expected to be completed in August 2013. The exchanges have agreed that once these systems changes are made they will not open for trading any new series of option contracts with Saturday expiration dates falling after February 1, 2015.

Background

Saturday was established as the standard Expiration Date for OCC-cleared options primarily in order to allow sufficient time for processing of option exercises, including correction of errors, while the markets were closed and positions remained fixed. However, improvements in technology and a great deal of experience have rendered Saturday expiration processing inefficient, and Saturday processing also poses

⁷ Examples of options with Non-standard Expiration Contracts include flex options, quarterly, monthly and weekly options, where the expiration exercise processing for such options presently occurs on a weekday.

unnecessary operational risk upon OCC and its clearing members. Therefore, it has been a long-term goal of OCC and its clearing members to move the expiration process for all options with Standard Expiration Contracts from Saturday to Friday night.

OCC states that eliminating Saturday expirations would allow OCC to streamline the expiration process between Standard Expiration Contracts and Non-standard Expiration Contracts, which will increase operational efficiencies and reduce operational risk for OCC and its clearing members. After the expiration date for Standard Expiration Contracts is moved to Friday night, expiration processing for standard options, quarterly options, and weekly options will all occur on the same day and will be a single, and inherently more efficient, operational process. The move to Friday night processing will also align expiration processing schedules for United States markets with expiration processing schedules for European markets and will allow affected clearing members to run a single, consistent, and efficient operational process for all U.S. equity/index options regardless of where such options are exercised. Moreover, the move to Friday night processing will also eliminate the operational risk presented by scheduling an expiration process to run on one Saturday per month when it is otherwise run weekly on Friday night. Saturdays are typically reserved for system maintenance and installs of system enhancements so Saturday expiration processes force such maintenance and installs to be rescheduled and sometimes delayed.

OCC states that from a risk management perspective, the proposed rule change would compress the operational timeframe for processing option expirations such that clearing members will be required to reconcile options trades on trade date. Trade date reconciliation is a better-risk management practice and will facilitate and promote the use

of intra-day risk management systems by clearing members as well as move clearing members toward adopting real-time trade date reconciliation and position balancing systems.

According to OCC, industry groups, clearing members, and options exchanges have been active participants in planning for the transition to the Friday expiration. In March, 2012, OCC began to discuss moving Standard Expiration Contracts to Friday expiration dates with industry groups, including two Securities Industry and Financial Markets Association ("SIFMA") committees, the Operations and Technology Steering Committee and the Options Committee, and at two major industry conferences, the SIFMA Operations Conference and the Options Industry Conference. OCC also discussed the project with the Intermarket Surveillance Group and at an OCC Operations Roundtable. In each case, OCC received broad support for the initiative. Also, OCC surveyed all of its clearing members as well as its service bureaus and learned that a significant majority of those surveyed are currently ready to move to Friday night expiration processing. OCC has worked with the other clearing members and service bureaus so that all affected parties experience a smooth transition to Friday night expiration processing. OCC has obtained assurances from all options industry participants that they will be ready to move to Friday night expiration processing by June 2013.

OCC states that Friday night expiration processing is also consistent with the long-standing rules and procedures of the options exchanges and the Financial Industry

Regulatory Authority ("FINRA"),⁸ which generally provide that exercise decisions with respect to Standard Expiration Contracts must be made by, and exercise instructions may not be accepted from customers after, 5:30 p.m. Eastern Time on the business day preceding expiration (usually Friday).⁹ Brokerage firms may set earlier cutoff times for customers submitting exercise notices. Clearing members are permitted to submit exercise instructions after the cutoff time ("Supplementary Exercises") only in case of errors or other unusual situations, and may be subject to fines or disciplinary actions.¹⁰ OCC believes that the extended period between cutoff time and expiration of options is no longer necessary given modern technology.

Transition Period

Based on significant dialogue between OCC and clearing members regarding the move to Friday expiration, OCC believes that the adoption of Friday expiration for Standard Expiration Contracts is best accomplished through an appropriate transition period during which processing activity for all options, whether expiring on Friday or Saturday, would move to Friday, followed by a change in the expiration day for new

⁸ OCC has contacted FINRA regarding the need to review the Contrary Exercise Advisory Rule to ensure such rule is consistent with the industry effort to move to Friday expiration dates. FINRA has determined that no changes to its current rules are needed in order to accommodate the transition of expiration processing from Saturday to Friday night. FINRA has agreed that it will work with the industry to implement coordinated and appropriate modifications to its rules in order to accommodate Friday night expiration dates, which will begin on or after February 1, 2015.

⁹ See, e.g., FINRA Rule 4210(b)(23)(A)(iii). "Option holders have until 5:30 p.m. Eastern Time ("ET") on the business day immediately prior to the expiration date to make a final exercise decision to exercise or not exercise an expiring option. Members may not accept exercise instructions for customer or noncustomer accounts after 5:30 p.m. ET." Member firms may specify earlier cutoff times.

¹⁰ See OCC Rule 805(g).

series of options. In May 2012, OCC and its clearing members determined that Friday, June 21, 2013, would be an appropriate date on which to move expiration processing from Saturday to Friday night. Accordingly, OCC proposes that, beginning June 21, 2013, Friday expiration processing will be in effect for all expiring Standard Expiration Contracts, regardless of whether the contract's actual expiration date is Friday or Saturday. However, for contracts having a Saturday expiration date, exercise requests received after Friday expiration processing is complete but before the Saturday contract expiration time will continue to be processed so long as they are submitted in accordance with OCC's procedures governing such requests. After the transition period and the expiration of all existing Saturday-expiring options, expiration processing will be a single operational process and will run on Friday night for all Standard Expiration Contracts.

Friday Expiration Processing Schedule

Currently, expiration processing for Standard Expiration Contracts begins on Saturday morning at 6:00 a.m. Central Time and is completed at approximately noon Central Time when margin and settlement reports are available. The window for submission of instructions in accordance with OCC's exercise-by-exception procedures under OCC Rule 805(d) is open from 6:00 a.m. to 9:00 a.m. Central Time on Saturday morning.¹¹ OCC proposes that the window for submission of exercise-by-exception

¹¹ OCC's exercise-by-exception procedures are described in its Rule 805(d), which generally provides that each clearing member will automatically be deemed to have submitted an exercise notice immediately prior to the expiration time for all in-the-money option contracts unless the clearing member has instructed OCC otherwise in a written exercise notice.

instructions be open from 6:00 p.m. to 9:15 p.m. Central Time on Friday evening.¹²

Friday expiration processing for Standard Expiration Contracts would therefore begin at 6:00 p.m. Central Time on Friday evening and end at approximately 2:00 a.m. Central Time on Saturday morning when margin and settlement reports will be available.¹³

Exercises for Standard Expiration Contracts with Saturday expirations must be allowed under the terms of the contracts. However, in order to accommodate the proposed new expiration schedule, OCC also proposes to shorten the period of time in which clearing members may submit a Supplementary Exercise notice under OCC Rule 805(b). In addition, OCC Rule 801 would be amended to eliminate the ability of clearing members to revoke or modify exercise notices submitted to OCC. This proposed change, along with the proposed change in the processing timeline discussed above, will more closely align OCC's expiration processing procedures with exchange rules, under which exchange members must submit exercise instructions by 5:30 p.m. Central Time on Friday and may not accept exercise instructions from customers after 4:30 p.m. Central Time on Friday. Accordingly, this proposed change will not represent a departure from current practices for clearing members or their customers.

In connection with moving from Saturday to Friday night processing and expiration, OCC reviewed other aspects of its business to confirm that there would be no unintended consequences, and concluded that there would be none. For example, OCC

¹² The exercise-by-exception window for weekly and quarterly expiration options is from 6:00 p.m. to 7:00 p.m. Central Time on the expiration date.

¹³ The proposed expiration schedule for Friday expiration processing is similar to the expiration schedule for weekly options, which begins at 6:00 p.m. Central Time on Friday evening and ends at 11:30 p.m. Central Time on Friday evening. All timeframes would be set forth in OCC's procedures and subject to change based on OCC's experience with Friday expiration processing.

believes the proposed changes do not affect OCC's liquidity forecasting procedures, nor do they impact OCC's liquidity needs, since OCC's liquidity forecasts and liquidity needs are driven by settlement obligations, which occur on the same day (T+3) irrespective of the move to Friday night processing and expiration dates.

Grandfathering of Certain Options Series

Certain option contracts have already been listed on exchanges with expiration dates as distant as December 2016. Such options have Saturday expiration dates and OCC cannot change the terms of existing option contracts. In addition, according to OCC clearing members have expressed a clear preference to not have open interest in any particular month with different expiration dates. Therefore, OCC will designate certain expiration dates as "grandfathered," and any option contract that is listed, or may be listed in the future, that expires on a grandfathered date will have a Saturday expiration date even if such expiration date is after February 1, 2015.¹⁴ Further, certain FLEX options that have already been accepted for clearance and have expiration dates beyond February 1, 2015, will also be designated as grandfathered. The Friday night expiration transition period processing schedule, as described above, will be in effect for any grandfathered Saturday expiration contract. According to OCC, in order to minimize the number of grandfathered expiration dates, exchanges have already agreed that, if there is not already a previously listed Standard Expiration Contract with an expiration in a

¹⁴ After OCC designates an expiration date as grandfathered, the exchanges have agreed to not permit the listing of, and OCC will not accept for clearance, any newly listed standard expiration option contract with a Friday expiration in the applicable month.

particular month that is after February 1, 2015,¹⁵ they will not open for trading any new series of Standard Expiration Contracts with Saturday expiration dates in such month.

Proposed Amendments to By-Laws and Rules

In order to implement the change to Friday expiration processing and eventual transition to Friday expiration for all Standard Expiration Contracts, OCC proposes to amend the definition of “expiration date” in Article I and certain other articles of the By-Laws. As amended, the applicability of the definition would not be limited to stock options, and the definition of “expiration date” in certain articles of the By-Laws therefore can be deleted in reliance on the Article I definition. OCC also proposes to amend Rule 805, and all rules supplementing or replacing Rule 805, to allow for Friday expiration processing during the transition to Friday expiration. Section 18 of Article VI of the By-Laws would also be amended to align procedures for delays in producing Expiration Exercise Reports and submission of exercise instructions with the amended expiration exercise procedures in OCC Rule 805. OCC Rule 801 would be amended to modify the prohibition against exercising an American-style option contract on the business day prior to its expiration date because this prohibition is necessary only for options expiring on a Saturday. The prohibition can be removed altogether when there are no longer any options expiring on a Saturday.

OCC Rule 801 would also be amended to remove clearing members’ ability to revoke or modify exercise notices in order to accommodate the proposed compressed Friday expiration processing expiration schedule. Finally, OCC Rules 801 and 805

¹⁵ Until exchanges complete certain systems enhancements in August 2013, it is possible that additional option contracts may be listed with Saturday expiration dates beyond February 1, 2015.

would be amended to allow certain determinations to be made by high-level officers of OCC, rather than the Board of Directors, in order to provide OCC with greater operational flexibility in processing exercise requests received after Friday expiration processing is complete but before the Saturday contract expiration time, and to replace various references to the expiration date of options with reference to the procedures of Rule 805.

Under the proposed rule change, OCC would preserve the ability of the options exchanges to designate (or, in the case of flexibly structured options, permit clearing members to designate) non-standard expiration dates for options, or classes or series of options, so long as the designated expiration date is not a date OCC has specified as ineligible to be an expiration date.

OCC believes the proposed rule change is consistent with the purposes and requirements of Section 17A of the Exchange Act¹⁶ because it provides for the prompt and accurate clearance and settlement of securities transactions and the protection of securities investors and the public interest¹⁷ by improving the processing time for clearing of option contracts, standardizing the expiration day of numerous options contracts, and requiring clearing members to reconcile options transactions on the trade date, which will facilitate and promote intra-day risk management by the clearing members. OCC believes proposed rule change is not inconsistent with any existing OCC By-Laws or Rules.

¹⁶ 15 U.S.C. Section 78q-1.

¹⁷ 15 U.S.C. Section 78q-1(b)(3)(F).

(B) Clearing Agency's Statement on Burden on Competition

OCC does not believe that the proposed rule change would impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change, which will apply to all OCC clearing members, involves operational improvements that will allow OCC and its clearing members to become more operationally efficient and reduce operational risk. Moreover, OCC has coordinated moving to a Friday night expiration process with options industry participants and has also obtained assurance from all such participants that they are able to adhere to OCC's Friday night expiration implementation schedule. Therefore, OCC does not believe the proposed rule change would impose a burden on competition.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

While the matters discussed in this proposed rule change have been subject to extensive discussion with clearing members, including during an OCC Operations Roundtable, written comments were not and are not intended to be solicited with respect to the proposed rule change, and none have been received.

(D) Advance Notices Filed Pursuant to Section 806(e) of the Clearing Supervision Act

OCC is filing this proposed rule change as an advance notice pursuant to Section 806(e)(2) of Clearing Supervision Act because OCC believes the proposed change could be deemed to materially affect the nature or level of risks presented by OCC. OCC believes that the Rule change will enhance OCC's ability to manage the risks presented to it. The operational processing of stock option contracts with Saturday expiration dates on the preceding Friday and the ultimate transition to a Friday expiration date for standard

expiration contracts as described above will reduce the operational risk to OCC by allowing OCC to streamline the expiration process for all such options contracts and increase the operational efficiencies for OCC and its clearing members. In addition, it will compress the operational timeframe for processing the options expirations such that clearing members will be required to reconcile options trades on the trade date, which will facilitate and promote intra-day risk management of cleared trades, and promote real-time trade date reconciliation and positions balancing, by clearing members.

III. Date of Effectiveness of the Advance Notice and Timing for Commission Action

The proposed change may be implemented pursuant to Section 806(e)(1)(G) of the Clearing Supervision Act¹⁸ if the Commission does not object to the proposed change within 60 days of the later of (i) the date that the proposed change was filed with the Commission or (ii) the date that any additional information requested by the Commission is received. The clearing agency shall not implement the proposed change if the Commission has any objection to the proposed change.

The Commission may extend period for review by an additional 60 days if the proposed change raises novel or complex issues, subject to the Commission or the Board of Governors of the Federal Reserve System providing the clearing agency with prompt written notice of the extension. A proposed change may be implemented in less than 60 days from the date the advance notice is filed, or the date further information requested by the Commission is received, if the Commission notifies the clearing agency in writing that it does not object to the proposed change and authorizes the clearing agency to

¹⁸ 12 U.S.C. 5465(e)(1)(G).

implement the proposed change on an earlier date, subject to any conditions imposed by the Commission.

The clearing agency shall post notice on its website of proposed changes that are implemented.

The proposal shall not take effect until all regulatory actions required with respect to the proposal are completed.¹⁹

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-OCC-2013-802 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

All submissions should refer to File Number SR-OCC-2013-802. This file number should be included on the subject line if e-mail is used. To help the Commission

¹⁹ OCC also filed the proposals contained in this advance notice as a proposed rule change, under Section 19(b)(1) of the Exchange Act and Rule 19b-4 thereunder, seeking Commission approval to permit OCC to change its rules to reflect the proposed changes in this advance notice. 15 U.S.C. 78s(b)(1); 17 CFR 240.19b-4; SR-OCC-2013-04. See Supra note 4.

process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the advance notice that are filed with the Commission, and all written communications relating to the advance notice between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 am and 3:00 pm. Copies of the filing also will be available for inspection and copying at the principal office of OCC and on OCC's website:

(http://www.optionsclearing.com/components/docs/legal/rules_and_bylaws/sr_occ_13_04.pdf). All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-OCC-2013-802 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

By the Commission.



Kevin M. O'Neill

Kevin M. O'Neill
Deputy Secretary

*Commissioner Gallagher
not participating*

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-69602; File No. SR-FICC-2013-802)

May 17, 2013

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Notice of Filing of Advance Notice to Include Options On Interest Rate Futures Contracts with Maturities Not Longer than Two Years in the One-Pot Cross-Margining Program Between the Government Securities Division and New York Portfolio Clearing, LLC

Pursuant to Section 806(e)(1) of the Payment, Clearing, and Settlement Supervision Act of 2010 (“Clearing Supervision Act”)¹ and Rule 19b-4(n)(1)(i)² of the Securities Exchange Act of 1934 (“Exchange Act”),³ notice is hereby given that, on April 15, 2013, the Fixed Income Clearing Corporation (“FICC”) filed with the Securities and Exchange Commission (“Commission”) the advance notice described in Items I and II below, which Items have been prepared primarily by FICC. The Commission is publishing this notice to solicit comments on the advance notice from interested persons.

I. Clearing Agency’s Statement of the Terms of Substance of the Advance Notice

This advance notice concerns proposed rule changes that would allow FICC to include options on interest rate futures contracts with maturities not longer than two years in the one-pot cross-margining program between FICC’s Government Securities Division (“GSD”) and New York Portfolio Clearing, LLC (“NYPC”).⁴

¹ 12 U.S.C. 5465(e)(1).

² 17 CFR 240.19b-4(n)(1)(i).

³ 15 U.S.C. 78q-1.

⁴ NYPC is jointly owned by NYSE Euronext and The Depository Trust & Clearing Corporation (“DTCC”).

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Advance Notice

In its filing with the Commission, FICC included statements concerning the purpose of and basis for the advance notice and discussed any comments it received on the advance notice. The text of these statements may be examined at the places specified in Item IV below. FICC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.⁵

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Advance Notice

(i) The purpose of the advance notice is to include options on interest rate futures contracts with maturities not longer than two years in the one-pot cross-margining program between the GSD and NYPC.

Background on NYPC and the FICC-NYPC One-Pot Cross-Margining Program

NYPC is registered with the Commodity Futures Trading Commission ("CFTC") as a derivatives clearing organization ("DCO") pursuant to Section 5b of the Commodity Exchange Act and Part 39 of the CFTC regulations. NYPC launched operations on March 21, 2011, and currently clears U.S. dollar-denominated interest rate futures contracts. It plans to add options on interest rate futures to its suite of products.

Pursuant to FICC Rule Filing 2010-09,⁶ FICC offers "single pot" cross margining of certain positions cleared at NYPC and the GSD. This arrangement is reflected in a cross-

⁵ The Commission has modified the text of the summaries prepared by FICC.

⁶ The Commission approved this rule filing on February 28, 2011. See Securities Exchange Act Release No. 63986 (Feb. 28, 2011); 76 FR 12144 (Mar. 4, 2011) (SR-FICC-2010-09).

margin agreement (“FICC-NYPC Cross-Margining Agreement”) between FICC and NYPC, which is a part of the GSD’s rules. Specifically, certain GSD members are permitted to combine their positions at GSD with their positions at NYPC, or with the positions of certain permitted affiliates that are cleared at NYPC, within a single margin portfolio. Joint GSD-NYPC members or GSD members and their permitted affiliates who wish to participate in the one-pot program must execute the requisite cross-margining participant agreements, which are exhibits to the FICC-NYPC Cross-Margining Agreement.⁷

As noted in FICC Rule Filing 2010-09, FICC is responsible for performing the margin calculations in its capacity as the “Administrator” under the terms of the FICC-NYPC Cross-Margining Agreement. Specifically, FICC determines the combined FICC Clearing Fund and NYPC Original Margin⁸ requirement for each cross-margining participant. The FICC-NYPC one-pot margin requirement for each participant is then allocated between FICC and NYPC in proportion to each clearing organization’s respective “stand-alone” margin requirements—in other words, an amount reflecting the ratio of what each clearing organization would have required from that member if it were not participating in the cross-margining program. The FICC-NYPC Cross-Margining Agreement refers to this as the “Constituent Margin Ratio.”

The FICC-NYPC Cross-Margining Agreement provides that either FICC or NYPC may, at any time, require additional margin to be deposited by a participant (above what is calculated under the FICC-NYPC Cross-Margining Agreement) based upon the financial condition of the

⁷ GSD members and NYPC members are also permitted to cross margin in the single pot the activity of their market professional customers. See Securities Exchange Act Release No. 66989 (May 15, 2012); 77 FR 30032 (May 21, 2012) (SR-FICC-2012-03).

⁸ Original Margin is NYPC’s equivalent of the GSD’s Clearing Fund.

participant, unusual market conditions or other special circumstances. The standards that FICC proposed in Rule Filing 2010-09 to use for these purposes are the standards contained within the GSD's rules currently, so that notwithstanding the calculation of a participant's Clearing Fund requirement pursuant to the FICC-NYPC Cross-Margining Agreement, FICC still retains the rights contained within the GSD's rules to require an additional Clearing Fund deposit under the circumstances specified in the GSD's rules. For example, the GSD's rules currently provide that, if a Dealer Netting Member⁹ falls below its minimum financial requirement, it shall be required to make an additional Clearing Fund deposit equal to the greater of (i) \$1 million or (ii) 25 percent of its Required Fund Deposit.¹⁰

In the event of the insolvency or default of a member that participates in the one-pot cross-margining arrangement, the positions in such member's FICC-NYPC one-pot portfolio (including, when applicable, the positions of its permitted margin affiliate at NYPC) will be liquidated by FICC and NYPC as a single portfolio, and the liquidation proceeds will be applied to the defaulting member's obligations to FICC and NYPC in accordance with the provisions of the FICC-NYPC Cross-Margining Agreement. The FICC-NYPC Cross-Margining Agreement provides for the sharing of losses by FICC and NYPC in the event that the one-pot portfolio margin deposits of a defaulting participant are not sufficient to cover the losses resulting from

⁹ The GSD's rules define the term "Dealer Netting Member" as "a Registered Government Securities Dealer that is admitted to membership in the Netting System pursuant to these Rules, and whose membership in the Netting System has not been terminated . . ." GSD Rulebook, Rule 2A, Section 2.

¹⁰ The GSD's rules define the term "Required Fund Deposit" as "the amount a Netting Member is required to deposit to the Clearing Fund." GSD Rulebook, Rule 1.

the liquidation of that participant's trades and positions, which is covered in detail in FICC Rule Filing 2010-09, and is reflected in the terms of the FICC-NYPC Cross-Margining Agreement.

According to FICC, the addition of options on interest rate futures to the one-pot cross-margining arrangement does not require any changes to the terms of the FICC-NYPC Cross-Margining Agreement. FICC would continue to act as the Administrator for purposes of margin calculations if the proposed rule changes were approved. The loss-sharing provisions in the FICC-NYPC Cross-Margining Agreement that would apply in the event of a participant's default would remain unchanged under this proposal, as well.

Proposal to Include Options on Interest Rate Futures in the One-Pot Cross-Margining Arrangement

FICC proposes to add options on interest rate futures contracts with maturities not longer than two years to the one-pot cross-margining arrangement. NYPC will act as the DCO for such products.

FICC observes that options on interest rate futures are a well-established, standardized product traded and cleared by futures exchanges¹¹ around the globe, including the Chicago Mercantile Exchange ("CME").¹² FICC states that the key risks associated with adding options on interest rate futures to the one-pot cross-margining arrangement relate to the ability of FICC and NYPC to properly model, test and monitor the risks that options on interest rate futures

¹¹ Exchanges that list options on interest rate futures include the following: (i) CME (US); (ii) CBOT (a subsidiary of CME); (iii) BM&F (Brazil); (iv) NYSE LIFFE (UK); (v) Eurex (Germany); (vi) ASX (Australia); (vii) Montreal Exchange (Canada); (viii) SGX (Singapore); and (ix) TFX (Japan).

¹² Options on interest rate futures are currently included in the "two-pot" cross-margining arrangement between FICC and the CME. The cross-margining agreement between FICC and the CME is incorporated in the GSD's Rules and may be found on the DTCC website, www.dtcc.com.

present to the clearing organizations. Consistent with FICC's quantitative policy for new initiatives, any new models or enhancements are subject to external review before they are utilized. FICC avers that the options proposal has followed this protocol, and that a team of external reviewers has tested the models and validated their methodology.

FICC asserts that, in the case of options on interest rate futures that are physically deliverable, the addition of options on interest rate futures to the one-pot cross-margining arrangement will not alter the manner in which physical deliveries occur. According to FICC, upon exercise or assignment of an option, the resulting futures position will be treated as a traded futures contract, with the same delivery obligations if the resulting futures position is not closed out prior to delivery. In general, delivery of U.S. Treasury futures can be submitted to FICC by NYPC on a locked-in basis and processed in accordance with FICC's rules (when such futures are submitted to FICC, they are no longer futures contracts but rather are in the form of buy-sells eligible for processing at the GSD).

FICC asserts that it will submit a separate rule filing to the Commission seeking approval for the inclusion in the single pot of longer-dated interest rate options products. FICC contends that it will also conduct appropriate testing and analysis of any future changes to the options model and, consistent with FICC's quantitative policy for new initiatives, submit the model for external review.

Risk Considerations Regarding the Proposal to Include Options on Interest Rate Futures in the One-Pot Cross-Margining Arrangement

FICC states that its methodology for managing the risks associated with options on interest rate futures that will be included in the one-pot cross-margining arrangement has three pillars: (i) Value-at-Risk ("VaR") with historical simulation, (ii) the Barone-Adesi & Whaley ("BAW") approximation, and (iii) the Stochastic Alpha, Beta, Rho ("SABR") volatility model.

According to FICC, the historical-simulation-based VaR model proposed for options on interest rate futures to be included in the one-pot cross-margining arrangement is the same model utilized in the current one-pot cross-margining arrangement between NYPC and the GSD, which is described in FICC Rule Filing 2010-09. FICC contends that the backbone of this VaR model—namely, the three-day/one-day liquidation period assumption for cash and derivatives positions, respectively; the 99th percentile confidence level; the one-year look-back period and the use of a linear interpolation/front-weighting mechanism to arrive at the 99th percentile threshold from simulated profits and losses—will remain the same when options on interest rate futures are added to FICC-NYPC one-pot portfolios.

FICC asserts that the BAW approximation is the pricing function that FICC and NYPC will use to estimate the value of options on interest rate futures within the Black-Scholes-Merton framework. FICC also contends that the SABR volatility model will be used to estimate volatility curves for various options series.

As noted above, a three-day liquidation period is assumed for cash positions cleared by FICC, whereas a one-day liquidation period is assumed for futures positions cleared by NYPC. FICC states that options on interest rate futures in the one-pot cross-margining arrangement will also be subject to a one-day liquidation requirement because options and futures share a similar liquidity profile. FICC contends that this is also consistent with CFTC requirements. FICC further observes that each cross-margining participant's FICC-NYPC one-pot margin requirement is currently subject to a daily back test, and that a "coverage component" is applied and charged to the participant in the event the daily back test reflects insufficient coverage. FICC states that options on interest rate futures in the one-pot cross-margining arrangement will be subject to this daily testing.

FICC asserts that the one-pot FICC-NYPC VaR model will account for the non-linear risk posed by the addition of options on interest rate futures to the one-pot cross-margining arrangement by performing full revaluation of such options using BAW and SABR. As options on interest rate futures can exhibit magnified exposure in extreme market conditions, FICC is proposing to employ the additional tools described below:

1. *Minimum Margin Charge for Portfolios That Include Options*

Similar to the practice FICC's Mortgage-Backed Securities Division uses to address potential mark-to-market offset of margin requirements, FICC and NYPC are proposing to apply a floor margin charge of five basis points of the gross market value of positions in options on interest rate futures to the unadjusted Required Fund Deposit of GSD Netting Members with one-pot portfolios that include options on interest rate futures. Therefore, for GSD Netting Members with one-pot portfolios that include options on interest rate futures, their minimum Required Fund Deposit will be the greater of: (i) the current minimum Required Fund Deposit as prescribed in GSD Rule 4, Section 2; or (ii) the proposed floor margin charge.

2. *Short Option Minimum Charge*

To address the risk associated with short positions in deep out-of-the-money ("OTM") options, FICC and NYPC propose to introduce a short option minimum ("SOM") for options on interest rate futures in the one-pot cross-margining arrangement. The SOM will apply only to options on interest rate futures with a settlement price of "cabinet."¹³ FICC notes that these

¹³ The minimum price increment for futures or options on futures is normally referred to as a "tick." For options on futures whose value is less than one tick, trading and settlement in the options are allowed at a price that is less than a tick. This latter price is known as "cabinet."

options demonstrate minimum price volatility in normal market conditions, but may potentially become volatile when market conditions change dramatically. In light of the losses that such options may cause, FICC proposes to apply an SOM charge to any short position in these options.

3. *Out-of-the-Money Options Surcharge*

FICC and NYPC also propose to impose a surcharge on all OTM options positions in the one-pot cross-margining arrangement in order to address any potential biases in the BAW options pricing model. The amount of the surcharge will be determined by the moneyness of the options position.

4. *Options Stress Testing*

In addition to the regular stress testing practices utilized by FICC and NYPC, FICC proposes to conduct monthly hypothetical implied volatility stress tests of FICC-NYPC one-pot portfolios, including options on interest rate futures, in order to analyze specifically the non-linear tail risks associated with options products.

Proposed Rule Changes

FICC's proposal to add options on interest rate futures to the one-pot cross-margining arrangement requires that Rule 4, Section 2 of GSD's rulebook be changed to include a reference to the proposed minimum margin charge discussed above. Technical clarifications to certain GSD Rules would also be required in order to make it clear that options on interest rate futures will be included in the arrangement. Specifically, FICC is proposing to make technical clarifications to the following: (i) the definitions of "CFTC-Recognized Clearing Organization" and "Eligible Positions" set forth in Rule 1; (ii) Section 5a of GSD Rule 13, and (iii) subsection

(b) of GSD Rule 29. As noted above, no changes are required to be made to the FICC-NYPC Cross-Margining Agreement itself.

(ii) FICC believes the proposed rule changes described above are consistent with the purposes and requirements of Section 17A of the Exchange Act¹⁴ and the rules and regulations promulgated thereunder. FICC contends that these proposed changes may increase the available offsets among positions held at FICC and NYPC, which, in turn, may allow a more efficient use of member collateral and promote additional efficiencies in the marketplace. FICC therefore believes the proposed rule changes would support the prompt and accurate clearance and settlement of securities transactions.¹⁵ FICC further believes that, as it will implement the proposed rule changes using the enhanced risk-management measures discussed above, the proposed rule changes will also be consistent with the Exchange Act because they will help to assure the safeguarding of the securities and funds in FICC's custody and control.¹⁶

(B) Clearing Agency's Statement on Burden on Competition

FICC does not believe that the proposed rule changes described above will have any negative impact, or impose any burden, on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

¹⁴ 15 U.S.C. 78q-1.

¹⁵ 15 U.S.C. 78q-1(b)(3)(F) (requiring that a clearing agency's rules be designed to "promote the prompt and accurate clearance and settlement of securities transactions . . .").

¹⁶ 15 U.S.C. 78q-1(b)(3)(A) (requiring a clearing agency to have the capacity to "safeguard securities and funds in its custody or control or for which it is responsible . . .").

(C) Clearing Agency's Statement on Comments on the Advance Notice Received from Members, Participants, or Others

Written comments relating to the advance notice have not yet been solicited or received.

FICC will notify the Commission of any written comments received by FICC.

(D) Anticipated Effect on and Management of Risk

FICC is filing these proposed rule changes as an advance notice pursuant to Section 806(e)(2) of Clearing Supervision Act because it believes the proposed changes could be deemed to affect materially the nature or level of risks presented by FICC. FICC believes that the proposed rule changes will not impair its ability to manage these risks. As described in Section (A) above, FICC has enhanced its risk-management framework to account for the added risks posed by including options on interest rate futures with a maturity of less than two years in the one-pot cross-margining arrangement. This framework has three pillars: (i) VaR with historical simulation, (ii) BAW approximation, and (iii) the SABR volatility model. Options on interest rate futures in the one-pot cross-margining arrangement will also be subject to a one-day liquidation requirement, as these products' liquidity profile is similar to that of futures, and because this is consistent with CFTC requirements. In addition, each cross-margining participant's FICC-NYPC one-pot margin requirement is currently subject to a daily back test, and a "coverage component" is applied and charged to the participant in the event the daily back test reflects insufficient coverage. Options on interest rate futures in the one-pot cross-margining arrangement will be subject to this daily testing.

The one-pot FICC-NYPC VaR model will account for the non-linear risk posed by the addition of options on interest rate futures to the one-pot cross-margining arrangement by performing full revaluation of such options using the BAW and SABR methodologies. Because options on interest rate futures may exhibit magnified exposure in extreme market conditions,

FICC is proposing to employ the following additional tools, as described above: (1) a minimum margin charge for portfolios including options, (2) an SOM charge, (3) an OTM options surcharge, and (4) options stress testing.

III. Date of Effectiveness of the Advance Notice and Timing for Commission Action

A clearing agency may implement a proposed change pursuant to Section 806(e)(1)(G) of the Clearing Supervision Act¹⁷ if the Commission does not object to the proposed change within 60 days of the later of: (i) the date the advance notice was filed with the Commission; or (ii) the date the Commission receives any further information it requests in order to facilitate its review of the notice. The clearing agency shall not implement the proposed change if the Commission has any objection to the proposed change.

The Commission may extend the period for review by an additional 60 days if the proposed change raises novel or complex issues, subject to the Commission providing the clearing agency with prompt written notice of the extension. A proposed change may be implemented in less than 60 days from the date the advance notice is filed, or the date the Commission receives any further information it has requested, if the Commission notifies the clearing agency in writing that it does not object to the proposed change and authorizes the clearing agency to implement the proposed change on an earlier date, subject to any conditions imposed by the Commission.

¹⁷ 12 U.S.C. 5465(e)(1)(G).

The proposal shall not take effect until all regulatory actions required with respect to the proposal are completed.¹⁸ The clearing agency shall post notice on its website of proposed changes that are implemented.¹⁹

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the advance notice is consistent with the Clearing Supervision Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File No. SR-FICC-2013-802 on the subject line.

¹⁸ FICC also filed the proposals contained in this advance notice as a proposed rule change under Section 19(b)(1) of the Act and Rule 19b-4 thereunder, seeking Commission approval to permit it to change its rules to reflect the proposed changes in this advance notice. Securities Exchange Act Release No. 69470 (Apr. 29, 2013), 78 FR 26093 (May 3, 2013) (File No. SR-FICC-2013-02). Pursuant to Section 19(b)(2) of the Exchange Act, within 45 days of the date of publication of the proposed rule change in the Federal Register or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will: (A) by order approve or disapprove such proposed rule change, or (B) institute proceedings to determine whether the proposed rule change should be disapproved. 15 U.S.C. 78s(b)(2)(A). The Commission will consider all public comments received on these proposed changes regardless of whether the comments are submitted in response to the proposed rule change (File No. SR-FICC-2013-02) or this advance notice (File No. SR-FICC-2013-802).

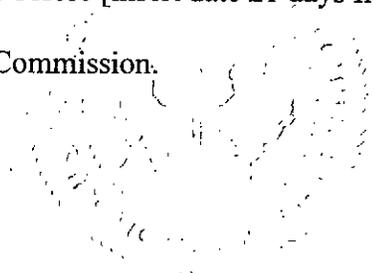
¹⁹ See 17 CFR 240.19b-4(n)(4).

Paper Comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File No. SR-FICC-2013-802. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method of submission. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the advance notice that are filed with the Commission, and all written communications relating to the advance notice between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filings also will be available for inspection and printing at the principal office of FICC and on FICC's website at http://dtcc.com/downloads/legal/rule_filings/2013/ficc/AN_FICC_2013_802.pdf. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-FICC-2013-802 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

By the Commission.



Kevin M. O'Neill

Kevin M. O'Neill
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 69601 / May 17, 2013

INVESTMENT ADVISERS ACT OF 1940
Release No. 3609 / May 17, 2013

INVESTMENT COMPANY ACT OF 1940
Release No. 30525 / May 17, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-14955

In the Matter of

**NOONAN CAPITAL
MANAGEMENT, LLC and
TIMOTHY GEORGE
NOONAN,**

Respondents.

**ORDER MAKING FINDINGS AND
IMPOSING REMEDIAL SANCTIONS
AND A CEASE-AND-DESIST ORDER
PURSUANT TO SECTION 21C OF THE
SECURITIES EXCHANGE ACT OF
1934, SECTIONS 203(e), 203(f) AND
203(k) OF THE INVESTMENT
ADVISERS ACT OF 1940, AND
SECTION 9(b) OF THE INVESTMENT
COMPANY ACT OF 1940**

I.

On July 18, 2012, the Securities and Exchange Commission ("Commission") instituted proceedings against Respondent Noonan Capital Management, LLC ("Noonan Capital") and Respondent Timothy George Noonan ("Noonan") (collectively "Respondents") pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act"), and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act").

II.

Respondents have submitted an Offer of Settlement ("Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are

admitted, Respondents consent to the entry of this Order Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist Order pursuant to Section 21C of the Securities Exchange Act of 1934, Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company Act of 1940 ("Order"), as set forth below.

III.

On the basis of this Order and Respondents' Offer, the Commission finds¹ that:

RESPONDENTS

1. Noonan Capital, LLC is a Commission-registered and Georgia-based investment adviser. Noonan Capital has been operating since in or about February 2009 and has been registered with the Commission since March 2009. While Noonan Capital represented in its initial Form ADV (filed on February 27, 2009) and in its most recently amended Form ADV (filed on July 13, 2009) that it was a Georgia limited liability company, it did not and has not taken the necessary legal steps required to become such an entity. In its July 13, 2009 amended Form ADV, Noonan Capital also represented that it provided advisory services to twenty-three accounts with \$39.4 million in assets under management ("AUM"). Noonan Capital's client accounts were custodied at Charles Schwab and Co., Inc. ("Schwab") from the time Noonan Capital first began operations to in or about early 2011. Noonan Capital is presently non-operational and based on its sworn Statement of Financial Information has practically no assets.

2. Timothy George Noonan, age 54, has been, for all relevant times, the sole owner, chief compliance officer, manager and employee of Noonan Capital. Although now expired, Noonan formerly held the securities licenses Series 7 and Series 66. From January 2002 until February 2009, Noonan was a registered representative with Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"). Prior to working at Merrill Lynch, Noonan was in sales and business development, primarily in the technology staffing sector. Noonan has no prior regulatory disciplinary history.

NOONAN CAPITAL MISAPPROPRIATED CLIENT ASSETS BY CHARGING EXCESSIVE "ADVISORY FEES"

3. In Noonan Capital's Form ADV, Part 2, Fee Schedule filed with the Commission on March 9, 2009 and, then again, on March 12, 2009 ("Fee Schedule"), Noonan Capital represented that its advisory fees from its clients' accounts were to be payable quarterly and in advance based on the value of the accounts' portfolio on the last business day of the prior quarter. The Fee Schedule provided for fees ranging from 1.0 to 1.5% based on the AUM held in the clients' accounts.

¹ The findings herein are made pursuant to Respondents' Offer and are not binding on any other person or entity in this or any other proceeding.

4. Noonan did not provide written advisory agreements to Noonan Capital clients. Although Noonan Capital and Noonan did not provide Part 2 of the Form ADVs to clients, Noonan Capital and Noonan represented to clients that they would be charged advisory fees at the rates set forth in those filings. Additionally, Noonan Capital and Noonan represented to and agreed with one of Noonan Capital's largest clients – who had accounts containing approximately \$1 million in AUM – that Noonan Capital would not charge any advisory fees until that client's accounts grew by approximately 50%, an event that never occurred.

5. Based on the Fee Schedule and/or Noonan's oral representations to clients, Noonan Capital should have charged the twenty-two clients a total of \$92,212 between April 2009 and January 2011. Instead, Noonan Capital and Noonan charged these clients advisory fees totaling \$183,908, resulting in total overcharges of approximately \$91,696 in advisory fees. In at least some client accounts, the improper fee requests resulted in the sale of money market funds to satisfy the requests.

6. As a result of these misappropriations, on an annualized basis, some clients paid "fees" of up to 7%, which was far in excess of the 1.0 to 1.5% they should have been charged.

**NOONAN CAPITAL AND NOONAN MISREPRESENTED NOONAN CAPITAL'S
ASSETS UNDER MANAGEMENT AND FAILED TO WITHDRAW ITS
REGISTRATION FROM THE COMMISSION**

7. Noonan Capital and Noonan misrepresented Noonan Capital's AUM in the Form ADV filed with the Commission. In its initial Form ADV filed with the Commission on February 27, 2009, Noonan Capital invoked Rule 203A-2(d), a registration prohibition exemption, thereby effectively representing that the firm expected to have \$25 million in assets under management within 120 days. On March 12, 2009, Noonan Capital filed an amended Form ADV again representing that the firm expected to have \$25 million in assets under management. And, on July 13, 2009, Noonan Capital filed an amended Form ADV in which the firm claimed that it was eligible to remain registered with the Commission because it had \$39.4 million in assets under management, comprised of \$9.4 million in twenty-two discretionary accounts and \$30 million in one non-discretionary account.

8. In fact, Noonan Capital never had more than approximately \$9 million in AUM. Noonan Capital's and Noonan's representations concerning its AUM in its July 2009 Form ADV were false at the time it was submitted.

9. At no time did Noonan Capital file any amendment to its Form ADV reflecting a corrected AUM of under \$25 million or seek to withdraw from registration. Noonan Capital further failed to file its required annual amendments to its Form ADV for the fiscal years ending December 31, 2009, 2010, and 2011.

**NOONAN CAPITAL FAILED TO CREATE OR MAINTAIN PROPER BOOKS
AND RECORDS AND FAILED TO PROVIDE A BROCHURE OR PART 2 OF ITS
FORM ADV TO ITS CLIENTS**

10. Noonan Capital did not create or maintain required balance sheets, income statements, and supporting documents as required under certain rules of the Advisers Act.

11. Neither Noonan Capital nor Noonan ever provided to any client Part 2 of Form ADV or any brochure containing the information required by Part 2.

VIOLATIONS

12. As a result of the conduct described above, Noonan Capital and Noonan willfully violated Section 10(b) of the Exchange Act and Rule 10b-5(b) thereunder, which prohibit fraudulent conduct in connection with the purchase or sale of securities.

13. As a result of the conduct described above, Noonan Capital and Noonan willfully violated Sections 206(1) and 206(2) of the Advisers Act, which prohibit fraudulent conduct by an investment adviser.

14. As a result of the conduct described above, Noonan Capital willfully violated, and Noonan willfully aided and abetted and caused Noonan Capital's violation of Section 203A(a)(1)(A), which, during the relevant time, generally prohibited an adviser regulated or required to be regulated in the state in which it had its principal office and place of business from registering with the Commission, unless it had assets under management in excess of \$25 million or advised a registered investment company.

15. As a result of the conduct described above, Noonan Capital and Noonan willfully violated Section 207 of the Advisers Act, which makes it "unlawful for any person willfully to make any untrue statement of a material fact in any registration application or report filed with the Commission . . . or willfully to omit to state in any such application or report any material fact which is required to be stated therein."

16. As a result of the conduct described above, Noonan Capital willfully violated, and Noonan willfully aided and abetted and caused Noonan Capital's violation of Section 204(a) of the Advisers Act and Rules 204-1(a)(1), 204-2(a)(6), 204-3(a), and 204-3(b)(1) and (2) thereunder. Section 204 of the Advisers Act requires every registered investment adviser to make and keep "such records . . . as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors." Such records are subject to periodic examinations by the Commission. Rule 204-1(a)(1) requires registered investment advisers to amend their Form ADV "at least annually, within 90 days of the end of [its] fiscal year." Rule 204-2(a)(6) requires registered investment advisers to make and keep true, accurate, and current certain books and records relating to its investment advisory business, including, trial balances, financial statements, and internal audit working papers relating to the business of the investment adviser. Rule 204-3(a) requires registered investment advisers to deliver a brochure to each

client or prospective client that contains all information required by Part 2 of Form ADV. Rule 204-3(b)(1) requires delivery of the current brochure to a client or prospective client before or at the time the investment adviser enters into an investment advisory contract with the client. Rule 204-3(b)(2) requires an adviser to deliver to each client annually, if there are material changes in the brochure, a current brochure or the summary of material changes to the brochure.

DISGORGEMENT AND CIVIL PENALTIES

17. Respondent Noonan Capital has submitted a sworn Statement of Financial Information dated October 22, 2012, and other evidence and has asserted its inability to pay disgorgement plus prejudgment interest and a civil penalty.

18. Respondent Noonan has submitted a sworn Statement of Financial Condition dated October 22, 2012, and other evidence and has asserted his inability to pay disgorgement plus prejudgment interest and a civil penalty.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondents' Offer.

Accordingly, pursuant to Section 21C of the Exchange Act, Sections 203(e), 203(f) and 203(k) of the Advisers Act and Section 9(b) of the Investment Company Act, it is hereby ORDERED that:

A. Respondents Noonan Capital and Noonan shall cease and desist from committing or causing violations of and any future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Sections 203A(a)(1)(A), 204(a), 206(1), 206(2), and 207 of the Advisers Act and Rules 204-1(a)(1), 204-2(a)(6), 204-3(a), and 204-3(b)(1) and (2) thereunder;

B. Respondent Noonan Capital's registration as an investment adviser be, and hereby is revoked;

C. Respondent Noonan be, and hereby is barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization;

D. Respondent Noonan be, and hereby is prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter.

E. Any reapplication for association by Respondent Noonan will be subject to the applicable laws and regulations governing the reentry process, and reentry may be

conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondents, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

F. Respondent Noonan Capital shall pay, on a joint and several basis with Noonan, disgorgement of \$91,696 and prejudgment interest of \$13,129.51 to the Commission, but that payment is waived based upon Respondent Noonan Capital's sworn representations in its Statement of Financial Information dated October 22, 2012 and other documents submitted to the Commission.

G. Respondent Noonan shall pay, on a joint and several basis with Noonan Capital, disgorgement of \$91,696 and prejudgment interest of \$13,129.51 to Commission, but payment of such amount except for \$60,000 is waived based upon Noonan's sworn representations in his Statement of Financial Condition dated October 22, 2012 and other documents submitted to the Commission. Payment by Noonan of \$60,000 shall be made in the following installments: (1) a first payment of \$20,000 shall be paid within ten business days of the entry of this Order, (2) a second payment of \$20,000 shall be paid within 360 days of the entry of this Order; and (3) a third and final payment of \$20,000 shall be paid within 720 days of the entry of this Order. If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of disgorgement and prejudgment interest, plus any additional interest accrued pursuant to SEC Rule of Practice 600, shall be due and payable immediately, without further application. Payment must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;³
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard

³ The minimum threshold for transmission of payment electronically is \$1,000,000 by December 31, 2012. For amounts below the threshold, Respondents must make payments pursuant to option (2) or (3) above.

Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Noonan as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to William P. Hicks, Securities and Exchange Commission, 950 East Paces Ferry Road, N.E., Suite 900, Atlanta, Georgia 30326-1382.

H. The Division of Enforcement ("Division") may, at any time following the entry of this Order, petition the Commission to: (1) reopen this matter to consider whether Respondents provided accurate and complete financial information at the time such representations were made; and (2) seek an order directing payment of disgorgement and prejudgment interest. No other issue shall be considered in connection with this petition other than whether the financial information provided by Respondents was fraudulent, misleading, inaccurate, or incomplete in any material respect. Respondents may not, by way of defense to any such petition: (1) contest the findings in this Order; (2) assert that payment of disgorgement and interest should not be ordered; (3) contest the amount of disgorgement and interest to be ordered; or (4) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

I. Based upon Respondent Noonan Capital's sworn representations in its Statement of Financial Information dated October 22, 2012 and other documents submitted to the Commission, the Commission is not imposing a penalty against Noonan Capital.

J. Based upon Respondent Noonan's sworn representations in his Statement of Financial Condition dated October 22, 2012 and other documents submitted to the Commission, the Commission is not imposing a penalty against Noonan.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR PARTS 242 AND 249

[Release No. 34-69606; File No. S7-01-13]

RIN 3235-AL43

Regulation Systems Compliance and Integrity

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule, form, and rule amendment; extension of comment period.

SUMMARY: On March 25, 2013, the Securities and Exchange Commission ("Commission") published in the Federal Register a proposed rule, Regulation Systems Compliance and Integrity ("Regulation SCI") under the Securities Exchange Act of 1934, for public comment. Proposed Regulation SCI would apply to certain self-regulatory organizations (including registered clearing agencies), alternative trading systems ("ATs"), plan processors, and exempt clearing agencies subject to the Commission's Automation Review Policy (collectively, "SCI entities"), and would require these SCI entities to comply with requirements with respect to their automated systems that support the performance of their regulated activities. The Commission is extending the time period in which to provide the Commission with comments.

DATES: Comments should be received on or before July 8, 2013.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/proposed.shtml>);
- Send an email to rule-comments@sec.gov. Please include File Number S7-01-13 on the subject line; or

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- Use the Federal eRulemaking Portal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

Paper Comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-01-13. This file number should be included on the subject line if email is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/proposed>). Comments will also be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m.

All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Heidi Pilpel, Special Counsel, Office of Market Supervision, at (202) 551-5666, Sara Hawkins, Special Counsel, Office of Market Supervision, at (202) 551-5523, Jonathan Balcom, Special Counsel, Office of Market Supervision, at (202) 551-5737, Yue Ding, Attorney, Office of Market Supervision, at (202) 551-5842, Dhawal Sharma, Attorney, Office of Market Supervision, at (202) 551-5779, Elizabeth C. Badawy, Senior Accountant, Office of Market Supervision, at (202) 551-5612, and Gordon Fuller, Senior Special Counsel, Office of Market Operations, at (202) 551-5686, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-7010.

SUPPLEMENTARY INFORMATION: On March 7, 2013, the Commission voted to propose Regulation SCI and solicit comment on a proposed rule and form, as well as an amendment to Regulation ATS,¹ that would require SCI entities to comply with requirements with respect to their automated systems that support the performance of their regulated activities. The Commission originally requested that comments on this proposal be received by May 24, 2013. The Commission has recently received requests to extend the comment period and believes that extending the comment period is appropriate in order to give the public additional time to comment on the matters addressed by the release.² This extension will allow for 105 days of comment, which the Commission believes should provide the public with sufficient additional time to consider thoroughly the matters addressed by proposed Regulation SCI and to submit comprehensive responses to the proposal which would benefit the Commission in its consideration of the final rules. Therefore, the Commission is extending the public comment period for 45 days, until Monday, July 8, 2013.

By the Commission.



Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Date: May 20, 2013

¹ See Securities Exchange Act Release No. 69077 (March 8, 2013), 78 FR 18084 (March 25, 2013).

² See Letters from Theodore R. Lazo, Managing Director & Associate General Counsel, SIFMA, to Elizabeth M. Murphy, Secretary, Commission, dated April 25, 2013; Manisha Kimmel, Executive Director, Financial Information Forum, to Elizabeth M. Murphy, Secretary, Commission, dated May 7, 2013; and David T. Bellaire, Esq., Executive Vice President and General Counsel, Financial Services Institute, dated May 15, 2013.

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-69605; File No. SR-NSCC-2013-802)

May 20, 2013

Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Extension of Review Period of Advance Notice, as Modified by Amendment No. 1, to Institute Supplemental Liquidity Deposits to Its Clearing Fund Designed to Increase Liquidity Resources to Meet Its Liquidity Needs

On March 21, 2013, National Securities Clearing Corporation (“NSCC”) filed with the Securities and Exchange Commission (“Commission”) advance notice SR-NSCC-2013-802 (“Advance Notice”) pursuant to Section 806(e)(1) of the Payment, Clearing, and Settlement Supervision Act of 2010 (“Clearing Supervision Act”)¹ and Rule 19b-4(n)(1)(i)² thereunder.³ On April 19, 2013, NSCC filed with the Commission Amendment No. 1 to the Advance Notice.⁴ The Advance Notice, as modified by Amendment No. 1, was published for comment in the Federal Register on May 1, 2013.⁵ As of May 14, 2013, the Commission has received eight comment letters on the proposal contained in the Advance Notice and its related proposed rule

¹ 12 U.S.C. 5465(e)(1).

² 17 CFR 240.19b-4(n)(1)(i).

³ NSCC also filed the proposal contained in the Advance Notice as a proposed rule change (File No. SR-NSCC-2013-02) under Section 19(b)(1) of the Securities and Exchange Act of 1934 (“Exchange Act”) and Rule 19b-4 thereunder. Release No. 34-69313 (Apr. 4, 2013), 78 FR 21487 (Apr. 10, 2013). Pursuant to Section 19(b)(2) of the Exchange Act, generally, not later than 45 days after the date of publication of the proposed rule change in the Federal Register or such longer period up to 90 days if the Commission determines that a longer period is appropriate and publishes the reasons for such determination or the self-regulatory organization consents, the Commission will either: (i) by order approve or disapprove the proposed rule change, or (ii) institute proceedings to determine whether the proposed rule change should be disapproved. 17 U.S.C. 78s(b)(2)(A). See Release No. 34-69313 (Apr. 4, 2013), 78 FR 21487 (Apr. 10, 2013). The proposal shall not take effect until all regulatory actions required with respect to the proposal are completed.

⁴ See Release No. 34-69451 (Apr. 25, 2013), 78 FR 25496 (May 1, 2013).

⁵ Id.

change.⁶ Additionally, on March 19, 2013, prior to filing the Advance Notice, NSCC received a comment letter on the proposal directly from an NSCC member.⁷

Section 806(e)(1)(G) of the Clearing Supervision Act provides that NSCC may implement the changes if it has not received an objection to the proposed changes within 60 days of the later of (i) the date that the Commission receives the advance notice or (ii) the date that any additional information requested by the Commission is received,⁸ unless extended as described below.

Pursuant to Section 806(e)(1)(H) of the Clearing Supervision Act, the Commission may extend the review period of an advance notice for an additional 60 days, if the changes proposed in the advance notice raise novel or complex issues, subject to the Commission providing the clearing agency with prompt written notice of the extension.⁹

Here, as the Commission has not requested any additional information, the date that is 60 days after NSCC filed the Advance Notice with the Commission is May 20, 2013. However, the Commission finds it appropriate to extend the review period of the Advance Notice, as modified

⁶ See Comments Received on File Nos. SR-NSCC-2013-802 (<http://sec.gov/comments/sr-nbcc-2013-802/nbcc2013802.shtml>) and SR-NSCC-2013-02 (<http://sec.gov/comments/sr-nbcc-2013-02/nbcc201302.shtml>). Since the proposal contained in the Advance Notice was also filed as a proposed rule change, see Release No. 34-69313, *supra* note 3, the Commission is considering all public comments received on the proposal regardless of whether the comments are submitted to the Advance Notice or the proposed rule change.

⁷ See Exhibit 2 to File No. SR-NSCC-2013-802 (<http://sec.gov/rules/sro/nbcc/2013/34-69451-ex2.pdf>).

⁸ See 12 U.S.C. 5465(e)(1)(G).

⁹ See 12 U.S.C. 5465(e)(1)(H).

by Amendment No. 1, for an additional 60 days under Section 806(e)(1)(H) of the Clearing Supervision Act.¹⁰ The Commission finds the Advance Notice, as modified by Amendment No. 1, both novel and complex because it proposes a rule change that is particularly detailed, intricate, multifaceted, and is the first of its kind for a registered clearing agency.

Accordingly, the Commission, pursuant to Section 806(e)(1)(H) of the Clearing Supervision Act,¹¹ extends the review period for an additional 60 days so that the Commission shall have until July 19, 2013 to issue an objection or non-objection to the Advance Notice, as modified by Amendment No. 1 (File No. SR-NSCC-2013-802).

By the Commission.

Kevin M. O'Neill

Kevin M. O'Neill
Deputy Secretary

¹⁰ Id.

¹¹ Id.

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 30539; 812-13877]

ASA Gold and Precious Metals Limited; Notice of Application

May 22, 2013

Agency: Securities and Exchange Commission ("Commission").

Action: Notice of application under section 7(d) of the Investment Company Act of 1940 (the "Act").

Summary of Application: Applicant, ASA Gold and Precious Metals Limited ("ASA"), a Bermuda closed-end management investment company registered under section 7(d) of the Act, requests an order that would permit ASA to make changes to its custodial arrangements without prior Commission approval, hold assets and conduct certain securities transactions in specified foreign countries, as well as permit ASA and certain other persons to designate CT Corporation System ("CT Corp") in the U.S. to accept service of process.

Filing Dates: The application was filed on March 9, 2011, and amended on March 21, 2012, and February 6, 2013.

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on June 17, 2013 and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues

contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

Addresses: Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, D.C. 20549-1090. Applicant, c/o Deborah Djeu, 400 S. El Camino Real, Suite 710, San Mateo, CA 94402.

For Further Information Contact: Deepak T. Pai, Senior Counsel, at (202) 551-6876, or Daniele Marchesani, Branch Chief, at (202) 551-6747 (Division of Investment Management, Exemptive Applications Office).

Supplementary Information: The following is a summary of the application. The complete application may be obtained via the Commission's website by searching for the file number, or an applicant using the Company name box, at

<http://www.sec.gov/search/search.htm> or by calling (202) 551-8090.

Applicants' Representations:

1. ASA is an internally-managed closed-end management investment company organized in 1958 in South Africa and currently organized in Bermuda. ASA is registered under the Act.¹ ASA had \$591 million in net assets as of February 29, 2012.

¹ Investment Company Act Release Nos. 2739 (July 3, 1958) (notice) and 2756 (Aug. 13, 1958) (order) (the "Original Order"). Since 1958, the Original Order has been amended on a number of occasions. See Investment Company Act Release Nos. 26582 (Aug. 27, 2004) (notice) and 26602 (Sep. 20, 2004) (order) ("Existing Order"); Investment Company Act Release Nos. 24321 (Feb. 29, 2000) (notice) and 24367 (Mar. 27, 2000) (order) (the "CSD Order"); Investment Company Act Release Nos. 21161 (June 23, 1995) (notice) and 21220 (July 20, 1995) (order); Investment Company Act Release Nos. 17904 (Dec. 17, 1990) (notice) and 17945 (Jan. 15, 1991) (order); Investment Company Act Release Nos. 14826 (Dec. 4, 1985) (notice) and 14878 (Dec. 31, 1985) (order); Investment Company Act Release Nos. 11669 (Mar. 6, 1981) (notice) and 11722 (Apr. 7, 1981) (order) (collectively with the CSD Order, the "Custody Orders"); Investment Company Act Release Nos. 8278 (Mar. 20, 1974) (notice) and 8312 (Apr. 17, 1974) (order); Investment Company Act Release Nos. 7860 (June 12, 1973) (notice) and 7894 (July 10, 1973) (order); Investment Company Act Release Nos. 2944 (Dec. 14, 1959) (notice) and 2957 (Dec. 29, 1959) (order); Investment Company Act Release Nos. 2883 (May 22, 1959) (notice) and 2886 (June 9, 1959) (order) ("1959 Order"); and Investment Company Act Release Nos.

Shares of ASA trade on the New York Stock Exchange ("NYSE"). ASA's main focus is to invest in securities of companies involved in the exploration and mining of gold and other precious minerals. To this end, ASA's management is seeking to take advantage of investment opportunities in non-South African companies that are, or in the future may be, listed on the Stock Exchange of Hong Kong Limited (the "HKSE"), the London Stock Exchange ("LSE"), the Toronto Stock Exchange ("TSX"), or the Australian Securities Exchange ("ASX").² ASA states that certain conditions of the Existing Order have made it difficult for ASA to implement fully a flexible investment strategy consistent with its current fundamental investment policy and to achieve its desired portfolio diversification outside of South Africa. Applicant asserts that with the requested relief ASA will be able to better adapt to changes in the gold and other precious minerals industry and to pursue the best investment prospects on a global scale, for the benefit of its shareholders.

2. Applicant requests an order that would: (a) permit ASA to appoint a primary custodian ("Primary Custodian") or otherwise amend its agreement with the Primary Custodian without prior Commission approval; (b) permit ASA to settle purchases and sales of portfolio securities outside of the U.S. on an additional "established securities exchange," the HKSE;³ (c) permit ASA, subject to the existing condition that ASA keep at least 20% of its assets in the United States in the custody of a

2817 (Jan. 5, 1959) (notice) and 2821 (Jan 20, 1959) (order) (collectively with the Custody Orders, the "Subsequent Orders" and together with the Original Order, the "Prior Orders").

² In 2005, with the approval of its shareholders, ASA replaced its fundamental investment policies that, among other things, required ASA to invest more than 50% of its assets in equity securities of gold mining companies in South Africa and no more than 20% of its assets in equity securities of companies outside of South Africa with a new investment policy that no longer contains any geographical limitations as to ASA's investments.

U.S. bank ("20% Requirement"), to maintain its remaining assets in the custody of an eligible foreign custodian or an eligible securities depository in South Africa, Hong Kong, the United Kingdom, Canada, or Australia;⁴ (d) permit ASA's Primary Custodian to change the eligible foreign custodian or eligible securities depository in whose custody it maintains ASA's assets in those five countries, and to amend the custodian agreement with ASA to reflect the change, without prior Commission approval; (e) permit ASA, through its Primary Custodian or its Primary Custodian's agent, to exercise in South Africa, Hong Kong, the United Kingdom, Canada, or Australia the rights issued to it as a shareholder in other companies for the purchase of securities; and (f) require ASA and each of its present or future directors, officers or investment advisers who is not a resident of the United States ("Non-Resident Persons") to irrevocably designate CT Corp, instead of ASA's Primary Custodian, as an agent in the U.S. to accept service of process ("U.S. Service Agent") in any suit, action, or proceeding (collectively, "Proceeding") before the Commission or any appropriate court relating to, respectively, the Non-Resident Persons' activities as directors, officers or investment advisers of ASA.⁵ As described more fully in the application, ASA's foreign subcustodians generally would also designate CT Corp as U.S. Service Agent.

³ The Existing Order defines the term "established securities exchange" as a national securities exchange as defined in Section 2(a)(26) of the Act, the JSE Limited South Africa ("JSE"), the LSE, the Tokyo Stock Exchange, the TSX, the ASX and the SWX Swiss Exchange.

⁴ If the Commission grants the requested relief, ASA will comply with the requirements of Rule 17f-5 and Rule 17f-7 under the Act as if ASA were a registered management investment company organized or incorporated in the United States ("U.S. Fund"). The terms "eligible foreign custodian" and "eligible securities depository" have the same meaning as defined in Rule 17f-5 and Rule 17f-7.

⁵ ASA would designate CT Corp as U.S. Service Agent in the same city in which ASA's Primary Custodian is located.

Applicants' Legal Analysis:

1. Section 7(d) of the Act prohibits an investment company organized outside the U.S. ("foreign fund") from making a public offering of its securities in the U.S., but authorizes the Commission by order to permit a foreign fund to register under the Act and make a public offering of its securities in the U.S. if the Commission finds that "by reason of special circumstances or arrangements, it is both legally and practically feasible effectively to enforce the provisions of [the Act] against such company and that the issuance of such order is otherwise consistent with the public interest and protection of investors." Rule 7d-1 under the Act sets forth the conditions that an investment company organized in Canada must satisfy in order to receive an order under section 7(d) of the Act.⁶ Applicant seeks an order under section 7(d) as discussed above, subject to conditions that, among other things, would require ASA to comply with many of the requirements of rule 7d-1 under the Act, including the requirement that its charter and bylaws contain the Act's substantive provisions.

2. ASA believes that it would be legally and practically feasible effectively to enforce the provisions of the Act against it and that the issuance of the requested order would be consistent with the public interest and the protection of investors. In particular, Applicant states that (i) applicable law provides substantial certainty that appropriate U.S. courts would exercise personal jurisdiction over ASA; (ii) a U.S. Federal court would possess subject matter jurisdiction in a case brought by the Commission because such a case would be based upon alleged violations of the federal securities laws; and (iii) the

⁶ Although rule 7d-1 by its terms applies only to Canadian funds, the Commission generally has required other foreign funds seeking section 7(d) orders to comply with the rule's conditions.

doctrine of *forum non conveniens* would not present an impediment to the Commission's or another party's ability to bring appropriate claims against ASA.⁷ Applicant also asserts that the analysis of whether a plaintiff would be able to enforce in Hong Kong, the United Kingdom, Canada, or Australia a judgment obtained in the United States or Bermuda would be the same with respect to ASA as with a U.S. Fund. Thus, Applicant claims that placing assets in those countries does not involve any greater jurisdictional concerns in the case of ASA than it does in the case of U.S. funds, which, in addition, are not subject to the 20% Requirement. In addition, ASA has agreed to perform every action and thing necessary to cause and assist its shareholders or the Commission to collect (i) any monetary amount specified in a Commission order or (i) a final judgment entered by a court of competent jurisdiction.

3. Under the terms and conditions of the Existing Order, ASA agreed that JPMorgan Chase Bank, N.A. ("Chase") will serve as ASA's Primary Custodian and will continue to meet the qualifications of a custodian under Section 17(f) of the Act.⁸ Furthermore, one of the conditions of the Existing Order requires ASA to seek an order of the Commission prior to any amendment of its custodian agreement with its Primary Custodian. ASA seeks an order to permit it to appoint a Primary Custodian or otherwise amend its custodian agreement without prior Commission approval. ASA states that

⁷ Applicant notes that (i) unlike a U.S. Fund, ASA must maintain at least 20% of its assets in the U.S.; (ii) ASA will appoint a U.S. bank as its Primary Custodian; (iii) ASA's principal offices are located in the U.S. and a majority of its directors, executive officers, and employees would be both citizens and residents of the U.S.; and (iv) ASA would stipulate that personal jurisdiction exists in any Commission action brought against ASA in the U.S. and waive any defense of *forum non conveniens* in any such action. ASA also represents that its agreement with its Primary Custodian would contain provisions stipulating that the United States is the proper venue for disputes arising under the agreement.

requiring Commission approval imposes on ASA an unfair and unnecessary burden not imposed on U.S. Funds, as well as diminishes ASA's ability effectively and efficiently to deal with business issues regarding its custody arrangements. ASA represents that (i) a U.S. bank eligible to serve as custodian under section 17(f) would serve as ASA's Primary Custodian, and (ii) ASA would request an order of the Commission prior to any amendment of its agreement with its Primary Custodian if the amendment conflicts with any of the representations or conditions of the requested order.

4. Under the terms and conditions of the Existing Order, ASA is required to settle its purchases and sales of portfolio securities, other than purchases and sales on an "established securities exchange," in the U.S.⁹ ASA requests an order expanding the definition of "established securities exchange" to permit it to settle purchases and sales of portfolio securities on the HKSE. Applicant states that the Act does not limit the securities exchanges on which U.S. Funds may settle securities transactions. Applicant asserts that the requirement that ASA's purchases and sales of portfolio securities, other than purchases and sales on an "established securities exchange" as currently defined, be settled in the U.S. renders it impracticable for ASA to purchase portfolio securities on the HKSE, and prevents ASA from taking advantage of certain investment opportunities to the detriment of its shareholders.

5. Under the terms and conditions of the Existing Order, ASA is required to keep at least 20% of its assets in the U.S. in the custody of a U.S. bank. ASA's remaining assets are also required to be kept in the custody of such U.S. custodian, except

⁸ Section 17(f) of the Act provides that "every registered management investment company shall place and maintain its securities and similar investments in the custody of: (A) a bank or banks having the qualifications prescribed in paragraph (1) of Section 26(a) of [the Act]...."

that, subject to the 20% Requirement, ASA may keep, through its custodian or South African subcustodian, in the central securities depository for equity securities in South Africa ("CSD") up to 100% of its securities eligible for deposit at the CSD.¹⁰ In addition, ASA is permitted to keep up to 33% of its assets in countries other than South Africa outside of the U.S. in the custody of an eligible foreign custodian or overseas branch of a U.S. bank under certain circumstances.¹¹ ASA seeks an order to permit it, subject to the 20% Requirement, to maintain up to 80% of its assets in the custody of an eligible foreign custodian, as defined in Rule 17f-5 under the Act, or an eligible securities depository, as defined in Rule 17f-7 under the Act, in South Africa, Hong Kong, the United Kingdom, Canada or Australia. ASA's management is seeking to take advantage of investment opportunities in non-South African companies that are, or in the future may be, listed on the HKSE, the LSE, the TSX, or the ASX.¹² ASA states that the requested relief would not change the total percentage of assets that ASA is currently permitted to

⁹ See *supra* note 3.

¹⁰ Under the Existing Order, ASA agreed that Standard Bank would serve as Chase's subcustodian in South Africa. Subsequent staff no-action relief permitted ASA's Primary Custodian to change the subcustodian to First National Bank. See *ASA (Bermuda) Limited*, SEC No-Action Letter (December 13, 2006) ("2006 Letter").

¹¹ ASA may keep: (i) up to 3% of its assets in South Africa in short-term rand-denominated investments issued or guaranteed by the Republic of South Africa; (ii) up to 5% of its assets in rand-denominated interest bearing bank accounts with eligible foreign custodians or overseas branches of U.S. banks; and (iii) up to 5% of its assets with an eligible foreign custodian or overseas branch of ASA's Primary Custodian in each of London, Japan, Australia, Switzerland, and Canada, if removal of securities purchased on the established exchanges becomes either prohibited by law or regulation or financially impracticable.

¹² Under the terms and conditions of the Existing Order, ASA is permitted to settle securities transactions on the LSE, the TSX, and the ASX (and ASA is seeking an order to permit it to settle securities transactions on the HKSE as well), but if ASA does so it must then satisfy the requirement that such securities be maintained in the U.S. with ASA's Primary Custodian. Applicant asserts that the only way it may meet this requirement is by moving physical securities away from their primary trading markets or purchasing American Depositary Receipts for those foreign securities in the U.S. market, neither of which is an effective and efficient means for ASA to achieve its desired international portfolio diversification.

maintain outside of the U.S. Rather, it would permit ASA to allocate that total percentage among, and maintain that total percentage in five countries, rather than maintain that total percentage all in one country. Moreover, as discussed more fully in the application, Applicant represents that the difficulty in enforcing a judgment obtained in the United States or Bermuda against ASA in South Africa does not exist in Hong Kong, the United Kingdom, Canada or Australia. Applicant represents that if the Commission grants the requested relief, ASA will comply with Rule 17f-5¹³ and Rule 17f-7¹⁴ under the Act as if ASA were a U.S. Fund.

6. ASA requests an order to permit its Primary Custodian to change the eligible foreign custodian or eligible securities depository in whose custody it maintains ASA's assets, and to amend the custodian agreement with ASA to reflect the change, without prior Commission approval. Applicant contends that requiring it to seek Commission approval before its Primary Custodian changes the eligible foreign custodian

¹³ Rule 17f-5 permits a U.S. Fund to maintain foreign assets with an "eligible foreign custodian." The fund's board of directors, its investment adviser, or custodian bank ("foreign custody manager") must determine that the fund's assets in custody will be subject to reasonable care, based upon the standards applicable to custodians in the relevant market after considering certain factors. Rule 17f-5 also requires that the custody arrangement be governed by a written contract, including certain specified (or equivalent) provisions, that the foreign custody manager determines will provide reasonable care for fund assets. The foreign custody manager must establish a system to monitor the appropriateness of maintaining the fund's assets with the eligible foreign custodian and the performance of the contract. ASA's board of directors (the "Board") will serve as foreign custody manager and will not delegate such function.

¹⁴ Rule 17f-7 permits a fund, including a registered Canadian fund, to maintain foreign assets with a foreign "eligible securities depository" that acts as or operates a system for the central handling of securities that is regulated by a foreign financial regulatory authority. Rule 17f-7 also requires a fund's primary custodian, or its agent, to furnish the fund or its investment adviser with an analysis of the custody risks of using an eligible securities depository before the fund places its assets with the depository. In addition, the fund's contract with its primary custodian must require the custodian, or its agent, to monitor these risks on a continuing basis and promptly notify the fund of any material change in these risks. Prior to use of an "eligible securities depository" for ASA's overseas assets, the Board will review the proposed arrangements to ensure they meet the requirements of Rule 17f-7.

or eligible securities depository in whose custody it maintains ASA's assets imposes on ASA and its Primary Custodian an unfair burden that is not imposed upon U.S. Funds. ASA also asserts that changing the eligible foreign custodian or eligible securities depository in whose custody ASA's Primary Custodian maintains ASA's assets does not raise any jurisdictional concerns different from than those discussed above. Finally, ASA asserts that requiring it to seek Commission approval diminishes ASA's (and its Primary Custodian's) ability to deal effectively and efficiently with business issues regarding ASA's custody arrangements.

7. ASA also seeks relief to exercise in South Africa, Hong Kong, the United Kingdom, Canada, or Australia the rights issued to it as a shareholder in other companies for the purchase of securities. Under the terms and conditions of the Existing Order, ASA is required to settle its purchases and sales of portfolio securities, other than purchases on established exchanges, in the U.S.¹⁵ Applicant contends that exercise in South Africa, Hong Kong, the United Kingdom, Canada or Australia of the rights issued to ASA as a shareholder in other companies for the purchase of securities would not constitute purchases and sales "on" the established exchanges. ASA asserts that without this relief, there could be significant opportunity costs and financial harms to ASA and its shareholders because, among other things, ASA could be precluded from participating in rights offerings that present attractive investment opportunities in companies with which ASA already is familiar. As stated in condition 23, applicant states that this relief would be limited so that: (a) the rights so exercised are offered to ASA as a shareholder in another company on the same basis as all other holders of the class or classes of shares of

¹⁵ See *supra* note 3.

such other company to whom such rights are offered, (b) the rights so exercised do not exceed 10% of the total amount of such rights so offered, and (c) the securities purchased pursuant to such exercise, or securities of the same class, are listed on the JSE, the HKSE, the LSE, the TSX, or the ASX, or application has been made to such exchange for the listing thereon of such securities, or it has been publicly announced that application will be made to such exchange for the listing thereon of such securities.

8. Under the terms and conditions of the Existing Order, ASA and each of its Non-Resident Persons must designate Chase, ASA's Primary Custodian, as U.S. Service Agent in any Proceeding before the Commission or any appropriate court relating to their activities as directors, officers or investment advisers of ASA. ASA requests that ASA and its Non-Resident Persons be required to designate CT Corp, instead of ASA's Primary Custodian, as U.S. Service Agent.¹⁶ ASA's foreign custodians generally also would designate CT Corp as U.S. Service Agent. Applicant states that CT Corp is a leading registered agent in the U.S. and has been in the business of providing registered agent services for over 100 years. Applicant states that permitting ASA and each of its Non-Resident Persons to designate CT Corp, instead of ASA's Primary Custodian, as U.S. Service Agent would eliminate the inconvenience and unnecessary expense associated with having to change the designated U.S. Service Agent in the event of changes to ASA's custodial arrangements. ASA, furthermore, is seeking more flexibility with respect to foreign custodians, which are not in privity of contract with ASA. ASA

¹⁶ ASA notes that the 2006 Letter granted staff no-action relief to (i) permit, among other things, ASA to continue relying on the Existing Order after Chase's subcustodian changed from Standard Bank to First National Bank, and (ii) permit ASA to continue to rely on the Existing Order while CT Corp, instead of ASA's custodian, served as FirstRand Bank Limited's U.S. Service Agent in any Proceeding before the Commission or any appropriate court relating to the activities of its subsidiary, First National Bank, as ASA's South African subcustodian.

asserts that while Chase's current foreign subcustodians have agreed to designate CT Corp, future foreign subcustodians may not be able or willing to do so. If ASA's foreign subcustodians change, ASA will use its best efforts to ensure that the new foreign subcustodians will also designate CT Corp as U.S. Service Agent.¹⁷ ASA does not believe that this relief would have an impact on the jurisdictional issues discussed above.

ASA's Conditions:

ASA agrees that any order granting the requested relief will be subject to the following conditions:¹⁸

1. A U.S. bank, as defined in section 2(a)(5) of the Act and having the qualification described in section 26(a)(1) of the Act, will serve as ASA's Primary Custodian. In addition, ASA's agreement with its Primary Custodian will contain provisions stipulating that the United States is the proper venue for disputes arising under the agreement.
2. ASA will seek an order of the Commission prior to any amendment of its agreement with its Primary Custodian if the amendment conflicts with any of the representations or conditions applicable to the Existing Order, as amended by the requested order.
3. The Board will serve as foreign custody manager and will not delegate such functions to ASA's Primary Custodian or any other person.

¹⁷ If, however, a foreign subcustodian cannot, or remains unwilling to, designate CT Corp as U.S. Service Agent, then ASA's Board will consider, as part of its decision whether to engage a Primary Custodian or use a particular foreign subcustodian, the fact that the foreign subcustodian would not designate CT Corp as U.S. Service Agent.

¹⁸ The terms "eligible foreign custodian," "U.S. bank" and "foreign custody manager" used in the conditions have the same meaning as defined in rule 17f-5 under the Act.

4. ASA will comply with Rule 17f-5 and Rule 17f-7 under the Act as if ASA were a registered management investment company organized or incorporated in the United States. Each eligible foreign custodian that ASA uses will be contractually obligated to follow the Primary Custodian's instructions with respect to assets the eligible foreign custodian holds on behalf of ASA. In each applicable jurisdiction, the Board will consider the relationship between an eligible foreign custodian and an eligible securities depository (including whether the eligible foreign custodian is liable for the eligible securities depository's misdeeds to the same extent as if such securities were maintained by the eligible foreign custodian) and will determine that maintaining assets in the eligible securities depository through the eligible foreign custodian is in the best interest of ASA and its shareholders.

5. ASA will cause each present and future officer, director, investment adviser, and principal underwriter of ASA to enter into an agreement ("Agreement") (to be filed by ASA with the Commission when that person assumes office), which will provide that each person agrees: (a) to comply with ASA's charter and bylaws, the Act and the rules of the Commission under the Act, and the undertakings and agreements contained in the application as applicable to each person and as each may be amended from time to time, as applicable to each person; (b) to do nothing inconsistent with the undertakings and agreements contained in the application, the provisions of the Act, or the rules under the Act; (c) that the undertakings described in (a) and (b) above constitute representations and inducements to the Commission to issue the requested order; and (d) each Agreement constitutes a contract between the person and ASA and the shareholders of ASA with the intent that ASA's shareholders will be beneficiaries of and will have the

status of parties to the Agreement so as to enable them to maintain actions at law or in equity within the United States or Bermuda. In addition, each Agreement of each officer and director of ASA will contain provisions similar to those contained in condition 21 below.¹⁹

6. So long as ASA is registered under the Act, ASA's charter and bylaws, together, will contain in substance the provisions required by Rule 7d-1(b)(8) under the Act, and neither the charter nor the bylaws will be changed or amended in any manner inconsistent with Rule 7d-1(b)(8) under the Act and the rules and regulations under the Act, unless authorized by the Commission.

7. ASA's Primary Custodian will not transfer any assets of ASA unless the instructions it receives from ASA include the written approval of ASA's Chief Compliance Officer. ASA will submit instructions relating to any transfer of assets to its Chief Compliance Officer, who will review them prior to the submission of any approved instructions to ASA's Primary Custodian. ASA's Chief Compliance Officer will not approve a transfer of assets if an agent, broker-dealer, or counterparty is an affiliated person of ASA or an affiliated person of any director, officer, or investment adviser of ASA, unless the transaction is of a type permitted by the Act or any regulation under the Act or specifically permitted by order of exemption issued under the Act. In addition to providing any other information relevant to the Chief Compliance Officer's review, ASA will require each of its officers, directors, and investment advisers to transmit quarterly a

¹⁹ ASA acknowledges that: (a) every agreement and undertaking of ASA, its officers, directors, investment adviser, and principal underwriters contained in the application constitutes (i) inducements to the Commission for the issuance and continuance in effect of the requested order, and (ii) a contract among ASA, the Commission, and ASA's shareholders with the same intent as set forth in condition 5 above; and (b) the failure by ASA or any of the persons listed

list of affiliated persons or a statement that there has been no change since the last list so transmitted to ASA's Chief Compliance Officer. No person will qualify to serve as a director or officer of ASA until he or she has transmitted to ASA a list of his or her affiliated persons, as that term is defined in Section 2(a)(3) of the Act.

8. ASA will furnish to the Commission revisions, if any, to the list of persons affiliated with ASA that previously was furnished to the Commission concurrently with the filing of periodic reports required to be filed under the Act. Such revised lists will include persons affiliated with any future investment adviser or principal underwriter of ASA.

9. The Chief Executive Officer of ASA, a majority of the directors of ASA, a majority of the officers, and the Chief Compliance Officer of ASA will be both citizens and residents of the United States. ASA will maintain its principal executive office in the United States.

10. ASA will hold all of its shareholder meetings in the United States.

11. ASA will maintain in the United States a transfer agent for transfer of its shares, and a registrar for the registration of its shares.

12. ASA will file, and will cause each of its present or future directors, officers, or investment advisers who is not a resident of the United States to file with the Commission irrevocable designation of CT Corp as an agent in the United States to accept service of process in any suit, action, or proceeding before the Commission or any appropriate court to enforce the provisions of the laws administered by the Commission, or to enforce any right or liability based upon ASA's charter or bylaws, contracts, or the

above to comply with any of the agreements or undertakings, unless permitted by the Commission, will constitute a violation of the requested order.

respective undertakings and agreements of any of these persons required by the terms and conditions of the requested order, or which alleges a liability on the part of any of these persons arising out of their services, acts, or transactions relating to ASA. Further, ASA will designate CT Corp as U.S. Service Agent in the same city in which ASA's Primary Custodian is located.

13. After receipt of the requested order, ASA will file with the Commission (a) a copy of each subcustodian agreement, if that subcustodian agreement irrevocably designates CT Corp as an agent in the United States to accept service of process in any Proceeding before the Commission or any appropriate court to enforce the provisions of the laws administered by the Commission in connection with the subcustodian agreement, or to enforce any right or liability ("Liability") based on the subcustodian agreement or which alleges a liability on the part of the subcustodian arising out of its services, acts, or transactions under the subcustodian agreement relating to ASA's assets; and (b) a copy of each subcustodian agreement that does not contain one or more provisions described in clause (a), along with a written explanation as to why ASA determined that it was nonetheless appropriate to use that subcustodian notwithstanding the lack of that provision or those provisions. This filing requirement will automatically terminate upon a subcustodian ceasing to hold ASA's assets, except as to a Proceeding or a Liability based on an action or inaction of the subcustodian prior to the subcustodian having ceased holding ASA's assets.

14. ASA will perform every action and thing necessary to cause and assist the custodian of its assets to distribute the same, or the proceeds, if the Commission or a

court of competent jurisdiction will have so directed by final order.²⁰ ASA also will perform every action and thing necessary to cause and assist its shareholders or the Commission to collect (a) any monetary amount specified in a Commission order or (b) a final judgment entered by a court of competent jurisdiction. ASA will assist the Commission in enforcing temporary and preliminary injunctions and other orders entered by a court of competent jurisdiction, including “freeze” orders that would direct the company to retain specified funds pending a final disposition of a Commission case. To this end, ASA will agree, and will have the right under its agreement with the Primary Custodian, to instruct the Primary Custodian to freeze specified assets of ASA for a short period of time at the request of the Commission, pending the Commission’s application for a formal court order freezing those assets. During this period, ASA will repatriate any cash or cash equivalents from frozen accounts, pending final disposition of the case. Further, ASA’s agreement with its Primary Custodian will include a provision that disputes concerning the implementation of any asset freeze are under the jurisdiction of the U.S. courts. As soon as practicable, ASA and its Primary Custodian will notify an eligible foreign custodian or eligible securities depository of any court-ordered asset freeze.

15. ASA stipulates that personal jurisdiction exists in any Commission action brought against ASA in the United States and agrees to waive any defense of *forum non conveniens* to any Commission action.

16. ASA will take all steps necessary to ensure that it will be listed on the NYSE, including the publishing of financial statements and other information required by

²⁰ A court of competent jurisdiction means any U.S. federal court that has jurisdiction to issue such an order.

the NYSE for the benefit of holders of the shares listed on the NYSE and the performance of all the covenants contained in its listing agreement.

17. The Commission, in its discretion, may revoke its order permitting registration of ASA and the public offering of its securities if the Commission finds, after notice and opportunity for hearing, that there has been a violation of the requested order or the Act and may determine whether distribution of ASA's assets is necessary or appropriate in the interests of investors and may so direct.

18. ASA waives any counsel fees to which it may be entitled and waives security for costs in any action brought against it in Bermuda by any shareholder based on its charter or bylaws or any of the undertakings and agreements contained in the application. ASA will cause each of its present or future directors who is a non-resident of the United States to make similar waivers.

19. ASA will promptly notify the Commission in the event that there is any change in Bermudian law that will be contrary to any provision of the Act or detrimental to or inconsistent with the protection afforded by the undertakings and agreements contained in the application.

20. Any shareholder of ASA or the Commission, on its own motion or on request of any of ASA's shareholders, will have the right to initiate a proceeding: (a) before the Commission for the revocation of the order permitting registration of ASA; or (b) before a court of competent jurisdiction for the liquidation of ASA and a distribution of its assets to its shareholders and creditors. The court may enter the order in the event that it finds, after notice and opportunity for hearing, that ASA, its officers, directors,

investment adviser, or principal underwriter has violated any provision of the Act or the requested order.

21. Any shareholder of ASA will have the right to bring suit at law or equity, in any court of the United States or Bermuda having jurisdiction over ASA, its assets, or any of its officers or directors to enforce compliance by ASA, its officers and directors with any provision of ASA's charter or bylaws, the Act, the rules under the Act, or the undertakings and agreements required by the conditions of the requested order, insofar as applicable to these persons. The court may appoint a trustee or receiver of ASA with all powers necessary to implement the purposes of the suit, including the administration of the estate, the collection of corporate property including choses-in-action, and distribution of ASA's assets to its creditors and shareholders. ASA and its officers and directors waive any objection they may be entitled to raise and any right they may have to object to the power and right of any shareholder of ASA to bring such suit, reserving, however, their right to maintain that they have complied with these provisions, undertakings and agreements, and otherwise to dispute the suit on its merits. ASA and its officers and directors also agree that any final judgment or decree of any U.S. court may be granted full faith and credit by a court of competent jurisdiction of Bermuda and consent that the Bermudian court may enter judgment or decree on ASA at the request of any shareholder, receiver, or trustee of ASA.

22. ASA will settle its purchases and sales of portfolio securities in the United States by use of the mails or means of interstate commerce, except for: (a) purchases and sales on an "established securities exchange" (defined as a national securities exchange as defined in Section 2(a)(26) of the Act, the JSE, the HKSE, the LSE, the Tokyo Stock

Exchange, the TSE, the ASX, and the SIX Swiss Exchange (collectively the "Established Exchanges")) and (b) purchases and sales, through its custodian or its custodian's agent, in South Africa of South African Treasury Bills from or to the South African Treasury or South African Reserve Bank securities, or CSD-eligible securities. Assets purchased on the JSE, the HKSE, the LSE, the TSE, and the ASX will be maintained as provided for in condition 25 below. Assets purchased on the Tokyo Stock Exchange and the SIX Swiss Exchange will be maintained in the United States with ASA's custodian, unless prohibited by law or regulation or financially impracticable as provided in condition 26 below.

23. Notwithstanding condition 22, ASA may, through its custodian or its custodian's agent, exercise in South Africa, Hong Kong, the United Kingdom, Canada, or Australia the rights issued to it as a shareholder of other companies for the purchase of securities, provided that, in the case of each such exercise, (i) the rights so exercised are offered to ASA as a shareholder in another company on the same basis as all other holders of the class or classes of shares of such other company to whom such rights are offered, (ii) the rights so exercised do not exceed 10% of the total amount of such rights so offered, and (iii) the securities purchased pursuant to such exercise, or securities of the same class, are listed on the JSE, the HKSE, the LSE, the TSE, or the ASX, or application has been made to such exchange for the listing thereon of such securities, or it has been publicly announced that application will be made to such exchange for the listing thereon of such securities.

24. Contracts of ASA, other than those executed on an Established Exchange which do not involve affiliated persons, will provide that: (a) the contracts, irrespective of

the place of their execution or performance, will be performed in accordance with the requirements of the Act, the Securities Act of 1933, and the Securities Exchange Act of 1934, each as amended, if the subject matter of the contracts is within the purview of these Acts; and (b) in effecting the purchase or sale of assets, the parties to the contracts will utilize the U.S. mails or means of interstate commerce.

25. ASA will keep at least 20% of its assets in the United States in the custody of a U.S. bank. ASA's remaining assets will be kept in the custody of (a) an eligible foreign custodian, as defined in rule 17f-5 under the Act, in South Africa, Hong Kong, the United Kingdom, Canada, or Australia; or (b) an eligible securities depository, as defined in rule 17f-7 under the Act, in South Africa, Hong Kong, the United Kingdom, Canada, or Australia.

26. If removal of securities purchased on the Tokyo Stock Exchange and the SIX Swiss Exchange becomes either prohibited by law or regulation or financially impracticable, up to 5% of ASA's assets may be held by an eligible foreign custodian or overseas branch of ASA's custodian in each of Japan and Switzerland.

27. ASA will withdraw its assets from the care of a subcustodian as soon as practicable, and in any event within 180 days of the date when a majority of the Board makes the determination that a particular subcustodian may no longer be considered eligible under rule 17f-5 under the Act or that continuance of the subcustodian arrangement would not be consistent with the best interests of ASA and its shareholders.

28. ASA will cause its custodian to enter into an agreement (to be filed by ASA with the Commission when the custodian commences service to ASA), which will provide that the custodian agrees: (a) to comply with the Act and the rules of the

Commission under the Act and the undertakings and agreements contained in the application as applicable to the custodian and as each may be amended from time to time, as applicable to the custodian; (b) to do nothing inconsistent with the undertakings and agreements contained in the application, the provisions of the Act, or the rules under the Act; and (c) that the undertakings described in (a) and (b) above constitute representations and inducements to the Commission to issue the requested order.²¹

29. So long as ASA is registered under the Act, ASA's custody contract with its custodian will provide that the custodian will: (a) consummate all purchases and sales of securities by ASA through the delivery of securities and receipt of cash, or vice versa as the case may be, within the United States, except for (i) purchases and sales on the Established Exchanges, and (ii) purchases and sales, through ASA's custodian or custodian's agent, in South Africa of South African Treasury Bills from or to the South African Treasury, South African Reserve Bank securities, or CSD-eligible securities; and (b) distribute ASA's assets, or the proceeds thereof, to ASA's creditors and shareholders, upon service upon the custodian of an order of the Commission or court directing such distribution as provided in conditions 17, 20, and 30.

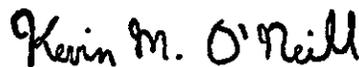
30. With respect to an alleged violation of the Act or the requested order by ASA's custodian, eligible foreign custodian, or eligible securities depository, the Commission, on its own motion, will have the right to initiate a proceeding: (a) before the Commission for the revocation of the order permitting registration of ASA; or

²¹ ASA acknowledges that: (a) every agreement and undertaking of ASA and its custodian contained in the application constitutes (i) inducements to the Commission for the issuance and continuance in effect of the requested order, and (ii) a contract among ASA, the Commission and ASA's shareholders; and (b) the failure by ASA or the custodian to comply with any of the agreements or undertakings, unless permitted by the Commission, will constitute a violation of the requested order.

(b) before a court of competent jurisdiction for the liquidation of ASA and a distribution of its assets to its shareholders and creditors. The court may enter the order in the event that it finds, after notice and opportunity for hearing, that ASA's custodian has violated any provision of the Act or the requested order.

31. The Chief Compliance Officer, as defined in Rule 38a-1(a)(4) under the Act, shall prepare a report, as part of the annual report to the Board, that evaluates ASA's compliance with the terms and conditions of the Application and the procedures established to achieve such compliance. The Chief Compliance Officer will also annually file a certification pursuant to item 77Q3 of Form N-SAR as such Form may be revised, amended or superseded from time to time, that certifies that ASA and the Board have established procedures reasonably designed to achieve compliance with Conditions 22, 25 and 26 regarding location of ASA's assets. Additionally, ASA's independent public accountants, in connection with their audit examination of ASA, will review the operations and procedures pertaining to the location of ASA's assets and custody arrangements for compliance with the conditions of the Application, and their review will form the basis, in part, of the auditor's report on internal accounting controls in Form N-SAR.

By the Commission.



Kevin M. O'Neill
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9404 / May 22, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15329

In the Matter of

CITY OF SOUTH MIAMI, FLORIDA

Respondent.

ORDER INSTITUTING CEASE-AND-DESIST
PROCEEDINGS PURSUANT TO SECTION
8A OF THE SECURITIES ACT OF 1933,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS AND A CEASE-
AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act") against the City of South Miami, Florida ("Respondent" or "City").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order")¹, as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

¹ The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

SUMMARY

1. This matter involves a municipality that jeopardized the tax-exempt status of municipal bonds by improperly utilizing proceeds received through a conduit borrowing. The City of South Miami, Florida misrepresented and omitted material information concerning the eligibility of a parking garage for tax-exempt financing in a pooled conduit municipal bond offering in 2006 by the Florida Municipal Loan Council ("FMLC"). The City borrowed funds in 2002 and again in 2006 to construct the largest municipal parking garage in its principal downtown commercial district. The City's participation in the offering enabled it to borrow funds from the FMLC at advantageous tax-exempt rates.

2. The City omitted to disclose to the FMLC that it had jeopardized the tax-exempt status of both bond offerings by impermissibly loaning proceeds from the offering to a private developer ("Developer") and restructuring the parking garage lease agreement with the Developer prior to the 2006 bond offering. In documents prepared in connection with the 2006 offering, and explicitly relied upon by Bond Counsel in rendering its tax opinion attached to the Official Statement, the City made material misrepresentations and omissions regarding: (1) the use of the proceeds of the offering and, (2) the altered terms of the parking garage lease.

3. The City's misrepresentations and omissions had a material impact on the tax-exempt status of the municipal securities issued in connection with this offering. In July 2010, the City filed a material event notice and disclosed for the first time the adverse impact of its actions on the tax-exempt status of the two bond offerings. In August 2011, the City entered into agreements with the Internal Revenue Service ("IRS"), paying \$260,345 to the IRS and defeasing a portion of the two prior bond offerings at a cost of \$1.16 million, so as to preserve their tax-exempt status for bondholders.

4. By engaging in this conduct, the City violated Sections 17(a)(2) and 17(a)(3) of the Securities Act.

RESPONDENT

5. The City of South Miami is a municipality located in Miami-Dade County, Florida. The City of South Miami was incorporated in 1927 and has an estimated population of approximately 11,000 residents.

BACKGROUND

A. The City Seeks Financing for a Parking Garage Through the FMLC Program

6. Starting in 1997, the City sought financing to develop a public parking garage (the "Project") to manage a lack of available parking space in the City's downtown commercial district. The City issued a request for proposals to develop the Project, which ultimately became a mixed-use retail and public parking structure to be developed by a for-profit Developer. In March 2002, the City Attorney, on behalf of the City, negotiated a lease agreement (the "2002 Lease") with the Developer, under which the City would be responsible for the cost of construction of the Project,

less the amount required to construct the retail portion of the Project. The City retained full control over the operation and maintenance of the parking portion of the Project and all parking revenues.

7. The Developer's limited role under the 2002 Lease was critical to the City receiving the benefits of any tax-exempt financing. Under applicable IRS regulations, the Project could be financed on a tax-exempt basis only if its use by for-profit businesses, such as the Developer, was kept to a minimum.

8. The City approved the financing to cover construction of the tax-exempt portion of the Project through its participation in the FMLC's 2002 bond pool. However, upon receiving a copy of the 2002 Lease sent by the City's then-Finance Director (the "2002 Finance Director"), bond counsel for the FMLC identified a potential tax issue raised by the Project's mixed public/retail nature. During subsequent conference calls between bond counsel and the 2002 Finance Director, bond counsel communicated to the City officials that none of the proceeds of the bond offering could be used to fund the retail portion of the building. However, subsequent finance directors were unaware of the substance of these discussions.

9. Thereafter, bond counsel concluded that no tax issues existed concerning the anticipated borrowing by the City from the FMLC based on, among other things, the City's representation that no funds from the bond offering would be used to finance the retail portion of the Project.

10. In May 2002, the City executed a loan agreement (the "2002 Loan Agreement"), which was reviewed by the City Attorney, and various documents relating to the City's participation in the FMLC's 2002 bond pool. In the Tax Certificate executed by the 2002 Finance Director, the City made several material representations that the City would not use funds borrowed from the FMLC for private use and that the City's Project would be owned and operated in a manner that complied with IRS regulations for tax-exempt financing. Additionally, the former Mayor executed a 2002 Certificate of Borrower and the 2002 Loan Agreement which stated that the City would not violate the private use restrictions associated with tax-exempt financing.

11. On May 17, 2002, the FMLC issued \$49.8 million of Series 2002A Revenue Bonds ("2002 Bonds"). The City borrowed \$6.5 million of the bond proceeds to finance the Project. Relying in part on the City's certifications and representations, bond counsel rendered a legal opinion to bondholders to the effect that the interest on the 2002 Bonds was tax-exempt. Because the FMLC's bond offering qualified as tax-exempt financing, the City borrowed funds from the FMLC at advantageous tax-exempt rates.

12. Notwithstanding the City's representations made to the FMLC relating to the 2002 Bonds, in June 2002 -- less than one month after the offering -- the City loaned the Developer \$2.5 million of the bond proceeds (the "Developer Loan"). The 2002 City Manager, on behalf of the City, and the Developer executed this loan without consulting or informing any FMLC representatives or bond counsel.

B. The City Improperly Revises the Project Lease

13. Later that year, based on concerns regarding the City's ability to pay the debt service on the 2002 Bonds, the City Commission voted to cancel the Project and ceased further construction of the parking garage and retail space. As part of the settlement of subsequent litigation filed by the Developer regarding the Project, the City Attorney negotiated a revised lease with the Developer (the "2005 Lease").

14. The 2005 Lease significantly changed several key provisions from the 2002 Lease regarding the use of the Project. Among other things, the 2005 Lease leased to the Developer the entire structure of the Project, including the retail space and the parking garage. In contrast, the 2002 Lease only leased the retail space to the Developer, while the City maintained and operated the parking garage. Additionally, pursuant to the 2005 Lease, the Developer now owed the City rent payments for the parking garage as well as the retail portion, with the Developer and the City sharing in the profits of the parking garage portion of the Project.

15. The terms of the 2005 Lease caused the Project to be considered "private business use" and, therefore, further jeopardized the tax-exempt status of the 2002 Bonds and raised an additional risk to investors. The City did not inform the FMLC, bond counsel, or any other third parties to the 2002 Bonds transaction about the changes to the Project. Instead, with the City's approval, the City Attorney negotiated the 2005 Lease believing there would be no implications for the 2002 Bonds. The commissioners approved the 2005 Lease and the 2005 City Manager executed the lease on behalf of the City.

C. The City Made Misrepresentations and Omissions in a 2006 Bond Offering with the FMLC

i. The City Seeks Further Project Financing Through the FMLC

16. By the fall of 2006, the City's Project was still incomplete. The then-City Finance Director ("2006 Finance Director") communicated to the FMLC that the City was still working on the Project using proceeds from the 2002 Bonds but that the City was nearly out of funds and required additional funding for completion. The City sought to borrow an additional \$5.5 million through the FMLC's program to continue construction on the Project.

17. In October 2006, the City submitted its application for participation in the upcoming bond offering ("2006 Bonds"²) to the FMLC. From October 2006 through January 2007, among other things, bond counsel reviewed submissions by the City and other municipalities and also participated in discussions with the FMLC, the underwriters, the borrowers and their counsel.

18. In various communications, the City did not inform the FMLC that the 2002 Lease, which bond counsel previously reviewed and concluded would not impair the tax-exempt status of the 2002 Bonds, had been modified and that the 2005 Lease impermissibly leased the entire

² The Official Statement for this bond offering references "Series 2006" bonds, however, the closing date for this transaction was on January 9, 2007.

parking garage to the Developer, including the public and retail portions. Further, the City did not notify the FMLC that only one month after the 2002 Bonds were issued, the City provided the Developer with a \$2.5 million loan directly from the proceeds of the FMLC's tax-exempt bonds.

ii. The City Made Material Misrepresentations and
Omissions in the FMLC's 2006 Bond Offering

19. Notwithstanding the terms of the City's 2005 Lease as well as the developer loan, the City misrepresented to the FMLC that its participation in the 2006 bond offering complied with tax-exempt requirements.

20. The City made misrepresentations to the FMLC in several documents, including the Loan Agreement, regarding compliance with the tax-exempt status of the loan. In particular, in January 2007, the 2006 Finance Director executed a Tax Certificate with the FMLC, which made the following misrepresentations:

- Not more than 10% of the proceeds of the City of South Miami Loan will be used (directly or indirectly) in a trade or business (or to finance facilities which are used in a trade or business) carried on by any person other than a state or local governmental unit. Not more than 5% of the proceeds of the City of South Miami Loan will be used (directly or indirectly) in trade or business (or to finance facilities which are used in a trade or business) carried on by any person other than a state or local governmental unit which private business use is not related to any governmental use or is disproportionate to governmental use . . .
- The City reasonably expects that the Project will be owned and operated throughout the term of the City of South Miami Loan in a manner that complies with the requirements set forth in Paragraph 23 above. The City will not change the ownership or use of all or any portion of the Project in a manner that fails to comply with Paragraph 23 above, unless it receives an opinion of Bond Counsel that such a change of ownership or use will not adversely affect the exclusion of interest on the Series 2006 Bonds from gross income for federal tax purposes.

21. Employees in the City's Finance Department were the primary contacts for the FMLC and bond counsel during the application process. Based on the existence of the 2005 Lease, which leased the entire parking structure of the Project to the Developer, and the Developer Loan, the 2006 Finance Director signed an inaccurate 2006 Tax Certificate on behalf of the City.

22. According to the Official Statement for the 2006 Bonds, the FMLC explicitly relied on the City's representations that the information did not contain any untrue statement of material fact or omit any material fact necessary to make the statements made, in light of the circumstances, not misleading. Based on the City's covenants and representations, bond counsel issued a bond opinion concluding that interest on the 2006 Bonds was exempt from federal income tax.

D. The City Incorrectly Files Annual Certifications with the FMLC

23. From 2003 through 2009, on behalf of the City, various finance directors incorrectly certified to the FMLC that the City was in compliance with the terms of the loan agreements. One of those terms was that no events had occurred which affected the tax-exempt status of the bonds.

24. For example, in 2003, 2004 and 2005, the 2002 Finance Director, and in 2006 the 2006 Finance Director incorrectly certified to the FMLC that the City was in compliance with the terms of the 2002 Loan Agreement relating to the bonds.

25. In 2008, bond counsel learned of the 2005 Lease. In February 2008, bond counsel explained in a conference call with the City Attorney and the then-Finance Director ("2008 Finance Director"), that the 2005 Lease would cause the City's loan and the 2002 and 2006 Bonds to be considered private activity bonds unless the City amended the 2005 Lease to comply with the IRS's guidance concerning the management of public facilities by for-profit entities. Nevertheless, the City never amended the 2005 Lease so as to comply with applicable IRS rules.

26. Despite this failure, and notwithstanding the City's communications with bond counsel and the FMLC about the tax implications of the 2005 Lease, the then-Finance Director ("2009 Finance Director"), who replaced the 2008 Finance Director in March 2008, incorrectly certified that the City was in compliance with the terms of the 2002 Loan Agreement and 2006 Loan Agreement. Although the 2009 Finance Director also attended a subsequent conference call at which bond counsel reiterated the need to restructure the 2005 Lease to avoid forfeiture of the tax-exempt status, the 2009 Finance Director incorrectly certified in 2009 that the City was in compliance with the terms of the loan agreements relating to the bonds.

27. The City's Finance Department experienced significant turnover from 2005 through 2009. The annual certifications required as part of the financing were signed by at least four different finance directors who were unaware of the implications of the certifications and how the 2005 Lease and Developer Loan affected the tax status of the bonds. The City's finance directors, while responsible for receiving, signing, and returning the annual compliance certifications, had no previous experience completing, reviewing, or assessing disclosure requirements or tax issues in bond offerings and did not receive any training or guidance on the subject.

28. On July 19, 2010, the City submitted a material event notice pursuant to its contractual commitments with underwriters subject to the requirements of Rule 15c2-12 of the Securities Exchange Act of 1934 with the MSRB's Electronic Municipal Market Access ("EMMA") system,³ publicly acknowledging a potential adverse impact on the tax-exempt status of the 2002 and 2007 Bonds. Notwithstanding that bonds of each series had been trading since their respective offering dates, this was the first time that the City publicly acknowledged any potential adverse impact on the tax-exempt status of the 2002 and 2006 Bonds.

³ In December 2008, Rule 15c2-12 was amended to designate EMMA as the central repository for ongoing disclosures by municipal issuers effective July 1, 2009.

E. The City Settles with the Internal Revenue Service

29. On July 13, 2010, the City, jointly with the FMLC, sought permission from the IRS to apply for a settlement under the IRS's Voluntary Compliance Agreement Program ("VCAP") in an attempt to preserve the tax-exempt status of the 2002 and 2006 Bonds. The VCAP program involves self-reporting of potential problems with tax-exemption issues.

30. On August 17, 2011, the City and the IRS executed two "Closing Agreements" ("Agreements") settling the matters at issue. The IRS required the City to pay settlement amounts totaling \$260,325.40. Furthermore, prior to executing the Agreements, the City was required to establish an irrevocable defeasance escrow for the purpose of defeasing significant portions of the 2002 Bonds and 2006 Bonds and retiring them on their earliest call dates. In order to finance the defeasance, the City entered into a new taxable bank loan resulting in an additional cost to the City of \$1,164,008.24. As a result of the Agreements, bondholders are not required to include any interest from the bonds in their gross incomes.

LEGAL DISCUSSION

31. Municipal securities represent an important part of the financial markets available to investors. By participating in the FMLC's pooled bond offering in 2006 as a conduit borrower, the City was able to obtain advantageous tax-exempt rates. Conduit borrowers of municipal securities have an obligation to ensure that financial information contained in their disclosure documents provided to issuers is not materially misleading. Proper disclosure allows investors to understand and evaluate the financial health of the state or local municipality in which they invest.

32. The City, which participated in municipal securities offerings as a conduit borrower of bond proceeds, is subject to the antifraud provisions of the federal securities laws, such as Section 17(a) of the Securities Act of 1933. That section prohibits the obtaining of money by means of any untrue statement of material fact or omitting to state a material fact in the offer or sale of securities. A fact is material if there is a substantial likelihood that its disclosure would be considered important by a reasonable investor. Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1987). Violations of Sections 17(a)(2) and (3) may be established by showing negligence. SEC v. Steadman, 967 F.2d 636, 643 n.5 (D.C. Cir. 1992).

VIOLATIONS

33. As a result of the negligent conduct described above, the City violated Sections 17(a)(2) and 17(a)(3) of the Securities Act. Specifically, the City made material misrepresentations and omissions in the 2006 Tax Certificate and Loan Agreement which certified that the City was in compliance with the terms of the loan agreements relating to the bonds. The City's misrepresentations and omissions were material because they directly jeopardized the tax-exempt status of the municipal bonds, which could have caused investors to pay tax-related penalties resulting in financial harm to investors. Moreover, numerous investors traded the 2002 and 2006 Bonds at prices that assumed those bonds were tax-exempt. Information regarding the bonds' tax-exempt status was important to investors in evaluating whether to purchase bonds through this municipal securities offering.

THE CITY'S REMEDIAL EFFORTS

34. In determining to accept the Offer, the Commission considered the cooperation afforded the Commission staff and the remedial acts taken by the City, referenced in paragraphs 29 – 30.

UNDERTAKINGS

35. The City agrees to retain, at the City's expense and within 120 days of this Order, an independent third-party consultant, not unacceptable to the staff, for a period of three years, to conduct annual reviews of the City's policies, procedures, and internal controls regarding: its disclosures for municipal securities offerings, including: (i) disclosures made in financial statements; (ii) disclosures made pursuant to continuing disclosure agreements and disclosures regarding credit ratings; (iii) the hiring of internal personnel and external experts for disclosure functions; (iv) the designation of an individual at the City responsible for ensuring compliance by the City of such policies, procedures, and internal controls; and (v) the implementation of active and ongoing training programs for, among others, the City Attorney(s), the City Manager, the Mayor, the City Finance Director, and the City Commissioners regarding compliance with disclosure obligations. After such review, which the City shall require to be completed within 300 days of the of issuance of this order, the City shall require the independent third-party consultant to submit to the City, a report making recommendations concerning these policies, procedures, and internal controls with a view towards assuring compliance with the City's disclosure obligations under the federal securities laws. The City will submit to the Commission, the findings of the independent consultant making recommendations for any changes in or improvements to City's policies, procedures, and practices, and a procedure for implementing such recommended changes. The City agrees to adopt the recommendations made in such report within 90 days from the date of the report.

36. Within 14 days of the City's adoption of the independent third-party consultant's recommendations, the City agrees to certify in writing to the Commission staff that the City has adopted and implemented the recommendations. The certification shall identify the undertaking(s), provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. Thereafter, the City agrees to require the independent third-party consultant to conduct annual reviews in years two and three following the order, to assess whether the City is complying with its policies, procedures, and internal controls, and whether the new policies, procedures, and internal controls were effective in achieving their stated purposes. The Commission staff may make reasonable requests for further evidence of compliance, and Respondent agrees to provide such evidence. All certifications of compliance and supporting material shall be submitted to Jason R. Berkowitz, Assistant Regional Director of the Municipal Securities and Public Pensions Unit in the Miami Regional Office, with a copy to the Office of Chief Counsel of the Enforcement Division.

37. The City shall require the independent third-party consultant to enter into an agreement that provides that for the period of engagement and for a period of two years from completion of the engagement, the third-party independent consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with the City, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity. The agreement will also provide that the independent third-party consultant will

require that any firm with which he/she is affiliated or of which he/she is a member, and any person engaged to assist the independent third party in performance of his/her duties under this Order shall not, without prior written consent of the Division of Enforcement, enter into any employment, consultant, attorney-client, auditing or other professional relationship with the City, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two years after the engagement.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in the City's Offer.

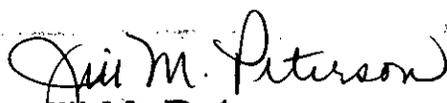
Accordingly, pursuant to Section 8A of the Securities Act, it is hereby ORDERED that:

A. The City of South Miami shall cease and desist from committing or causing any violations and any future violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act.

B. The City of South Miami shall comply with its undertakings as enumerated in paragraphs 35 – 37 in Section III above.

By the Commission.

Elizabeth M. Murphy
Secretary


By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

May 22, 2013

In the Matter of

Bloggerwave, Inc.,
Cardima, Inc.
(n/k/a CLI Liquidating Corporation),
Innuity, Inc.,
Kaleidoscope Venture Capital, Inc.,
Lipid Sciences, Inc.,
Radix Marine, Inc.,
SBS Interactive Co., and
VersaTech, Inc.
(n/k/a VersaTech USA),

File No. 500-1

ORDER OF SUSPENSION OF
TRADING

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Bloggerwave, Inc. because it has not filed any periodic reports since the period ended September 30, 2010.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Cardima, Inc. (n/k/a CLI Liquidating Corporation) because it has not filed any periodic reports since the period ended June 30, 2010.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Innuity, Inc. because it has not filed any periodic reports since the period ended September 30, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Kaleidoscope Venture Capital, Inc. because it has not filed any periodic reports since the period ended September 30, 2008.

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It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Lipid Sciences, Inc. because it has not filed any periodic reports since the period ended June 30, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Radix Marine, Inc. because it has not filed any periodic reports since the period ended March 31, 2005.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of SBS Interactive Co. because it has not filed any periodic reports since the period ended June 30, 2005.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of VersaTech, Inc. (n/k/a VersaTech USA) because it has filed only one periodic report since the period ended September 30, 2005.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EDT on May 22, 2013, through 11:59 p.m. EDT on June 5, 2013.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: **Jill M. Peterson**
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 69618 / May 22, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15328

In the Matter of

Bloggerwave, Inc.,
Cardima, Inc.
(n/k/a CLI Liquidating Corporation),
Innuity, Inc.,
Kaleidoscope Venture Capital, Inc.,
Lipid Sciences, Inc.,
Radix Marine, Inc.,
SBS Interactive Co., and
VersaTech, Inc.
(n/k/a VersaTech USA),

Respondents.

ORDER INSTITUTING
ADMINISTRATIVE
PROCEEDINGS AND
NOTICE OF HEARING
PURSUANT TO SECTION
12(j) OF THE SECURITIES
EXCHANGE ACT OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against the Respondents named in the caption.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Bloggerwave, Inc. ("BLGW")¹ (CIK No. 1446727) is a Nevada corporation located in Mountain View, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). BLGW is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period

¹The short form of each issuer's name is also its stock symbol.

ended September 30, 2010, which reported a net loss of \$246,444 for the prior nine months. As of May 20, 2013, the common stock of BLGW was quoted on OTC Link (formerly "Pink Sheets") operated by OTC Markets Group Inc. ("OTC Link"), had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. Cardima, Inc. (n/k/a CLI Liquidating Corporation) ("CADMQ") (CIK No. 1022570) is a dissolved Delaware corporation located in Fremont, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). CADMQ is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 2010, which reported a net loss of \$7,277,000 for the prior six months. As of May 20, 2013, the common stock of CADMQ was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. Innuity, Inc. ("INNU") (CIK No. 1103645) is an expired Utah corporation located in Redmond, Washington with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). INNU is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2008. As of May 20, 2013, the common stock of INNU was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. Kaleidoscope Venture Capital, Inc. ("KLDO") (CIK No. 1083721) is a Nevada corporation located in Woodinville, Washington with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). KLDO is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2008, which reported a net loss of \$3,920,832 for the prior nine months. As of May 20, 2013, the common stock of KLDO was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

5. Lipid Sciences, Inc. ("LIPD") (CIK No. 71478) is a revoked Arizona corporation located in Pleasanton, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). LIPD is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 2008, which reported a net loss of \$4,224,000 for the prior six months. On October 3, 2008, LIPD filed a Chapter 7 petition in the U.S. Bankruptcy Court for the Northern District of California, which was closed on April 26, 2012. As of May 20, 2013, the common stock of LIPD was quoted on OTC Link, had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

6. Radix Marine, Inc. ("RDXM") (CIK No. 1030984) is a Nevada corporation located in Poulsbo, Washington with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). RDXM is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended March 31, 2005, which reported a net loss of \$988,698 for the prior nine months. As of

May 20, 2013, the common stock of RDXM was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

7. SBS Interactive Co. ("SBSS") (CIK No. 1085220) is a dissolved Florida corporation located in Newport Beach, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). SBSS is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended June 30, 2005, which reported a net loss of \$1,011,767 for the prior six months. As of May 20, 2013, the common stock of SBSS was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

8. VersaTech, Inc. (n/k/a VersaTech USA) ("VRST") (CIK No. 933954) is a Nevada corporation located in Malibu, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). VRST is delinquent in its periodic filings with the Commission, having filed only one periodic report since it filed a Form 10-QSB for the period ended September 30, 2005, which reported a net loss of \$108,631 for the prior nine months. As of May 20, 2013, the common stock of VRST was quoted on OTC Link, had four market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

9. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission, have repeatedly failed to meet their obligations to file timely periodic reports, and failed to heed delinquency letters sent to them by the Division of Corporation Finance requesting compliance with their periodic filing obligations or, through their failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

10. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports, and Rule 13a-13 requires domestic issuers to file quarterly reports.

11. As a result of the foregoing, Respondents failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II hereof are true and, in connection therewith, to afford the Respondents an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that Respondents shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If Respondents fail to file the directed Answers, or fail to appear at a hearing after being duly notified, the Respondents, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents, may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon Respondents personally or by certified, registered, or Express Mail, or by other means permitted by the Commission Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 69626 / May 23, 2013

ADMINISTRATIVE PROCEEDING

File No. 3-15330

In the Matter of

**Greatmat Technology Corp.,
Kentucky USA Energy, Inc.,
Solar Energy Ltd., and
Visiphor Corp.,**

Respondents.

**ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
AND NOTICE OF HEARING
PURSUANT TO SECTION 12(j) OF
THE SECURITIES EXCHANGE ACT
OF 1934**

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents Greatmat Technology Corp., Kentucky USA Energy, Inc., Solar Energy Ltd., and Visiphor Corp.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Greatmat Technology Corp. (CIK No. 1415543) is a Nevada corporation located in Hong Kong with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Greatmat Technology is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the period ended December 31, 2010. As of May 15, 2013, the company's stock (symbol "GMATF") was quoted on OTC Link (previously, "Pink Sheets") operated by OTC Markets Group Inc. ("OTC Link"), had four market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. Kentucky USA Energy, Inc. (CIK No. 1393614) is a Delaware corporation located in London, Kentucky with a class of securities registered with the Commission

pursuant to Exchange Act Section 12(g). Kentucky USA Energy is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended April 30, 2010. On October 3, 2010, Kentucky USA Energy filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Kentucky, and the case was terminated on July 23, 2012. As of May 15, 2013, the company's stock (symbol "KYUS") was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. Solar Energy Ltd. (CIK No. 1058322) is a void Delaware corporation located in Palm Desert, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Solar Energy is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the period ended December 31, 2010, which reported a net loss of over \$7,700 for the prior year. As of May 15, 2013, the company's stock (symbol "SLRE") was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. Visiphor Corp. (CIK No. 1088393) is a Canadian corporation located in Burnaby, British Columbia, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Visiphor is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended March 31, 2008, which reported a net loss of over \$300,000 (Canadian) for the prior three months. As of May 15, 2013, the company's stock (symbol "VISRF") was quoted on OTC Link, had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

5. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission, have repeatedly failed to meet their obligations to file timely periodic reports, and failed to heed delinquency letters sent to them by the Division of Corporation Finance requesting compliance with their periodic filing obligations or, through their failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

6. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports, and Rule 13a-13 requires domestic issuers to file quarterly reports.

7. As a result of the foregoing, Respondents failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and/or 13a-13 thereunder.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II hereof are true and, in connection therewith, to afford the Respondents an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that Respondents shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If Respondents fail to file the directed Answers, or fail to appear at a hearing after being duly notified, the Respondents, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents, may be deemed in default and the proceedings may be determined against them upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon Respondents personally or by certified, registered, or Express Mail, or by other means permitted by the Commission Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

May 23, 2013

In the Matter of

Greatmat Technology Corp.,
Kentucky USA Energy, Inc.,
Solar Energy Ltd., and
Visiphor Corp.,

File No. 500-1

ORDER OF SUSPENSION OF
TRADING

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of GreatMat Technology Corp. because it has not filed any periodic reports since the period ended December 31, 2010.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Kentucky USA Energy, Inc. because it has not filed any periodic reports since the period ended April 30, 2010.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Solar Energy Ltd. because it has not filed any periodic reports since the period ended December 31, 2010.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Visiphor Corp. because it has not filed any periodic reports since the period ended March 31, 2008.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies.

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Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EDT on May 23, 2013, through 11:59 p.m. EDT on June 6, 2013.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

*Commissioner Gallagher
not participating*

**UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934
Release No. 69627 / May 23, 2013**

**INVESTMENT COMPANY ACT OF 1940
Release No. 30540 / May 23, 2013**

**ADMINISTRATIVE PROCEEDING
File No. 3-15049**

**In the Matter of

NEIL M.M. MORRISON

Respondent.**

**ORDER MAKING FINDINGS AND
IMPOSING REMEDIAL SANCTIONS
AND A CEASE-AND-DESIST ORDER
PURSUANT TO SECTIONS 15(b)(6),
15B(c)(4) and 21C OF THE SECURITIES
EXCHANGE ACT OF 1934, AND
SECTION 9(b) OF THE INVESTMENT
COMPANY ACT OF 1940**

I.

On September 27, 2012, the Securities and Exchange Commission ("Commission") instituted administrative and cease-and-desist proceedings pursuant to Sections 15(b)(6), 15B(c)(4) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") against Neil M.M. Morrison ("Morrison" or "Respondent").

II.

In response to these proceedings, Respondent has submitted an Offer of Settlement ("Offer"), which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Sections 15(b)(6), 15B(c)(4) and 21C of the Securities Exchange Act of 1934, and Section 9(b) of the Investment Company Act of 1940 as to Neil M.M. Morrison ("Order") as set forth below.

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III.

On the basis of this Order and the Respondent's Offer, the Commission finds that:¹

Summary

These proceedings involve a "pay-to-play" scheme conducted by Neil M.M. Morrison ("Morrison"), a former vice president in the investment banking division of Goldman, Sachs & Co. ("Goldman Sachs"), a broker-dealer and registered municipal securities dealer. The scheme, which lasted from November 2008 to October 2010, resulted in violations of the Municipal Securities Rulemaking Board's ("MSRB") Rules by both Morrison and Goldman Sachs. Starting in July 2008, Morrison was employed by Goldman Sachs to solicit municipal underwriting business from, among others, the Massachusetts Treasurer's Office. During the period November 2008 to October 2010, however, Morrison was also substantially engaged in the political campaigns, including the November 2010 Massachusetts gubernatorial campaign, for Timothy P. Cahill ("Cahill"), the then-Treasurer of Massachusetts.² Morrison participated extensively in Cahill's gubernatorial campaign and did so at times from his Goldman Sachs office, during his Goldman Sachs work hours and using Goldman Sachs resources, such as phones, e-mail and office space. Morrison's campaign work gave him complete access to Cahill and his staff, who often provided him with information about the office's internal deliberations involving underwriter selection.

Morrison's campaign activities during his Goldman Sachs work hours and use of Goldman Sachs resources constituted valuable undisclosed "in-kind" campaign contributions to Cahill attributable to Goldman Sachs. In addition, during the same period, Morrison circumvented the pay-to-play rules by making an indirect contribution to the Cahill campaign through another person in violation of MSRB Rule G-37(d). Moreover, Morrison solicited campaign contributions for Cahill when Goldman Sachs was engaged in or seeking to engage in municipal underwriting business with the Treasurer's Office in willful violation of MSRB Rule G-37(c).

Within two years of these campaign contributions, Goldman Sachs engaged in municipal securities business with issuers associated with Cahill as Treasurer of Massachusetts and as a candidate for Governor of Massachusetts. Goldman Sachs' engagement in municipal securities business with these issuers violated Section 15B(c)(1) of the Exchange Act and MSRB Rule G-37(b).³ Morrison caused Goldman Sachs to violate Rule G-37(b). The contributions were not

¹ The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

² In addition to Cahill's gubernatorial campaign, between November 2008 and September 2009, Morrison worked on Cahill's re-election campaign for Treasurer of Massachusetts.

³ Rule G-37(b) is a broad prophylactic measure. It provides that no broker, dealer or municipal securities dealer shall engage in municipal securities business with an issuer within two years after any contribution to an official of such issuer made by: (A) the broker, dealer or

disclosed on MSRB Forms G-37, and no records of the contributions were made and kept in violation of MSRB Rules G-37(e), G-8 and G-9. Morrison caused Goldman Sachs to violate MSRB Rules G-37(e), G-8 and G-9. In addition, Morrison did not disclose the attributed contributions, or campaign work or the conflicts of interest raised by this conduct in the bond offering documents. By failing to disclose the campaign work, cash and in-kind contributions and the resulting conflict of interest to the purchasers of municipal securities, Morrison willfully violated MSRB Rule G-17, which requires broker-dealers to deal fairly and not engage in any deceptive, dishonest, or unfair practice.

Respondent

1. Morrison was a vice president in Goldman Sachs' investment banking division in one of the firm's Boston, Massachusetts offices between July 14, 2008 and December 19, 2010. Morrison was also a registered representative associated with Goldman Sachs, a registered broker-dealer and municipal securities dealer. Morrison, 38 years old, is a resident of Taunton, Massachusetts.

Other Relevant Entity

2. Goldman, Sachs & Co., a New York limited partnership with its principal offices in New York, New York, is a registered broker-dealer pursuant to Section 15(b) of the Exchange Act and a municipal securities dealer as defined in Sections 3(a)(30) and 3(a)(31) of the Exchange Act. Goldman Sachs, a limited partnership, is a subsidiary of The Goldman Sachs Group, Inc., a Delaware corporation with common stock that is registered with the Commission pursuant to Section 12(b) of the Exchange Act and is listed on the New York Stock Exchange.

Background

3. Between July 2008 and October 2010, Morrison engaged in activities that constituted solicitation of municipal securities business from certain issuers on behalf of Goldman Sachs. In addition, Morrison was listed on Goldman Sachs' list of municipal finance professionals ("MFP") during his employment with the firm. As a result, Morrison was an MFP associated with Goldman Sachs within the meaning of MSRB Rule G-37.⁴

municipal securities dealer; (B) any municipal finance professional associated with such broker, dealer or municipal securities dealer; or (C) any political action committee controlled by the broker, dealer or municipal securities dealer or by any municipal finance professional. A violation of Rule G-37(b) does not require a showing of "quid pro quo" (i.e. that municipal securities business was actually given in exchange for the contribution.).

⁴ Rule G-37(g)(iv)(B) provides that "the term 'municipal finance professional' [includes] . . . any associated person [of a broker, dealer or municipal securities dealer] who solicits municipal securities business." Morrison solicited municipal securities business by attending meetings with issuer staff, which were intended to obtain municipal securities business with the issuer and by communicating with issuer staff about Goldman Sachs' underwriting capabilities. In addition, Morrison engaged in municipal securities solicitation activities by, among other things, signing cover letters attached to responses to requests for qualifications ("RFQ") for underwriting business and by having his name appear in the

4. As the Treasurer of Massachusetts and candidate for Governor of Massachusetts, Cahill was an "official" of various municipal securities issuers in Massachusetts within the meaning of Rule G-37.⁵ Specifically, as Treasurer of Massachusetts, Cahill was an incumbent who was responsible for, or had the authority to appoint persons who were responsible for, the hiring of brokers, dealers, or municipal securities dealers for municipal securities business by the Commonwealth of Massachusetts and certain related state issuers, including the Massachusetts Water Pollution Abatement Trust and Massachusetts School Building Authority. As candidate for Governor of Massachusetts, Cahill was a candidate for elective office which has authority to appoint persons who are directly or indirectly responsible for, or can influence the outcome of, the hiring of a municipal securities dealer for municipal securities business of certain issuers, including the Massachusetts Housing Finance Authority, Massachusetts Bay Transportation Authority, Massachusetts Health and Education Facilities Authority, and Massachusetts Water Resources Authority. The issuers listed in this paragraph are hereafter referred to collectively as "Issuers."

Morrison Worked Extensively on Cahill's Campaigns Using Goldman Sachs Resources

5. Starting at least as early as November 2008, Morrison began actively assisting with Cahill's re-election campaign for Treasurer of Massachusetts by soliciting contributions for fundraisers and arranging for others to solicit contributions for Cahill. Thereafter, between July 2009 and September 2009, Morrison's campaign work focused on assisting the campaign to prepare for Cahill's eventual bid for Governor of Massachusetts. This assistance included interviewing campaign consultants, preparing and reviewing campaign documents, participating on campaign conference calls, and attending campaign meetings during Goldman Sachs work hours.

6. On September 9, 2009, Cahill officially announced his candidacy for Governor of Massachusetts. Thereafter, Morrison's campaign work increased dramatically, including the number of campaign telephone calls made during work hours and the number of e-mails that he sent using his Goldman Sachs' e-mail account. Starting in September 2009, Morrison became one of Cahill's most trusted campaign advisers. As described below, he was involved in, and used Goldman Sachs resources for, numerous significant aspects of the campaign, including

responses to the RFQs as a member of Goldman Sachs' underwriting team. Either one of these solicitation activities by itself was sufficient to make him an MFP. See John F. Kendrick, Exchange Act Release No. 62500 (July 14, 2010).

⁵ Rule G-37(g)(vi) defines an "official of such issuer" as any person who was, at the time of the contribution, an incumbent, candidate or successful candidate: (A) for elective office of the issuer which office is directly or indirectly responsible for, or can influence the outcome of, the hiring of a broker, dealer or municipal securities dealer for municipal securities business by the issuer; or (B) for any elective office of a state or of any political subdivision, which office has authority to appoint any person who is directly or indirectly responsible for, or can influence the outcome of, the hiring of a broker, dealer or municipal securities dealer for municipal securities business by an issuer.

interviewing at least one representative of a possible running mate in his Goldman Sachs office, negotiating campaign contracts and accepting contract terms on behalf of the campaign during Goldman Sachs' work hours and/or using Goldman Sachs' telephones and e-mail.

7. Morrison's work for Cahill's campaign during his Goldman Sachs' work hours was broad. Between September 2009 and October 4, 2010, Morrison engaged in (a) fundraising; (b) drafting speeches and fundraising solicitations; (c) reviewing, approving and writing campaign memos, contracts, letters, talking points, campaign position papers, and responses to campaign issues; (d) attending and preparing for press conferences; (e) approving campaign invoices and expenditures; (f) approving personnel decisions, such as salaries and hiring; (g) negotiating with campaign personnel; (h) arranging advertisements and commercials; (i) communicating with reporters on behalf of the campaign; (j) reviewing the campaign's budget; (k) recruiting supporters; (l) reviewing campaign leases for office space; (m) selecting county representatives; (n) interviewing consultants; (o) drafting campaign plans and quotations; (p) providing legal advice; and (q) assisting with debates. In engaging in these actions, Morrison at times used his Goldman Sachs e-mail account, phone and other resources and did so during ordinary work hours. During the thirteen-month period, September 9, 2009 to October 4, 2010, Morrison sent at least 364 campaign-related e-mails using his Goldman Sachs e-mail account.

**Morrison Actively Solicited Underwriting Business and
Attempted to Exert Influence on the Underwriter Selection Process**

8. At the same time Morrison was working on Cahill's campaign, he was actively soliciting municipal securities business from the Cahill Treasurer's Office. At times, Morrison referenced his campaign work in those solicitations.

9. For example, on September 29, 2009, Morrison sent an e-mail using his Goldman Sachs e-mail account to a Deputy Treasurer discussing the selection of underwriters. In this e-mail Morrison stated:

The boss [Cahill] mentioned to me this morning that he spoke to [the Assistant Treasurer] and that it is looking good for us [Goldman Sachs] on the build America bond deal. He then said that you would probably split it up with 2 joint bookrunners. I am ok with that if that's what you want. I actually think it will be good because it enables the boss [Cahill] to handsomely reward someone else.

10. In the same e-mail exchange, apparently referencing the upcoming election, Morrison went on to say:

From my standpoint as an advisor/consultant/friend I am saying, PLEASE don't give these [underwriter] slots away willy-nilly. You are in the fight of your lives and need to reward loyalty and encourage friendship. If people aren't willing to be creative with their support then they shouldn't expect business. This has to be a political decision.

11. In another e-mail dated September 28, 2009, to the Deputy Treasurer, Morrison again linked his campaign work and his solicitation for underwriting business:

I have a couple of items that I want to put out there in the interest of leaving nothing unsaid.

1. We have discussed the Build American Bond transaction and how important it is to me. You have been great keeping me up to speed. This is my number 1 priority and most important ask. Having Goldman as the lead and getting 50% of the economics would be such a home run for me.

2. There is a Taunton/Southeastern Mass function for the boss [Cahill] coming up. It looks like it will be on Oct. 26.

3. In the event that [a local municipal securities dealer] were going to have a role in the Build American Bond deal, it might be beneficial to tell me that before the local banker there. She might be more interested in being more supportive. HAVING SAID THAT, I am only pushing for number 1 above. This would help number 2, (and certainly help that banker) but I am not so aggressive as to push for more than myself at this point.

12. Morrison knew about the restrictions in Rule G-37. Specifically, Morrison was trained about the restrictions in Rule G-37 by Goldman Sachs and received numerous notices about compliance with the MSRB's rules. For example, on December 18, 2008 and October 20, 2009, Goldman Sachs' compliance office sent e-mails to Morrison containing the firm's policies and procedures relating to campaign contributions, which included, among other things, a prohibition on using firm resources, such as e-mail and office space, for political activities. In addition, the policies and procedures provided that a violation of this policy can result in the firm being disqualified from municipal securities business for two years. Moreover, the policies and procedures explained that MSRB Rule G-37 prohibits MFPs from using conduits to contribute indirectly to issuers and that a violation of this policy can lead to a two-year prohibition on municipal securities business. On September 21, 2010, Morrison certified to Goldman Sachs that he reviewed the firm's policies and procedures relating to Political Contributions and Activities and that he had disclosed to the firm all political contributions and political activities since January 1, 2009. Morrison also admitted in two e-mails on May 29, 2009 and April 2, 2010 that he had familiarity with Rule G-37.

13. In addition, during an interview with Morrison, he admitted to Goldman Sachs' compliance officials that he sent campaign-related e-mails and helped the Cahill campaign using firm resources and during work hours. Moreover, Morrison admitted to the compliance officials that he was uncomfortable helping Cahill because of the negative impact on Goldman Sachs.

Morrison's Conduct Disqualified Goldman Sachs from Underwritings

14. From November 25, 2008 to October 4, 2010, each instance of Morrison's extensive campaign work during work hours or using firm resources constituted valuable "in-kind" campaign contributions to Cahill attributable to Goldman Sachs.

15. On October 26, 2009, Morrison provided \$400 in cash to an individual at a Cahill fundraiser who, in turn, made a campaign contribution for \$500 rather than \$100. The \$400 was above the \$250 *de minimis* exception provided in Rule G-37. By providing \$400, Morrison violated Rule G-37(d), which prohibits a municipal securities dealer or any MFP from doing any act indirectly which would result in a violation of the rule if done directly by the dealer or MFP.⁶

16. Under Rule G-37, Morrison's indirect contribution and each "in-kind" contribution attributable to Goldman Sachs, starting on November 25, 2008 and ending on October 4, 2010, triggered a two-year ban on municipal securities business with the Issuers.

17. Despite the prohibitions contained in Rule G-37, within two years after the above contributions, Goldman Sachs, with Morrison's knowledge, participated as senior manager, co-senior manager, or co-manager for a total of thirty negotiated underwritings by the Issuers totaling approximately \$9 billion. For its roles in the thirty underwritings, Goldman Sachs received fees in the amount of \$7,558,942.

18. The "in-kind" contributions attributable to Goldman Sachs and the indirect cash contribution by Morrison were not disclosed as required in Goldman Sachs' quarterly reports to the MSRB on Form G-37. In addition, Goldman Sachs did not make and keep books and records of the contributions.

19. The indirect contribution by Morrison and the undisclosed "in-kind" contributions attributable to Goldman Sachs also created a conflict of interest which was not disclosed in the relevant municipal securities offerings, in violation of MSRB Rule G-17. In a July 29, 2009 e-mail to a campaign official, Morrison acknowledged the existence of this conflict, stating:

I am staying in banking and don't want a story that says that I am helping Cahill, who is giving me banking business. If that came out, I'm sure I wouldn't get any more business.

Morrison Solicited Campaign Contributions for Cahill

20. Between November 25, 2008 and October 5, 2010, Morrison also solicited campaign contributions for Cahill by engaging in fundraising activities, including asking or

⁶ A *de minimis* exception to Rule G-37(b) allows an MFP to contribute up to \$250 per candidate per election if the MFP is entitled to vote for the candidate. Cahill's gubernatorial election was held on November 2, 2010.

telling others to make contributions, asking others to coordinate the collection of contributions, sending e-mails with fundraising information, and providing fundraiser tickets to potential contributors for self-use or to re-distribute to others.

21. Specifically, on November 25, 2008, Morrison used Goldman Sachs' e-mail system to solicit contributions by asking a friend to contribute to a Cahill fundraising event. In this e-mail, Morrison told his friend to make a contribution for a December 1, 2008, fundraiser. In addition, Morrison engaged in coordinating contributions by instructing at least three others to find contributors or to sell tickets for fundraisers. For example, in November 2008 and September 2009, Morrison asked a friend to help find contributors for two Cahill fundraisers. In another example, on October 8, 2009, Morrison sent an e-mail using Goldman Sachs' e-mail system to a state treasury employee regarding an October 2009 fundraiser for Cahill. In this e-mail, Morrison stated:

Very regretfully, I have to reach out to you again regarding the Treasurer's event...If you could do anything by way of tickets it would be very helpful and would probably be a good idea for you. The tickets have a face value of ...\$100 but you can sell them for \$50 each. I really dislike relaying this type of information and I know its not easy for anyone.

22. In addition, Morrison solicited contributions by sending fundraising literature and information, in the form of e-mails, to others. The e-mail solicitations, some of which were sent using Goldman Sachs' e-mail system, referenced, among other things, the fundraiser date, time, location and suggested contribution amounts. Moreover, Morrison solicited or coordinated contributions by providing fundraising tickets to others for self-use or to re-distribute to others. For example, around October 2009, Morrison told a friend that Cahill would be having a local fundraiser and that a campaign representative would contact him. Shortly thereafter, Morrison provided the friend with an envelope containing 10 tickets to an October 2009 fundraiser. The friend used one of the tickets himself and provided another to a friend (both contributed \$100).

23. During each of Morrison's solicitations, Goldman Sachs was engaged in municipal securities business with the Massachusetts Treasurer's Office by being selected as an underwriter for Massachusetts municipal securities offerings and seeking to engage in municipal securities business by responding to two Requests for Qualifications by the Massachusetts Treasurer's Office, which were valid or active for two year periods. Therefore, Goldman Sachs was engaged in or seeking to engage in municipal securities business with the Massachusetts Treasurer's Office during Morrison's solicitation activities.

24. Morrison devoted a significant amount of time to fundraising for the Cahill campaign and his e-mails reflected this. For example, in an October 15, 2009, e-mail to a friend, Morrison stated "I am pushing hard on fundraising and recruiting supporters." In addition, in an October 19, 2009, e-mail to a family member, Morrison stated:

I am starting to feel better but I will be happy when this fundraiser is over, as it is adding stress and combined with work and home, is wearing me out.

25. By soliciting or coordinating campaign contributions for Cahill when Goldman Sachs was seeking to engage in municipal securities business with the Treasurer's Office, Morrison violated Rule G-37(c).

Violations

26. As a result of the conduct described above, Morrison willfully aided and abetted and caused Goldman Sachs' violations of MSRB Rule G-8, which requires brokers, dealers and municipal securities dealers to make and keep current records reflecting all direct and indirect contributions to officials of issuers made by the broker, dealer, municipal securities dealer and each municipal finance professional.

27. As a result of the conduct described above, Morrison willfully aided and abetted and caused Goldman Sachs' violations of MSRB Rule G-9, which requires brokers, dealers and municipal securities dealers to preserve records reflecting all direct and indirect contributions to officials of issuers made by the broker, dealer, municipal securities dealer and each municipal finance professional for six years.

28. As a result of the conduct described above, Morrison willfully violated MSRB Rule G-17, which states that in the conduct of its municipal securities business, every broker, dealer and municipal securities dealer shall deal fairly with all persons and shall not engage in any deceptive, dishonest, or unfair practice.

29. As a result of the conduct described above, Morrison willfully aided and abetted and caused Goldman Sachs' violations of MSRB Rule G-37(b), which prohibits brokers, dealers or municipal securities dealers from engaging in municipal securities business with an issuer within two years after any contribution to an official of such issuer made by (i) the broker, dealer or municipal securities dealer; (ii) any municipal finance professional associated with such broker, dealer or municipal securities dealer; or (iii) any political action committee controlled by the broker, dealer or municipal securities dealer or by any municipal finance professional, unless the contribution is exempt.

30. As a result of the conduct described above, Morrison willfully violated MSRB Rule G-37(c), which prohibits, among other things, brokers, dealers, municipal securities dealers or any municipal finance professional of the broker, dealer or municipal securities dealer from soliciting any person to make any contributions or coordinating any contributions to an official of an issuer with which the broker, dealer or municipal securities dealer is engaging or is seeking to engage in municipal securities business.

31. As a result of the conduct described above, Morrison willfully violated MSRB Rule G-37(d), which prohibits, brokers, dealers or municipal securities dealers or any municipal finance professional from, directly or indirectly, through or by any other person or means, doing any act which would result in a violation of sections (b) or (c) of Rule G-37.

32. As a result of the conduct described above, Morrison willfully aided and abetted and caused Goldman Sachs' violations of MSRB Rule G-37(e), which requires brokers, dealers, or municipal securities dealers to file quarterly reports with the MSRB disclosing all direct and indirect contributions, exceeding the *de minimis* amount, to any official of a municipal securities issuer made by, among others, the broker, dealer, municipal securities dealer and each municipal finance professional associated with such broker, dealer, or municipal securities dealer.

33. As a result of the conduct described above, Morrison willfully aided and abetted and caused Goldman Sachs' violations of Section 15B(c)(1) of the Exchange Act, which prohibits a broker, dealer or municipal securities dealer from using the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any municipal security in contravention of any rule of the MSRB.

IV.

On the basis of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in the Respondent's Offer.

Accordingly, pursuant to Sections 15(b)(6), 15B(c)(4), 21B and 21C of the Exchange Act and Section 9(b) of the Investment Company Act, it is hereby ORDERED that:

A. Respondent Morrison shall cease and desist from committing or causing any violations and any future violations of Section 15B(c)(1) of the Exchange Act, MSRB Rule G-8, MSRB Rule G-9, MSRB Rule G-17, MSRB Rule G-37(b), MSRB Rule G-37(c), MSRB Rule G-37(d), and MSRB Rule G-37(e).

B. Respondent Morrison be, and hereby is:

barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization;

prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter; and

barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock,

with the right to apply for reentry after five (5) years to the appropriate self-regulatory organization, or if there is none, to the Commission.

C. Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

D. Respondent shall pay a civil money penalty in the amount of \$100,000 to the Securities and Exchange Commission. Morrison shall make payment of this penalty in two installments of \$50,000. Morrison shall pay the first installment of \$50,000 within 10 days of the entry of this Order. Of this first installment payment of \$50,000, the Securities and Exchange Commission shall transfer \$25,000 to the Municipal Securities Rulemaking Board in accordance with Section 15B(c)(9)(A) of the Exchange Act and transfer the remaining \$25,000 to the United States Treasury. Morrison shall pay the second installment of \$50,000 within 365 days of the entry of this Order. Of this second installment payment of \$50,000, the Securities and Exchange Commission shall transfer \$25,000 to the Municipal Securities Rulemaking Board in accordance with Section 15B(c)(9)(A) of the Exchange Act and transfer the remaining \$25,000 to the United States Treasury. If any payment is not made by the date the payment is required by this Order, the entire outstanding balance, plus any accrued interest pursuant to 31 U.S.C. 3717, shall be due and payable immediately, without further application. Payment must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Neil M.M. Morrison as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Elaine C. Greenberg, Chief, Municipal Securities and Public Pensions Unit, Securities and Exchange Commission, Philadelphia Regional Office, The Mellon Independence Center, 701 Market Street Philadelphia, PA 19106-1532.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 69640 / May 24, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15333

In the Matter of:

Deer Hill Financial Group, LLC,

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 15(b) OF THE
SECURITIES EXCHANGE ACT OF 1934,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Deer Hill Financial Group, LLC ("Deer Hill" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, Respondent consents to the Commission's jurisdiction over it and the subject matter of these proceedings and to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

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III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Deer Hill Financial Group, LLC operated as an unregistered investment adviser and broker-dealer in Danbury, Connecticut fully owned by Stephen B. Blankenship.

2. Blankenship, age 63, is a resident of New Fairfield, Connecticut and former registered representative of Vanderbilt Securities, LLC, a broker-dealer registered with the Commission.

3. On September 12, 2012, Blankenship pled guilty to one count of Mail Fraud in violation of Title 18 of the United States Code, Section 1341 and one count of Securities Fraud in violation of Title 15 of the United States Code, Section 78j(b) and Title 17, Code of Federal Regulations, Section 240.10b-5 before the United States District Court for the District of Connecticut, in *United States of America v. Stephen B. Blankenship*, Criminal No. 12-197 (VLB).

4. On May 16, 2013, a final judgment was entered by consent against Deer Hill, permanently enjoining it from future violations of Section 17(a) of the Securities Act of 1933, Sections 10(b) and 15(a) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and Sections 206(1) and 206(2) of the Investment Advisers Act of 1940 in the civil action entitled *Securities and Exchange Commission v. Deer Hill Financial Group, LLC et al.*, Civil Action Number 12-01317, in the United States District Court for the District of Connecticut.

5. The Commission's complaint alleged that, from at least 2002 through at least November 2011, Defendant Stephen B. Blankenship engaged in a scheme to misappropriate at least \$600,000 from at least 12 brokerage customers by falsely representing that he would invest their funds in securities through Defendant Deer Hill Financial Group, LLC, a Connecticut-based limited liability company formed by Blankenship. Most of the investors lied to by Blankenship were brokerage customers of his, first at Syndicated Capital, Inc., a registered broker-dealer based in Santa Monica, California and then at Vanderbilt Securities, LLC, a registered broker-dealer based in Melville, New York. In many instances, Blankenship lured his customers to withdraw money from their brokerage accounts with promises that they could obtain a greater rate of return, while in other instances Blankenship simply falsely told his customers that he was changing his brokerage affiliation. In all cases, the brokerage customers that chose to invest with Blankenship through Deer Hill believed, due to Blankenship's assurances, that Blankenship was investing their money in established securities such as publicly traded mutual funds or securities. After Blankenship received the customers' funds, Blankenship gave many customers purported "account" statements from Deer Hill that falsely represented that he had invested their money in a variety of investments. In reality, Blankenship did not use the customers' money to purchase the investments as represented. Instead, Blankenship used the customers' money: (1) for his personal expenses; (2) to pay business expenses; and (3) to make Ponzi-like payments to other customers who requested a return of all or part of their investment.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Deer Hill's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act that Respondent Deer Hill be, and hereby is:

barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and

barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

*Commissioner Aguilar
not participating*

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 69644 / May 28, 2013

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3459 / May 28, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15078

In the Matter of

RAJNISH K. DAS,

Respondent.

ORDER MAKING FINDINGS AND
IMPOSING REMEDIAL SANCTIONS
PURSUANT TO RULE 102(e)(3)(i) OF THE
COMMISSION'S RULES OF PRACTICE

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest to issue this Order Making Findings and Imposing Remedial Sanctions pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice against Rajnish K. Das ("Respondent" or "Das") with respect to public administrative proceedings previously instituted against him.¹

II.

In resolution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the

¹ Rule 102(e)(3)(i) provides, in relevant part, that:

The Commission, with due regard to the public interest and without preliminary hearing, may, by order, . . . suspend from appearing or practicing before it any . . . accountant . . . who has been by name . . . permanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating or aiding and abetting the violation of any provision of the Federal securities laws or of the rules and regulations thereunder; or found by any court of competent jurisdiction in an action brought by the Commission to which he or she is a party . . . to have violated . . . or aided and abetted the violation of any provision of the Federal securities laws or rules and regulations thereunder.

Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Sections III.2. and III.3. below, which are admitted, Respondent consents to the entry of this Order Making Findings and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Rajnish K. Das, age 41, is a resident of New York, New York. From approximately September 2003 through January 2006, Das was employed as chief financial officer ("CFO") of infoUSA, Inc. ("Info"), a database marketing company. As CFO, Das signed and certified Info's Forms 10-K which incorporated information from the company's proxy statements. Das was terminated from Info in approximately July 2006. Das has not passed the certified public accountant ("CPA") exam and has not been a licensed CPA. Prior to working at Info, Das was employed with various investment banking firms. Following his employment at Info, Das has owned and operated POM Partners, LLC. Das previously held Series 7 and 63 securities licenses.

2. On May 29, 2012, the U.S. District Court for the District of Nebraska entered a final judgment against Das, permanently enjoining him from future violations, direct or indirect, of Sections 10(b), 13(a), 13(b)(2)(A), 13(b)(2)(B), 13(b)(5), and 14(a) of the Securities Exchange Act of 1934 and Rules 10b-5, 12b-20, 13a-1, 13a-13, 13a-14, 13b2-1, 13b2-2, 14a-3, and 14a-9 thereunder. Securities and Exchange Commission v. Rajnish K. Das, et al., Civil Action Number 8:10-cv-00102-LSC-FG3. In the final judgment, the court declared that Das "acted in bad faith toward shareholders of [Info], when committing the acts and omissions that led to this proceeding, and knew his actions were contrary to the interests of [Info] and its shareholders."

3. Previously, on March 1, 2012, after a trial, a jury for the U.S. District Court for the District of Nebraska, issued a verdict finding Das liable for violations of Sections 10(b), 13(a), 13(b)(2)(A), 13(b)(2)(B), 13(b)(5), 14(a) of the Exchange Act and Rules 10b-5, 12b-20, 13a-1, 13a-13, 13a-14, 13b2-1, 13b2-2, 14a-3, and 14a-9 thereunder. Securities and Exchange Commission v. Rajnish K. Das, et al., Civil Action Number 8:10-cv-00102-LSC-FG3.

4. The Commission's complaint alleged that Das signed and certified Info's false Forms 10-K and proxy statements that materially understated and failed to properly disclose the perquisite compensation of Vinod Gupta, Info's former chief executive officer and Chairman of the Board of Directors, and failed to properly disclose related party transactions involving Gupta. The complaint alleged that for the years 2003 through 2007, Gupta used Info to pay for his personal expenses associated with private jet flights, a yacht, homes, automobiles, credit card expenses, country club memberships, and life insurance policies. As CFO, Das approved Info's payment of Gupta's personal expenses and signed and certified Info's false Forms 10-K for 2003 and 2004 which incorporated information from Info's proxy statements. The complaint also alleged that Das aided and abetted the filing of Info's false Form 10-K for 2005 which incorporated information from Info's proxy statements.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanction agreed to in Respondent Das's Offer.

Accordingly, it is hereby ORDERED, effective immediately, that:

A. Das is suspended from appearing or practicing before the Commission as an accountant.

B. After three years from the date of this order, Respondent may request that the Commission consider his reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as:

1. a preparer or reviewer, or a person responsible for the preparation or review, of any public company's financial statements that are filed with the Commission. Such an application must satisfy the Commission that Respondent's work in his practice before the Commission will be reviewed either by the independent audit committee of the public company for which he works or in some other acceptable manner, as long as he practices before the Commission in this capacity; and/or

2. an independent accountant. Such an application must satisfy the Commission that:

(a) Respondent, or the public accounting firm with which he is associated, is registered with the Public Company Accounting Oversight Board ("Board") in accordance with the Sarbanes-Oxley Act of 2002, and such registration continues to be effective;

(b) Respondent, or the registered public accounting firm with which he is associated, has been inspected by the Board and that inspection did not identify any criticisms of or potential defects in the respondent's or the firm's quality control system that would indicate that the respondent will not receive appropriate supervision;

(c) Respondent has resolved all disciplinary issues with the Board, and has complied with all terms and conditions of any sanctions imposed by the Board (other than reinstatement by the Commission); and

(d) Respondent acknowledges his responsibility, as long as Respondent appears or practices before the Commission as an independent accountant, to comply with all requirements of the Commission and the Board, including, but not limited to, all requirements relating to registration, inspections, concurring partner reviews and quality control standards.

C. The Commission will consider an application by Respondent to resume appearing or practicing before the Commission provided that, if applying under Section IV.B.2. above, his state CPA license is current and he has resolved all other disciplinary issues with the applicable state boards of accountancy. However, if state licensure is dependent on reinstatement by the Commission, the Commission will consider an application on its other merits. For any application for reinstatement, the Commission's review may include consideration of, in addition to the matters referenced above, any other matters relating to Respondent's character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

*Commissioner Aguilar
not participating*

**UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934
Release No. 69645 / May 28, 2013**

**ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3460 / May 28, 2013**

**ADMINISTRATIVE PROCEEDING
File No. 3-15077**

In the Matter of

STORMY L. DEAN,

Respondent.

**ORDER MAKING FINDINGS AND
IMPOSING REMEDIAL SANCTIONS
PURSUANT TO RULE 102(e)(3)(i) OF THE
COMMISSION'S RULES OF PRACTICE**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest to issue this Order Making Findings and Imposing Remedial Sanctions pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice against Stormy L. Dean ("Respondent" or "Dean") with respect to public administrative proceedings previously instituted against him.¹

II.

In resolution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the

¹ Rule 102(e)(3)(i) provides, in relevant part, that:

The Commission, with due regard to the public interest and without preliminary hearing, may, by order, . . . suspend from appearing or practicing before it any . . . accountant . . . who has been by name . . . permanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating or aiding and abetting the violation of any provision of the Federal securities laws or of the rules and regulations thereunder; or found by any court of competent jurisdiction in an action brought by the Commission to which he or she is a party . . . to have violated . . . or aided and abetted the violation of any provision of the Federal securities laws or rules and regulations thereunder.

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Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Sections III.2. and III.3. below, which are admitted, Respondent consents to the entry of this Order Making Findings and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Stormy L. Dean, age 54, is a resident of Ralston, Nebraska. From 1995 through 2008, Dean served in various capacities in the accounting department of infoUSA, Inc. ("Info"), an Omaha-based database marketing company. At Info, Dean served as controller, principal accounting officer, and chief financial officer ("CFO"). Dean was Info's CFO from January 2000 to September 2003, and then again from January 2006 through December 2008. As Info's CFO, Dean signed and certified Info's public filings. Dean passed the certified public accountant ("CPA") examination in 1995 and holds a CPA certificate in the state of Nebraska. Dean has never obtained a CPA license.

2. On May 29, 2012, the U.S. District Court for the District of Nebraska entered a final judgment against Dean, permanently enjoining him from future violations, direct or indirect, of Sections 10(b), 13(a), 13(b)(2)(A), 13(b)(2)(B), 13(b)(5), and 14(a) of the Securities Exchange Act of 1934 and Rules 10b-5, 12b-20, 13a-1, 13a-14, 13b2-1, 13b2-2, 14a-3, and 14a-9 thereunder. Securities and Exchange Commission v. Stormy L. Dean, et al., Civil Action Number 8:10-cv-00102-LSC-FG3. In the final judgment, the court declared that Dean "acted in bad faith toward shareholders of [Info], when committing the acts and omissions that led to this proceeding, and knew his actions were contrary to the interests of [Info] and its shareholders."

3. Previously, on March 1, 2012, after a trial, a jury for the U.S. District Court for the District of Nebraska, issued a verdict finding Dean liable for violations of Sections 10(b), 13(a), 13(b)(2)(A), 13(b)(2)(B), 13(b)(5), 14(a) of the Exchange Act and Rules 10b-5, 12b-20, 13a-1, 13a-14, 13b2-1, 13b2-2, 14a-3, and 14a-9 thereunder. Securities and Exchange Commission v. Stormy L. Dean, et al., Civil Action Number 8:10-cv-00102-LSC-FG3.

4. The Commission's complaint alleged that Dean signed and certified Info's false Forms 10-K and proxy statements that materially understated and failed to properly disclose the perquisite compensation of Vinod Gupta, Info's former chief executive officer and Chairman of the Board of Directors, and failed to properly disclose related party transactions involving Gupta. The complaint alleged that for the years 2003 through 2007, Gupta used Info to pay for his personal expenses associated with private jet flights, a yacht, homes, automobiles, credit card expenses, country club memberships, and life insurance policies. As CFO, Dean approved Info's payment of Gupta's personal expenses and signed and certified Info's false Forms 10-K for 2005 and 2006 which incorporated information from Info's proxy statements. The complaint also alleged that Dean aided and abetted the filing of Info's false Form 10-K for 2003 which incorporated information from Info's proxy statements.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanction agreed to in Respondent Dean's Offer.

Accordingly, it is hereby ORDERED, effective immediately, that:

A. Dean is suspended from appearing or practicing before the Commission as an accountant.

B. After three years from the date of this order, Respondent may request that the Commission consider his reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as:

1. a preparer or reviewer, or a person responsible for the preparation or review, of any public company's financial statements that are filed with the Commission. Such an application must satisfy the Commission that Respondent's work in his practice before the Commission will be reviewed either by the independent audit committee of the public company for which he works or in some other acceptable manner, as long as he practices before the Commission in this capacity; and/or

2. an independent accountant. Such an application must satisfy the Commission that:

(a) Respondent, or the public accounting firm with which he is associated, is registered with the Public Company Accounting Oversight Board ("Board") in accordance with the Sarbanes-Oxley Act of 2002, and such registration continues to be effective;

(b) Respondent, or the registered public accounting firm with which he is associated, has been inspected by the Board and that inspection did not identify any criticisms of or potential defects in the respondent's or the firm's quality control system that would indicate that the respondent will not receive appropriate supervision;

(c) Respondent has resolved all disciplinary issues with the Board, and has complied with all terms and conditions of any sanctions imposed by the Board (other than reinstatement by the Commission); and

(d) Respondent acknowledges his responsibility, as long as Respondent appears or practices before the Commission as an independent accountant, to comply with all requirements of the Commission and the Board, including, but not limited to, all requirements relating to registration, inspections, concurring partner reviews and quality control standards.

C. The Commission will consider an application by Respondent to resume appearing or practicing before the Commission as an independent accountant provided that his state CPA

license is current and he has resolved all other disciplinary issues with the applicable state boards of accountancy. The Commission will consider an application by Respondent to resume appearing or practicing before the Commission as a preparer or reviewer, or a person responsible for the preparation or review, of any public company's financial statements that are filed with the Commission provided that his state CPA license or certificate is current and he has resolved all other disciplinary issues with the applicable state boards of accountancy. However, if state licensure is dependent on reinstatement by the Commission, the Commission will consider an application on its other merits. The Commission's review may include consideration of, in addition to the matters referenced above, any other matters relating to Respondent's character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

May 29, 2013

In the Matter of

Jupiter Enterprises, Inc.,

File No. 500-1

ORDER OF SUSPENSION OF
TRADING

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Jupiter Enterprises, Inc. because it has not filed any periodic reports since the period ended June 30, 2007.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 9:30 a.m. EDT on May 29, 2013, through 11:59 p.m. EDT on June 11, 2013.

By the Commission.

Elizabeth M. Murphy
Secretary

Kevin M. O'Neill
By: Kevin M. O'Neill
Deputy Secretary

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 69650 / May 29, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15336

In the Matter of

Jupiter Enterprises, Inc.,

Respondent.

**ORDER INSTITUTING ADMINISTRATIVE
PROCEEDINGS AND NOTICE OF HEARING
PURSUANT TO SECTION 12(j) OF THE
SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against the respondent named in the caption.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Jupiter Enterprises, Inc. ("JPTR")¹ (CIK No. 1083422) is a revoked Nevada corporation located in Beijing, People's Republic of China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). JPTR is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended June 30, 2007, which reported a net loss of \$62 for the prior three months. As of May 24, 2013, the common stock of JPTR was quoted on OTC Link (formerly "Pink Sheets") operated by OTC Markets Group Inc., had four market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

¹ The short form of the issuer's name is also its ticker symbol.

B. DELINQUENT PERIODIC FILINGS

2. As discussed in more detail above, the Respondent is delinquent in its periodic filings with the Commission, has repeatedly failed to meet its obligations to file timely periodic reports, and, through its failure to maintain a valid address on file with the Commission as required by Commission rules, failed to receive the delinquency letter sent to it by the Division of Corporation Finance requesting compliance with its periodic filing obligations.

3. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports, and Rule 13a-13 requires domestic issuers to file quarterly reports.

4. As a result of the foregoing, the Respondent failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II hereof are true and, in connection therewith, to afford the Respondent an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondent identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of the Respondent.

IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that the Respondent shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If the Respondent fails to file the directed Answer, or fails to appear at a hearing after being duly notified, the Respondent, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of the Respondent, may be deemed in default and the

proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon the Respondent personally or by certified, registered, or Express Mail, or by other means permitted by the Commission Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Secretary

Kevin M. O'Neill
By: Kevin M. O'Neill
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 69648 / May 29, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15335

In the Matter of
China Properties Developments, Inc.,
Respondent.

**ORDER INSTITUTING ADMINISTRATIVE
PROCEEDINGS AND NOTICE OF HEARING
PURSUANT TO SECTION 12(j) OF THE
SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against the respondent named in the caption.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. China Properties Developments, Inc. ("CPDV")¹ (CIK No. 1174741) is a delinquent Colorado corporation located in Xi'an, People's Republic of China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). CPDV is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2010, which reported a net loss of \$1,760,000 for the prior nine months. As of May 24, 2013, the common stock of CPDV was quoted on OTC Link (formerly "Pink Sheets") operated by OTC Markets Group Inc., had three market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

¹ The short form of the issuer's name is also its ticker symbol.

B. DELINQUENT PERIODIC FILINGS

2. As discussed in more detail above, the Respondent is delinquent in its periodic filings with the Commission, has repeatedly failed to meet its obligations to file timely periodic reports, and, through its failure to maintain a valid address on file with the Commission as required by Commission rules, failed to receive the delinquency letter sent to it by the Division of Corporation Finance requesting compliance with its periodic filing obligations.

3. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports, and Rule 13a-13 requires domestic issuers to file quarterly reports.

4. As a result of the foregoing, the Respondent failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II hereof are true and, in connection therewith, to afford the Respondent an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondent identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of the Respondent.

IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that the Respondent shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If the Respondent fails to file the directed Answer, or fails to appear at a hearing after being duly notified, the Respondent, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of the Respondent, may be deemed in default and the

proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon the Respondent personally or by certified, registered, or Express Mail, or by other means permitted by the Commission Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Secretary

Kevin M. O'Neill

By: Kevin M. O'Neill
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

May 29, 2013

In the Matter of

China Properties Developments, Inc.,

File No. 500-1

ORDER OF SUSPENSION OF
TRADING

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of China Properties Developments, Inc. because it has not filed any periodic reports since the period ended September 30, 2010.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 9:30 a.m. EDT on May 29, 2013, through 11:59 p.m. EDT on June 11, 2013.

By the Commission.

Elizabeth M. Murphy
Secretary

Kevin M. O'Neill
By: **Kevin M. O'Neill**
Deputy Secretary

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 69646 / May 29, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15334

In the Matter of

China Environmental Protection, Inc.,

Respondent.

**ORDER INSTITUTING ADMINISTRATIVE
PROCEEDINGS AND NOTICE OF HEARING
PURSUANT TO SECTION 12(j) OF THE
SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against the respondent named in the caption.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. China Environmental Protection, Inc. ("CNVP")¹ (CIK No. 1418475) is a Nevada corporation located in Yixing City, Jiangsu Province, People's Republic of China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). CNVP is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 2011, which reported a net loss of \$6,584,540 for the prior nine months. As of May 24, 2013, the common stock of CNVP was quoted on OTC Link (formerly "Pink Sheets") operated by OTC Markets Group Inc., had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

¹ The short form of the issuer's name is also its ticker symbol.

B. DELINQUENT PERIODIC FILINGS

2. As discussed in more detail above, the Respondent is delinquent in its periodic filings with the Commission, has repeatedly failed to meet its obligations to file timely periodic reports and failed to bring its filings current in response to the delinquency letter sent to it by the Division of Corporation Finance requesting compliance with its periodic filing obligations.

3. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports, and Rule 13a-13 requires domestic issuers to file quarterly reports.

4. As a result of the foregoing, the Respondent failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II hereof are true and, in connection therewith, to afford the Respondent an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondent identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of the Respondent.

IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that the Respondent shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If the Respondent fails to file the directed Answer, or fails to appear at a hearing after being duly notified, the Respondent, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of the Respondent, may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of

which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon the Respondent personally or by certified, registered, or Express Mail, or by other means permitted by the Commission Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Secretary

Kevin M. O'Neill

By: Kevin M. O'Neill
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

May 29, 2013

In the Matter of

China Environmental Protection, Inc.,
File No. 500-1

ORDER OF SUSPENSION OF
TRADING

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of China Environmental Protection, Inc. because it has not filed any periodic reports since the period ended June 30, 2011.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 9:30 a.m. EDT on May 29, 2013, through 11:59 p.m. EDT on June 11, 2013.

By the Commission.

Elizabeth M. Murphy
Secretary

Kevin M. O'Neill
By: **Kevin M. O'Neill**
Deputy Secretary

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 69656 / May 29, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15340

In the Matter of

**Greenstart, Inc.,
Viseon, Inc.,
WMPH 2, Inc. (n/k/a Major League
Poker, Inc.),
WMPH 3, Inc.,
WMPH 4, Inc.,
Zow, Inc., and
51143, Inc.,**

Respondents.

**ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
AND NOTICE OF HEARING
PURSUANT TO SECTION 12(j) OF
THE SECURITIES EXCHANGE ACT
OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents Greenstart, Inc., Viseon, Inc., WMPH 2, Inc. (n/k/a Major League Poker, Inc.), WMPH 3, Inc., WMPH 4, Inc., Zow, Inc., and 51143, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Greenstart, Inc. (CIK No. 1414630) is a Nevada corporation located in Bountiful, Utah with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Greenstart is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the

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period ended September 30, 2009, which reported a net loss of over \$172,000 for the prior nine months.

2. Viseon, Inc. (CIK No. 936130) is a permanently revoked Nevada corporation located in Dallas, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Viseon is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended December 31, 2006, which reported a net loss of over \$1.6 million for the prior six months. As of February 20, 2013, the company's stock (symbol "VSNI") was traded on the over-the-counter markets.

3. WMPH 2, Inc. (n/k/a Major League Poker, Inc.) (CIK No. 1393904) is a revoked Nevada corporation located in Costa Mesa, CA with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). WMPH 2 is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-SB/A registration statement on June 22, 2007, which reported a net loss of \$1,980 between its March 14, 2007 inception and March 31, 2007.

4. WMPH 3, Inc. (CIK No. 1393903) is a revoked Nevada corporation located in San Clemente, CA with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). WMPH 3 is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-SB/A registration statement on June 25, 2007, which reported a net loss of \$1,980 between its March 14, 2007 inception and March 31, 2007.

5. WMPH 4, Inc. (CIK No. 1393902) is a permanently revoked Nevada corporation located in San Clemente, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). WMPH 4 is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-SB/A registration statement on June 25, 2007, which reported a net loss of \$1,980 between its March 14, 2007 inception and March 31, 2007.

6. Zow, Inc. (CIK No. 1081184) is a permanently revoked Nevada corporation located in Fountain Valley, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Zow is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended March 31, 2004.

7. 51143, Inc. (CIK No. 1317834) is a void Delaware corporation located in Santa Clara, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). 51143 is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-KSB for the period ended January 31, 2006, which reported a net loss of \$1,825 for the prior year.

B. DELINQUENT PERIODIC FILINGS

8. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission, have repeatedly failed to meet their

obligations to file timely periodic reports, and failed to heed delinquency letters sent to them by the Division of Corporation Finance requesting compliance with their periodic filing obligations or, through their failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

9. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports, and Rule 13a-13 requires domestic issuers to file quarterly reports.

10. As a result of the foregoing, Respondents failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and/or 13a-13 thereunder.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II hereof are true and, in connection therewith, to afford the Respondents an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that Respondents shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If Respondents fail to file the directed Answers, or fail to appear at a hearing after being duly notified, the Respondents, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents, may be deemed in default and the proceedings may be determined against them upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f),

221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon Respondents personally or by certified, registered, or Express Mail, or by other means permitted by the Commission Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Secretary


By: *Jill M. Peterson*
Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

*Chair White
Commissioner Gallagher
not participating*

SECURITIES EXCHANGE ACT OF 1934
Release No. 69655 / May 29, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15339

In the Matter of

THE NASDAQ STOCK MARKET,
LLC and
NASDAQ EXECUTION SERVICES,
LLC

Respondents.

ORDER INSTITUTING
ADMINISTRATIVE AND CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 19(h)(1) AND 21C OF THE
SECURITIES EXCHANGE ACT OF 1934,
MAKING FINDINGS AND IMPOSING
SANCTIONS AND A CEASE-AND-
DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate in the public interest and for the protection of investors that public administrative proceedings and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 19(h)(1) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against The NASDAQ Stock Market, LLC ("NASDAQ") and NASDAQ Execution Services, LLC ("NES") (together, "Respondents").

II.

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement (the "Offers") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 19(h)(1) and 21C of the Exchange Act, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

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III.

On the basis of this Order and Respondents' Offers, the Commission finds that:

Introduction

1. National securities exchanges, which are registered by the Commission under Section 6 of the Exchange Act, are critical components of the National Market System, which provides the foundation for investor confidence in the integrity and stability of the United States' capital markets. The Exchange Act establishes a regulatory scheme that combines self-regulation by the exchanges with oversight by the Commission. NASDAQ, which is owned and operated by The NASDAQ OMX Group, Inc. ("NASDAQ OMX"), is one of the largest national securities exchanges. NASDAQ executes approximately 15% of U.S. equity securities transactions every day and NASDAQ OMX technology supports the operations of over 70 exchanges, clearing organizations and central securities depositories around the world.

2. More than 2,500 companies are listed on NASDAQ and it is one of the most active exchanges in listing companies that have just held their Initial Public Offering ("IPO"). The orderly initiation of secondary market trading after an IPO is one of the most fundamental functions of a national securities exchange, and affects not only the market for those individual companies but also investor confidence in the markets as a whole. Until trading in a company's security opens on its listing market on the day of its IPO, secondary market trading may not commence on any other market. When initiating an IPO, an exchange has an obligation to ensure that its systems, processes and contingency planning are robust and adequate to manage the IPO without disruption to the market, and that it complies with all rules regarding, among other things, order price and time priority.

3. In April 2012, Facebook, Inc. ("Facebook") announced that it had selected NASDAQ as its listing exchange. The Facebook IPO was widely anticipated to be among the largest in history, with huge numbers of institutional and retail investors expressing interest in participating. On May 18, 2012, the eyes of the investing world were focused on the Facebook IPO. Unfortunately, as a result of a design limitation in NASDAQ's IPO Cross system, neither the IPO itself nor secondary market trading in Facebook proceeded as expected. The decisions made by NASDAQ in response to trading disruptions that resulted from the design limitation led to further downstream systems issues and caused NASDAQ to violate a fundamental rule governing order priority as well as several other Commission and NASDAQ rules.

Respondents

4. NASDAQ is a national securities exchange registered with the Commission pursuant to Section 6 of the Exchange Act. NASDAQ is a Delaware limited liability company and a subsidiary of NASDAQ OMX.

5. NES is a broker-dealer registered with the Commission pursuant to Section 15 of the Exchange Act. NES is a facility and an affiliate of NASDAQ, and provides routing services to NASDAQ.

Facts

A. NASDAQ's Initial Public Offering Cross System Prior to May 18, 2012

6. In a typical IPO on NASDAQ, shares of the issuer are sold by the IPO's underwriters to participating purchasers at approximately midnight and secondary market trading begins later that morning. Secondary trading begins after a designated period – called the “Display Only Period” or “DOP” – during which members¹ can specify the price and quantity of shares that they are willing to buy or sell (along with various other order characteristics), and can also cancel and/or replace previous orders. The DOP usually lasts 15 minutes, although NASDAQ's rules permit the DOP to be extended by up to 30 minutes (in 5 minute intervals) if certain conditions related to the balance of buy and sell orders are met.²

7. At the end of the DOP, NASDAQ's “IPO Cross Application” analyzes all of the buy and sell orders to determine the price at which the largest number of shares will trade and then NASDAQ's matching engine matches buy and sell orders at that price. (The matching of the buy and sell orders is referred to as the “cross.”) The electronic calculation by the IPO Cross Application usually takes approximately one to two milliseconds to complete.

8. NASDAQ's systems ran a “validation check,” which would confirm that the orders in the IPO Cross Application were identical to those in NASDAQ's matching engine. One reason that the orders might not match is because NASDAQ allowed orders to be cancelled at any time up until the end of the DOP – including the very brief interval during which the IPO Cross Application was calculating the price and volume of the cross. If any of the orders used to calculate the price and volume of the cross had been cancelled during the IPO Cross Application's calculation process, the validation check would “fail” and the system would cause the IPO Cross Application to recalculate the price and volume of the cross. The validation check had been in place for NASDAQ's IPO cross process since December 2010, and a similar check had been in place in NASDAQ's market opening and closing cross processes since 2006.

9. This second calculation by the IPO Cross Application, if necessary, incorporated only the first cancellation received during the first calculation, as well as any new orders that were received between the beginning of the first calculation and the receipt of that first cancellation. Thus, if there were multiple orders cancelled during the first IPO Cross Application's calculation, the validation check performed after the second calculation would fail again and the IPO Cross Application would need to be run a third time in order to include the second cancellation, as well as any orders received between the first and second cancellations.

¹ The term “member,” as defined in Section 3(a)(3)(A) of the Exchange Act, includes any registered broker or dealer permitted to effect transactions on an exchange and any person associated with such broker dealers. Only members of NASDAQ can submit orders to NASDAQ.

² Members are permitted to place certain types of buy and sell orders starting at 7 a.m. – before the Display Only Period begins – but such orders are placed in a “holding bin” until the beginning of the Display Only Period.

10. Because the share and volume calculations and validation checks occur in a matter of milliseconds it was usually possible for the system to incorporate multiple cancellations (and intervening orders) and produce a calculation that satisfies the validation check after a few cycles of calculation and validation. However, the design of the system created the risk that if orders continued to be cancelled during each re-calculation, a repeated cycle of validation checks and re-calculations – known as a “loop” – would occur, preventing NASDAQ’s system from: (i) completing the cross; (ii) reporting the price and volume of the executions in the cross (a report known as the “bulk print”); and (iii) commencing normal secondary market trading. This risk was greatest during crosses in which a large volume of orders and cancellations were submitted in rapid succession during the brief period of the cross calculation process.

B. The Facebook IPO

11. The Facebook IPO was one of the largest IPOs in history, and NASDAQ anticipated that the Facebook IPO cross would be the largest IPO cross in its history in terms of the number of orders. The IPO occurred on May 18, 2012, and Facebook’s underwriters selected 11:00 a.m.³ as the time of the cross, which would be followed immediately by the start of secondary trading. As detailed below, however, NASDAQ’s systems experienced several problems related to its efforts to complete the cross and to deliver execution reports (“confirmations”) to its members. The design limitation that led to these problems, and the decisions made by NASDAQ in response to those problems, directly resulted in many of the securities law violations described below.

12. Given the heightened anticipation for the Facebook IPO, NASDAQ took steps during the week prior to the IPO to test its systems in both live trading and test environments. Among other things, NASDAQ conducted intraday test crosses in NASDAQ’s live trading environment, which allowed member firms to place dummy orders in a test security (symbol ZWZZT) during a specified quoting period. NASDAQ limited the total number of orders that could be received in the test security to 40,000 orders. On May 18, 2012, NASDAQ members entered over 496,000 orders into the Facebook IPO cross.

13. At 7:56 a.m. on May 18, NASDAQ announced that the DOP for Facebook would begin at 10:45 a.m., and that secondary trading would begin at approximately 11:00 a.m. At 10:45 a.m., consistent with its normal practice, NASDAQ began providing indicative price and volume information in five second intervals via the Net Order Imbalance Indicator (“NOII”) on its website. The NOII showed the price at which Facebook shares would be traded if the IPO cross occurred at each time interval, and the number of shares (buys and sells) that would be matched in such a cross. NASDAQ also announced indicative pricing and volume information in five minute intervals over a market wide conference call that was open to members during the DOP.

³ All times referred to in this Order are in Eastern Daylight Time.

14. At 10:58 a.m., when the NOII displayed an indicative price of \$43.25, a large market making broker-dealer made a request to Facebook's lead underwriter that NASDAQ extend the DOP by five minutes. The underwriter then made the same request of NASDAQ, and NASDAQ agreed to the extension. Though underwriter requests for extensions are not unusual on NASDAQ, and are referred to in certain of NASDAQ's marketing materials, NASDAQ Rule 4120(c)(7)(C) only permits extensions of the DOP if certain conditions are met with respect to the balance of buy and sell orders received. These conditions were not met at the time that NASDAQ granted the five minute extension on May 18.

i. **The Failed IPO Cross and NASDAQ's Response**

15. At 11:05:10 a.m., NASDAQ attempted to execute the IPO Cross Application and begin secondary market trading in Facebook. The additional ten second delay (after the completion of the five minute extension initiated by Facebook's lead underwriter) was the result of a "randomization" function embedded in NASDAQ's systems that randomly selected a time for the cross during the fifteen seconds after the end of the DOP.

16. While NASDAQ's rules had previously provided for a randomization interval at the conclusion of the DOP, in 2007, NASDAQ filed a rule change removing the randomization period from its rule. Under the version of NASDAQ Rule 4120(c)(7)(B) in effect on May 18, 2012, trading was supposed to commence "immediately" after the end of the DOP. However, the randomization function had never been removed from NASDAQ's systems, and therefore the IPO Cross Application for Facebook – and for all other companies that had an IPO on NASDAQ since August 31, 2007 – was run after a randomized period of delay in contravention of NASDAQ's rules.

17. After the IPO Cross Application determined the price and volume of the cross, the matching engine performed a validation check to confirm that none of the orders on which the price and volume determination were based had been cancelled during the time that the IPO Cross Application was calculating the price and volume of the cross. The time that had elapsed during the price/volume calculation and validation check was 20 milliseconds, which is significantly longer than usual for an IPO cross, which usually takes 1 to 2 milliseconds. This additional length resulted from the larger than normal volume of orders received during the DOP.

18. The validation check found that a cancellation had been received during the calculation and thus the validation check failed. This caused the IPO Cross Application to recalculate the cross price and volume incorporating the cancellation.

19. During this second price/volume calculation, two additional cancellations were received and thus the validation check failed again because the second calculation did not account for those two additional cancellations. However, due to the design of the IPO Cross Application, only the first of those two cancellations was incorporated into a third price/volume calculation, and as a result the validation check failed again. And by the time that the IPO Cross Application had run for the fourth time – thereby including the second of the two cancellations

that came in during the second calculation – an additional cancellation had been received, thereby causing another failure of the validation check.

20. During the next price/volume calculation four more cancellations arrived. And because the system was designed to perform a separate recalculation for each of those cancellations, the validation check failed each time. As it did so, even more cancellations came in, and the system was unable to “catch up” and incorporate the cancellations (and intervening orders) received during each successive price/volume calculation. A loop resulted and prevented NASDAQ’s system from completing the cross, releasing the bulk print, and commencing normal secondary market trading at the scheduled time.

21. When the cross price and volume were not announced and secondary market trading did not commence as expected at 11:05 a.m., several members of NASDAQ’s senior leadership team convened a “Code Blue” conference call to discuss the situation. The participants on the call included, among other senior executives from various disciplines, NASDAQ OMX’s Chief Executive Officer; the Executive Vice-President for Transaction Services (U.S.) (“EVP/Transactions”); the Senior Vice-President for INET, Regulatory, and Data Services (“SVP/INET”); the Senior Vice-President, Equity Market Management and Strategy; the Senior Vice President and Head of Market Regulation for the U.S. Markets operated by NASDAQ; and the Executive Vice President, General Counsel and Chief Regulatory Officer of NASDAQ OMX.

22. A few minutes after the Code Blue call began, software engineers at NASDAQ (the “engineers”) determined that the failure to complete the cross resulted from a problem with the validation check process. The engineers were not then aware of the specific cause of the problem (i.e., the loop caused by the system’s inability to process all of the cancellation requests received during the price/volume calculation); they knew only that the validation check was preventing the cross from being completed. The engineers reported this information to their supervisor, SVP/INET, who relayed it to the other Code Blue call participants. Prior to receiving this report on May 18, the SVP/INET was unaware of the existence of the validation check. EVP/Transactions instructed the SVP/INET to investigate whether there was a way to resolve the problem and complete the cross.

23. First, NASDAQ attempted to change the commands in its IPO Cross system to override the validation check. This attempt was unsuccessful. Next, the engineers reported to the SVP/INET their belief that NASDAQ could complete the cross if it initiated a “failover” to a duplicate version of the matching engine and removed several lines of code that configured the validation check function from the failover system (the “failover system proposal”). This removal of code would allow the failover system to accept the price and volume calculated by the IPO Cross Application and complete the cross, but the cross would not take into account, as a NASDAQ cross typically did following the validation check, cancels received during the brief time interval of the calculation. Although NASDAQ does, as a typical practice, maintain failover systems for its applications, it had not tested for this situation leading up to the Facebook IPO and usually employs failovers as duplicates of its existing systems (for example, when there is a power outage), rather than as the vehicle for launching a new, modified version of those systems.

24. The SVP/INET recommended the failover system proposal to the other participants on the Code Blue call, who then discussed the failover system proposal and identified two related potential collateral consequences. First, during the switch to the failover system, NASDAQ's order ports would be disconnected for a second or less, meaning that NASDAQ's members would have to reconnect, though this very brief interruption was unlikely to have a significant effect on the performance of the IPO. Second, the orders that were cancelled during the IPO Cross Application's price/volume calculation would be included in the cross (instead of being cancelled pursuant to the validation check process). NASDAQ understood at the time that the IPO Cross Application would still give effect to those cancellations, but would do so by causing the exchange itself to take the opposite side of the mismatch caused by the last-moment cancels of orders. As a result, unless the same volume of cancels of buys and sells occurred, NASDAQ would acquire a position in Facebook.⁴ No additional collateral consequences of proceeding with the failover system proposal were discussed, and there was no discussion of cancelling the IPO or postponing it until later in the day on May 18.

25. At approximately 11:25 a.m., within a few minutes of learning of the failover system proposal, the EVP/Transactions approved using the failover system to complete the cross at 11:30 a.m. At that time, no one on the Code Blue call knew the precise cause of the error with the validation check. The EVP/Transactions recognized that this decision would very likely result in NASDAQ and NES assuming an error position in Facebook shares that resulted from the orders corresponding to the cancellations entered during the IPO Cross Application's price/volume calculation. At that time, NASDAQ believed that any such error position would be very small given the short duration (less than a second) of the IPO Cross Application's price/volume calculation.

26. At 11:30:09 a.m.,⁵ NASDAQ initiated the switch to the failover system, completed the cross, and released the bulk print, which showed that 75.7 million Facebook shares traded at \$42. Continuous trading in Facebook shares then commenced on NASDAQ and other exchanges. At the time, NASDAQ's leadership believed that the cross had included all orders entered up until 11:30:09 a.m. (including a small number of orders corresponding to

⁴ Another alternative would have been to inform those members who had entered cancellations during the time between the start of the price/volume calculation and the issuance of the bulk print that their orders had not been successfully cancelled, even though NASDAQ's system had, immediately upon submission, acknowledged these members' cancellations. However, this alternative was not discussed by any of the participants on the Code Blue call.

⁵ The nine second delay in the release of the bulk print from 11:30 a.m. was a result of the same randomization function that had caused the initial attempt to run the IPO Cross Application to occur at 11:05:10 a.m. NASDAQ's use of the "randomization" function was again a violation of its Rule 4120(c)(7)(B).

unsuccessful cancels).⁶ However, NASDAQ had not realized, and did not learn until after 1:50 p.m., that the continuing stream of cancellations and orders from members from 11:05:10 a.m. onward, and the IPO Cross Application's inability to escape the loop caused by the validation check up until the failover, had caused the IPO Cross Application to fall 19 minutes behind the orders received by NASDAQ. As a result, when NASDAQ switched to the failover system at 11:30:09 a.m., the IPO Cross Application calculated the price and volume of the cross based on the orders and cancellations received up until 11:11 a.m. This time discrepancy caused more than 38,000 marketable Facebook orders placed between 11:11 a.m. and 11:30:09 a.m. to not be included in the cross. Approximately 8,000 of those orders were entered into the market at 11:30 a.m. when continuous trading commenced. NASDAQ now refers to the more than 30,000 remaining orders not included in the cross as "stuck" orders. These orders were not only not included in the cross but, as described in paragraph 38 below, were either cancelled or not released to the secondary market for over two hours, causing a violation of NASDAQ's price/time priority rule (Rule 4757(a)(1)) with respect to each of those orders.

27. Immediately prior to the cross, the final indicative pricing and volume totals on NASDAQ's internal systems indicated that the cross would occur at a price of \$42 and with approximately 82 million shares traded. When the bulk print was released, certain NASDAQ executives, including its Senior Vice President and Chief Economist ("Chief Economist"), noticed the approximately 6.3 million share difference between the final indicative volume total (82 million) and the actual volume in the print (75.7 million). This discrepancy indicated to NASDAQ's Chief Economist that there was still a problem with the cross, and that some cross-eligible orders may not have been handled properly in the cross but NASDAQ did not address this issue during the minutes and hours following the cross. In addition, NASDAQ could have run a real-time status check of its applications, which would have indicated that the cross executed at 11:30 a.m. did not include any orders entered after 11:11 a.m.

28. The fact that the IPO Cross Application failed to include 19 minutes of orders in its price/volume calculation also substantially impacted the error position that NASDAQ assumed based on its decision at 11:25 a.m. to eliminate the validation check when it moved to the failover system. Instead of assuming a position covering an imbalance created during the expected fraction of a second between the start and the completion of the cross calculation, NASDAQ ended up assuming a position resulting from the imbalance between buy cancels and sell cancels entered between 11:11 a.m. and 11:30:09 a.m. Because more sell shares than buy shares were cancelled during this period, NASDAQ had a more than 3 million share short position in Facebook that it needed to cover in order to fill the excess buy orders. As detailed further below, as of May 18, 2012, NASDAQ did not have a rule that allowed NASDAQ or NES to assume an error position in any listed security.⁷

⁶ From 11:05 a.m. until 11:30 a.m. NASDAQ members had been able to submit orders and cancellations, although the NOII had not been disseminated every five seconds during that period.

⁷ In April 2012, NASDAQ submitted a proposed rule change to the Commission addressing various circumstances in which NES may assume a position in a listed security in an error

ii. NASDAQ's Failure to Deliver Confirmations for IPO Cross Orders

29. Within seconds of the release of the bulk print at 11:30:09 a.m., NASDAQ learned of an additional problem concerning the Facebook IPO. Based on telephone complaints from its members and its own monitoring of its trading systems, NASDAQ determined that confirmations were not being delivered to members that placed orders into the cross. This meant that NASDAQ members that placed marketable orders in Facebook before 11:30:09 a.m. were not able to determine whether their orders had been included in the cross and, therefore did not know what position they held in Facebook securities.

30. NASDAQ did not realize it at the time, but its inability to deliver confirmations for orders included in the cross resulted from its decision to complete the cross by removing the validation check function from the failover system it used to complete the cross. On NASDAQ's trading system, delivery of confirmations is controlled by the Execution Application ("Execution App"), which communicates with the main order matching system to ensure the accuracy of executions before confirmations are delivered. Following an IPO cross, information concerning all of the orders in the cross is delivered to the Execution App, and the Execution App must reconcile the price and volume of the cross with its view of the total shares that were eligible for the cross before it will deliver confirmations. For the Facebook IPO, the Execution App, having not been affected by the validation loop, viewed orders and cancels up until the time the cross occurred at 11:30:09 a.m. The Execution App was therefore unable to reconcile its share count with the cross as executed, since the cross as executed contained only orders and cancels entered as of 11:11 a.m. Almost immediately after the bulk print was released, the Execution App marked the cross as being in error and did not disseminate confirmations for orders executed in the cross.

31. The Execution App's inability to reconcile its view of the orders eligible for the cross with the share count in the executed cross led to an additional Facebook-related problem concerning NASDAQ's data feeds. In addition to preventing the delivery of confirmations to members, the Execution App's marking the cross in error also prevented accurate quoting data from being delivered to NASDAQ's proprietary feed ("Prop Feed") and the Securities Information Processor quotation data feed ("SIP Quotation Data Feed"). Following the cross, the Prop Feed showed a stale, crossed quote (bid price higher than ask price) for Facebook on the "top of book" because orders from the cross were still appearing in the Prop Feed. However, market participants with access to the Prop Feed could determine the actual best bid and offer on NASDAQ by looking at the "depth of book" and filtering out the obviously incorrect crossed quotes at the top of the book. The SIP Quotation Data Feed showed only the crossed, incorrect top of book quote, although it was marked "non-firm" such that it was not included in the SIP's calculation of the national best bid and offer.

account. NASDAQ was aware on May 18, 2012, that it did not have authority to act in accordance with any rule submitted to, but not yet effective pursuant to Section 19(b) of Exchange Act and Rule 19b-4 thereunder.

32. At approximately 11:35 a.m., the participants on the Code Blue call discussed whether to halt trading in Facebook.⁸ NASDAQ's Rule 4120(a) provides the exchange with the authority to initiate trading halts under various circumstances, including when NASDAQ determines that "extraordinary market activity in the security is occurring." NASDAQ determined not to halt Facebook trading because, in the view of the participants on the Code Blue call, continuous trading was operating normally,⁹ with active trading on NASDAQ and other exchanges. The participants, including the EVP/Transactions, the Head of Market Regulation for the U.S. Markets operated by NASDAQ, and the Senior Vice-President, Equity Market Management and Strategy decided that "extraordinary market activity" was not occurring, and the EVP/Transactions concluded that NASDAQ therefore did not have the authority to halt trading.

33. At the time of this decision, NASDAQ was still not aware that the IPO cross included only orders and cancels entered as of 11:11 a.m., but the Code Blue call participants were aware that the Prop Feed and SIP Quotation Data Feed were not functioning properly and were also aware that IPO cross execution confirmations had not been delivered to members. The participants on the Code Blue call did not know why confirmations for trades executed in the IPO cross were not being delivered to members, but they believed that the problem would be corrected within minutes.

34. After deciding not to halt Facebook trading, NASDAQ began trying to find a way to deliver IPO cross execution confirmations to its members. Over approximately the next half hour, it made two attempts to alter the commands in the Execution App to force it to issue the confirmations, but neither attempt was successful. Despite these failures, NASDAQ never revisited its 11:35 a.m. decision to not halt Facebook trading.

35. At 12:01 p.m., the chief executive of a large market making broker-dealer sent an email to NASDAQ's Chief Executive Officer. The email stated that "since NASDAQ is still unable to send out reports we are all trading blind. Should you stop trading for some period of time so we can all catch up and actually understand our exposure?" The EVP/Transactions, the SVP/INET, and NASDAQ's Executive Vice President, Global Technology Services and Chief Information Officer, received this information at 12:06 p.m., but did not change their view of whether to halt trading in Facebook. As of that time, members had been waiting 36 minutes for their IPO cross execution confirmations, the Prop Feed top of book still showed crossed quotes, and the quotes that NASDAQ sent to the SIP Quotation Data Feed remained stale and crossed.¹⁰

⁸ NASDAQ OMX's Chief Executive Officer had left the Code Blue call after the bulk print appeared to have been executed successfully at 11:30 a.m.

⁹ Following the IPO cross, secondary trading did begin, and NASDAQ members received confirmations for trades resulting from orders they placed after 11:30:09.

¹⁰ At certain times between 11:30 a.m. and 1:50 p.m., NASDAQ changed the crossed quote on the SIP Quotation Data Feed to a zero for both the bid and ask.

36. After failing to force out the confirmations by changing the commands for the Execution App, NASDAQ pursued two separate methods for delivering confirmations. One team of engineers was assigned to create manual execution reports that would list all confirmations for each member and be delivered by email. Another team of engineers was tasked with determining an electronic solution to the Execution App problem. This work was performed between approximately 12:00 p.m. and 1:45 p.m. During this time period, NASDAQ's member call center continued to receive numerous complaints from members who were seeking to determine their position in Facebook securities.

37. At approximately 1:45 p.m., NASDAQ determined that it could configure the Execution App to ignore the IPO Cross Application's error in calculating the volume of the bulk print – essentially bypassing the Execution App's reconciliation of its share total and the bulk print – and thereby deliver confirmations to members. The EVP/Transactions approved this proposal after consulting with the SVP/INET, and NASDAQ alerted members at 1:47 p.m. that it would be delivering electronic confirmation reports at approximately 1:50 p.m.

iii. **NASDAQ's Delivery of Confirmations and its Realization of Additional Problems**

38. At 1:49:49 p.m., NASDAQ delivered to members all confirmation messages for orders executed in the cross. NASDAQ also released into the market or canceled the more than 30,000 cross-eligible "stuck" orders entered between 11:11 a.m. and 11:30:09 a.m., which had not been included in the cross. It was not until 1:49:49 p.m. that members who entered these orders – as well as NASDAQ itself – learned that they had incorrectly not been included in the cross. Further, by not releasing or canceling these stuck orders until approximately 1:50 p.m., NASDAQ violated its own Rule 4757(a)(1) concerning price/time priority. Each of the more than 30,000 "stuck" orders was not given priority over same or worse-priced orders executed in secondary trading between 11:30:09 a.m. and 1:49:49 p.m.

39. Of the more than 30,000 "stuck" orders, approximately 13,000 were released into the secondary market at 1:49:49 (the other "stuck" orders were canceled). The release of these approximately 13,000 orders in the secondary market at approximately 1:50 p.m. altered the composition of the resting order book in Facebook (across all public markets), such that there were orders for approximately 3 million more shares on the sell side. This was the largest sell imbalance in the aggregate order book over the course of the entire trading day, and correlated with a 93-cent decrease in Facebook's share price between 1:50 p.m. and 1:51 p.m. With the delivery of the IPO cross execution confirmations, the Execution App began to function normally again, allowing the Prop Feed to provide accurate top of book information, and the SIP Quotation Data Feed to provide a firm quote for the first time since the IPO cross occurred almost two-and-a-half hours earlier.

40. During the minutes following the delivery of confirmations, NASDAQ, in addition to learning about the "stuck" orders, learned that the systems errors that kept these orders out of the cross had also caused NASDAQ's error position in Facebook to become massively greater than NASDAQ had envisioned at 11:25 a.m. Because substantially more shares in sell orders than in buy orders had been cancelled between 11:11 a.m. and

11:30:09 a.m., NASDAQ assumed a short position of more than 3 million Facebook shares that was valued at approximately \$129 million. After learning the size and direction of its position, NASDAQ quickly contacted its designated non-affiliated third-party broker with instructions to fully cover the position by buying Facebook shares.¹¹ Because Facebook's share price had sunk since the IPO cross, NASDAQ profited by approximately \$10.8 million from trading in Facebook shares through its error account.¹²

41. As of May 18, 2012, NASDAQ's rules did not permit it or its affiliated broker-dealer, NES, to assume an error position in a listed security for any reason, and it therefore was also not permitted to engage in trading to cover any position it did assume.

42. As a result of NES's error account activity on May 18, 2012, NES experienced a net capital deficiency of approximately \$26.5 million in violation of Exchange Act Section 15(c)(3) and Rule 15c3-1 thereunder.¹³ This deficiency resulted from the requirement that NES take a haircut of \$35.3 million due to its error account activity related to the Facebook IPO. Prior to the haircut, NES's excess net capital was approximately \$8.8 million.

iv. **Problems in Zynga Trading Caused by NASDAQ's Facebook Issues on May 18, 2012**

43. On May 18, 2012, trading in Zynga was halted twice pursuant to NASDAQ Rule 4120(a)(11), after Zynga's share price moved more than 10% in a five-minute window. The first Zynga halt occurred at 11:37 a.m., with Zynga stock trading at \$7.15. Under Rule 4120(a)(11), trading was to resume after a halt cross at 11:42 a.m.¹⁴ However, NASDAQ uses the IPO Cross Application for halt crosses as well as IPO crosses, and the IPO Cross Application – which had

¹¹ NASDAQ also instructed the third-party broker to sell a long position that NASDAQ assumed in Zynga, Inc. ("Zynga") as a result of the problems associated with trading in Zynga that were caused by the issues surrounding the Facebook IPO. See paragraph 43, below.

¹² NASDAQ announced on May 21, 2012 that it would contribute the \$10.8 million in profits from its May 18, 2012 Facebook trading towards funding an accommodation policy. In a rule filing dated July 26, 2012, NASDAQ voluntarily proposed a \$62 million accommodation program to compensate certain members for their losses in connection with the Facebook IPO. On March 22, 2013, the Commission approved NASDAQ's proposed accommodation policy as consistent with the requirements of the Exchange Act. See Exchange Act Rel. No. 69216 (March 22, 2013), 60 F.R. 19040 (March 28, 2013).

¹³ NASDAQ, acting on behalf of NES, reported this deficiency to the Commission and FINRA in accordance with Exchange Act Rule 17a-11.

¹⁴ A "halt cross" is analogous to the IPO cross and is the process by which NASDAQ determines the price at which a security in which trading has been halted on NASDAQ will start continuous trading again. See NASDAQ Rule 4753(a)(3).

fallen behind the pace of Facebook orders by 19 minutes – was still occupied with orders from the Facebook IPO cross.

44. Thus, when NASDAQ was finally able to issue the bulk print for Zynga and resume continuous trading at 12:27 p.m., the IPO Cross Application had only processed orders received between 11:37 a.m. and 11:55 a.m. And, as with the more than 30,000 orders in the Facebook IPO cross, approximately 365 cross-eligible orders in Zynga that were received between 11:55 a.m. and 12:27 p.m. were processed in violation of NASDAQ's price-time priority rules. Those orders were not placed into the continuous trading book for Zynga and confirmations for orders executed in the halt cross were not sent out to members until approximately 1:50 p.m.

45. At 12:29 p.m. – just two minutes after Zynga trading had resumed on NASDAQ and other markets – the halt threshold was crossed again when Zynga's share price moved more than 10% (from \$7.18 to \$7.81), and trading was halted once more. Following this second halt of Zynga trading, NASDAQ violated its Rule 4120(c)(7)(A), which requires NASDAQ to have a five minute DOP prior to terminating any halt. NASDAQ knew that the DOP would require the proper functioning of the Execution App which at the time had still not disseminated IPO cross execution confirmations for the Facebook IPO cross or the Zynga halt cross. Therefore, not knowing how long those issues would remain unresolved, NASDAQ decided to end the second halt at 1:35 p.m. without any DOP.

C. NASDAQ's Failure to Comply with Regulations NMS and SHO in October 2011

46. Rule 611 of Regulation NMS requires, subject to certain exceptions, that trading centers establish, maintain, and enforce written policies and procedures reasonably designed to prevent "trade-throughs" in NMS stocks. Trade-throughs are the purchases or sales of NMS stocks at prices inferior to the national best bid (for sell orders) or the national best offer (for buy orders). In order to comply with Rule 611, NASDAQ, among other things, employs an application within its trading systems called "Trade Through," which automatically cancels non-displayed sell orders priced at or below the national best bid, and non-displayed buy orders priced at or above the national best offer, for a covered security.

47. Rule 201 of Regulation SHO requires trading centers to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the execution or display of a short sale order of covered securities (as defined by Regulation SHO) at a price that is less than or equal to the current national best bid if the price of that covered security decreases by ten percent or more from the covered security's closing price from the prior day (as determined by the listing market for the covered security). Rule 201 requires that this short sale price test restriction remain in force for the remainder of the day and the following day.

48. In order to comply with the short sale price test requirements of Rule 201 of Regulation SHO, NASDAQ, as a trading center, employs an application within its trading systems called "SHO Through," which automatically cancels non-displayed short sale orders priced at or below the national best bid for a covered security if the covered security has decreased at least ten percent from the prior day's closing price.

49. NASDAQ's efforts to prevent trade-throughs and to comply with the Regulation SHO price test are based in part on its continuous calculation of the current national best bid and offer ("NBBO") for each security traded on the exchange. On October 7, 2011, NASDAQ modified the data sources that were used to calculate its trading system's view of the NBBO. Specifically, NASDAQ began calculating the NBBO based on both the prices contained in the publicly reported SIP Quotation Data Feed as well as data that it received directly from certain trading centers.

50. However, in implementing this modification, NASDAQ's technology team erroneously altered the configuration files used by the application that computes the NBBO. As a result, the Trade Through and SHO Through applications ceased operating since they were not receiving the underlying NBBO data that allowed them to cancel or reprice orders that violated the price tests in Rule 611 of Regulation NMS and Rule 201 of Regulation SHO. After becoming aware of this problem as a result of a member complaint, NASDAQ implemented a change to ensure that the affected applications began receiving the data as of 12:55 p.m. on October 10, 2011.

51. NASDAQ self-reported this incident to the Commission staff on October 19, 2011. In November 2011, NASDAQ informed the Commission staff that it had reviewed trading on the exchange on October 7 and 10, 2011 and determined that the exchange's incorrect determination of the NBBO on those dates had resulted in approximately 595 short sale executions at prices that were less than or equal to the then-current national best bid, but that there had been no trade-throughs as a result of the data feed modification. However, in January 2012, NASDAQ determined that 2,004 trade-throughs had occurred on those dates (although NASDAQ did not report this finding to the Commission staff until September 2012).

D. Problems with NASDAQ's Regulation SHO Compliance Systems in August 2012

52. On the evening of Friday, August 10, 2012, NASDAQ installed an upgrade to its trading systems. This system upgrade – which did not relate to the SHO Through application – was implemented by an information technology employee in NASDAQ's Operations Center. This employee misinterpreted the instructions associated with the upgrade and assumed that the SHO Through application was not needed and could be removed from the system. As a result, the employee removed the SHO Through application. According to NASDAQ's internal protocols for implementing changes to its trading systems, a second Operations Center employee was responsible for checking the work of the employee who implemented the upgrade. However, this second employee also misinterpreted the upgrade instructions to mean that the SHO Through application could be removed. Neither of these Operations Center employees had compliance responsibilities and, at the time, their implementation of systems upgrades was not overseen by employees who were familiar with regulatory and compliance requirements.

53. On the morning of August 13, 2012, while running the daily configuration test for the exchange's trading systems, Operations Center personnel received a system alert based on the fact that the SHO Through application was no longer part of the system. Operations Center personnel acknowledged the alert but continued with the startup processes because they also

thought the SHO Through application could be removed. As a result, there were no further alerts regarding the missing SHO Through application.

54. Trading continued on NASDAQ without the SHO Through application until the morning of August 21, 2012, when a member inquired about a short sale order resting on NASDAQ's order book. This led NASDAQ to determine that the SHO Through application had been removed, after which the application was re-installed and NASDAQ alerted the market that resting non-displayed short sale orders may have been executed in violation of Regulation SHO Rule 201. The next day, NASDAQ officially notified the Commission staff of the issue.

55. The inadvertent removal of the SHO Through application, which was discovered as a result of a member inquiry, affected 3,820 executions (of 1,745,623 shares) in 92 separate securities between August 13 and August 21, 2012. These trades were all executed at prices that were less than or equal to the then-current national best bid in securities that had decreased more than ten percent from the prior day's closing price.

Violations

56. In determining to accept the Offers, the Commission has considered the remedial efforts and initiatives undertaken by NASDAQ and determined that at this time it is not in the public interest to impose limitations upon the activities, functions, or operations of NASDAQ pursuant to Section 19(h)(1) of the Exchange Act.

A. Section 19(g)(1) of the Exchange Act

57. Section 19(g)(1) of the Exchange Act requires every exchange to comply with the provisions of the Exchange Act, the rules and regulations thereunder, and its own rules, and, absent reasonable justification or excuse, to enforce compliance by its members with such provisions. Article IX, Section 5 of NASDAQ's Bylaws grants NASDAQ the authority to take action in an emergency to fulfill its mandate under the Exchange Act. While trading disruptions arising from internal technology problems may in certain circumstances constitute an emergency justifying the invocation of Article IX, Section 5 of NASDAQ's Bylaws, the Commission finds that the events of May 18, 2012 within NASDAQ did not constitute such an emergency.

58. NASDAQ violated Section 19(g)(1) of the Exchange Act by not complying with several of its own rules on May 18, 2012. These rules violations included:

- a. NASDAQ failed to comply with its own Rule 4757(a)(1) when it failed to execute equally priced or better priced trading interest in Facebook in price/time priority. As detailed above, more than 30,000 Facebook orders placed before the IPO Cross were not included in the Cross and were "stuck" in NASDAQ's trading system until approximately 1:50 p.m. on May 18. Between the IPO Cross and 1:50 p.m., equally or worse priced Facebook orders placed after the IPO Cross received price/time priority over the "stuck" orders in violation of Rule 4757(a)(1).

- b. Similarly, approximately 365 Zynga orders placed between 11:55 a.m. and 12:27 p.m. were not accorded proper price/time priority in accordance with Rule 4757(a)(1).
- c. NASDAQ's rules did not permit it to engage in activities in relation to its error account. As detailed above, NASDAQ assumed an error position of more than 3 million Facebook shares valued at almost \$129 million and traded these shares in its error account through NES to close the position, resulting in profits of approximately \$10.8 million.
- d. NASDAQ failed to comply with its own Rule 4120(c)(7) in three respects on May 18:
 - i. NASDAQ failed to immediately initiate trading in Facebook at the conclusion of the DOP, as required by Rule 4120(c)(7)(B). NASDAQ's use of a randomization period, which was removed from this rule in August 2007, delayed secondary trading after the end of the DOP by approximately nine seconds. NASDAQ likewise failed to comply with this rule during every other IPO between August 2007 and January 2013, using a randomization period at the end of the DOP in each instance.
 - ii. NASDAQ agreed to extend the DOP for Facebook by five minutes at the request of Facebook's lead underwriter. An underwriter request is not a permitted justification for extending the DOP. Rule 4120(c)(7) allows such extensions only if NASDAQ detects a liquidity imbalance in the security at the end of the DOP.
 - iii. NASDAQ reopened trading in Zynga at approximately 1:35 p.m. on May 18, following the second circuit-breaker-related Zynga halt on that day, without first initiating a five minute DOP, as is required by Rule 4120(c)(7).

B. Regulation SHO

59. As detailed above in paragraphs 46 to 55, on nine separate trading days in October 2011 and August 2012, NASDAQ's actions resulted in the disabling of its SHO Through application, which is the application through which NASDAQ effects compliance of the price test requirements of Rule 201 of Regulation SHO. The disabling of the application resulted in over 4,400 short sales that did not comply with the price test.

60. As noted above in paragraph 47, Rule 201(b) requires trading centers to establish, maintain, and enforce written policies and procedures reasonably designed to ensure compliance with the price test rule of Rule 201. Because the SHO Through application was not operational during these nine trading days, NASDAQ, as a trading center, was not maintaining and enforcing policies and procedures for compliance with the Rule 201 price test. In addition, because the inoperative SHO Through application was only uncovered through a member complaint,

NASDAQ, as a trading center, was not carefully and adequately monitoring for Rule 201 compliance. Accordingly, NASDAQ's conduct violated Rule 201(b) of Regulation SHO.

C. Regulation NMS

61. As noted above in paragraph 46, Rule 611 of Regulation NMS requires, subject to certain exceptions, that trading centers establish, maintain, and enforce written policies and procedures reasonably designed to prevent "trade-throughs" in NMS stocks.

62. As detailed above in paragraphs 49 through 51, between October 7 and 10, 2011, NASDAQ's Trade Through application, through which NASDAQ effects compliance with Rule 611, was effectively disabled and therefore NASDAQ was not enforcing its policies and procedures with respect to trade-throughs. Accordingly, NASDAQ's conduct violated Rule 611 of Regulation NMS.

D. Section 15(c)(3) of the Exchange Act and Rule 15c3-1 Thereunder

63. A broker-dealer violates Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder when it uses the mails, or any means or instrumentality of interstate commerce, to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than exempt securities) while not maintaining its required minimum net capital.

64. As detailed above in paragraph 42, NES violated Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder on May 18, 2012, as a result of its handling of its error account activity related to the Facebook IPO, which caused a net capital deficiency for NES of approximately \$26.5 million.

Respondents' Remedial Efforts

In determining to accept the Offers, the Commission considered remedial acts undertaken by Respondents and cooperation afforded the Commission staff.

Undertakings

Respondents have undertaken to implement the following measures, many of which have already been completed:

65. NASDAQ will make technical changes to its IPO/Halt Crosses, and to its Opening and Closing Crosses, designed to prevent a recurrence of the persistent recalculation problem that affected the Facebook IPO. For IPO and Halt Crosses, NASDAQ will close its order ports to new Cross orders and cancels of orders in the security involved in the Cross after the calculation of the Cross is triggered. For Opening and Closing Crosses, NASDAQ will change its system to take into account bursts of changes to orders that would affect the result of the Cross in one recalculation of the Cross rather than in multiple recalculations. For all types of crosses, NASDAQ will also enhance the system log entry that results from a failed Cross

validation check to give NASDAQ more data about the failed validation, and therefore greater insight into the nature of the problem.

66. NASDAQ will amend NASDAQ Rule 4120 to provide for a randomization interval at the conclusion of the DOP in an IPO Cross.

67. NASDAQ will amend NASDAQ Rule 4120 to provide for an underwriter-requested extension of the DOP for an IPO Cross.

68. NASDAQ will implement additional automated and operational processes for monitoring compliance with Regulation NMS and Regulation SHO. These include: a new Regulation SHO alert that detects any non-exempt short sale execution that executes at a price equal to or below the best current bid price potentially violating Rule 201 of Regulation SHO, and that operates independently of NASDAQ's trading system; a new automated tool for regulatory and operational staff to monitor trade-throughs on an hourly basis; new procedures for ensuring that proper closing price values are used for Regulation SHO enforcement; and new procedures for ensuring that applications that receive market data for purposes of Regulation NMS and Regulation SHO are receiving market data.

69. NES will revise its written supervisory procedures pertaining to moment-to-moment net capital to ensure compliance with net capital requirements.

70. NASDAQ will enhance its technology change process by, among other things: expanding and formalizing participation by stakeholders across NASDAQ – including technology, business, legal, and regulatory personnel – in the product development lifecycle to promote greater transparency and communication, and enhanced supervision, in the design, deployment, project management, and approval phases. NASDAQ will adopt a Global Change Management Policy that formalizes the role and responsibility of its Change Approval Board, which includes technology, business, and legal personnel, the formal requirements to request a change, and unified standards for documenting change development and implementation.

71. NASDAQ will expand the scope of its Regulatory Group's coverage of the rules governing NASDAQ's trading platforms. NASDAQ will also expand and formalize the role of the group in the technology change process such that, among other things, the Group participates in daily software change review discussions, participates in the initial project planning phase for all major trading system software changes, and must approve all major trading system software changes before they are implemented into production.

72. NASDAQ will deploy new standardized global change management software to provide technology personnel a unified single view into changes made throughout the NASDAQ enterprise, and enhanced risk management capability and expedited incident response/management.

73. NASDAQ will dedicate a system and performance engineering team to daily monitoring and analysis of system performance, and will establish a new quality assurance organization reporting to the Senior Vice President, Market Systems, NASDAQ OMX, to focus on integration of testing of trading systems.

74. When NASDAQ's Chief Executive Officer concludes that, to the best of his or her knowledge based on reasonable inquiry, NASDAQ and NES have achieved all of the Undertakings set forth in this Order, he or she shall certify, in writing, compliance with the Undertakings set forth above. Such certification shall be reviewed and accepted for filing by the Board of Directors of NASDAQ. The certification shall identify the Undertakings, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and Respondent agrees to provide such evidence. The certification and supporting material shall be submitted to Amelia A. Cottrell, Assistant Director, Market Abuse Unit, New York Regional Office, with a copy to the Office of Chief Counsel of the Enforcement Division, no later than sixty (60) days from the date of the completion of the undertakings, or, in any event, no later than December 31, 2013.

IV.

In view of the foregoing, the Commission deems it appropriate, in the public interest and for the protection of investors to impose the sanctions agreed to in Respondents' Offers.

Accordingly, pursuant to Section 19(h)(1) and 21C of the Exchange Act, it is hereby ORDERED that:

- A. Respondent NASDAQ cease and desist from committing or causing any violations and any future violations of Section 19(g)(1) of the Exchange Act, Rule 201(b) of Regulation SHO, and Rule 611(a) of Regulation NMS.
- B. Respondent NES cease and desist from committing or causing any violations and any future violations of Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder.
- C. Respondents NASDAQ and NES are censured.
- D. Respondent NASDAQ shall, within ten (10) days of the entry of this Order, pay a civil money penalty in the amount of \$10 million to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717. Payment must be made in one of the following ways: (1) Respondent NASDAQ may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request; (2) Respondent NASDAQ may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or (3) Respondent NASDAQ may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying NASDAQ as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Sanjay Wadhwa, Division of Enforcement, Securities and Exchange Commission, New York Regional Office, 3 World Financial Center, Room 400, New York, New York 10281.

- E. Respondents shall comply with the undertakings enumerated above.

By the Commission.

Elizabeth M. Murphy
Elizabeth M. Murphy
Secretary



UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

May 30, 2013

In the Matter of

Lanbo Financial Group, Inc.,
File No. 500-1

ORDER OF SUSPENSION OF
TRADING

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Lanbo Financial Group, Inc. because it has not filed any periodic reports since the period ended September 30, 2005.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 9:30 a.m. EDT on May 30, 2013, through 11:59 p.m. EDT on June 12, 2013.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 69662 / May 30, 2013

ADMINISTRATIVE PROCEEDING

File No. 3-15341

In the Matter of

Lanbo Financial Group, Inc.,

Respondent.

**ORDER INSTITUTING ADMINISTRATIVE
PROCEEDINGS AND NOTICE OF HEARING
PURSUANT TO SECTION 12(j) OF THE
SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against the respondent named in the caption.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Lanbo Financial Group, Inc. ("LNBO")¹ (CIK No. 1061819) is a revoked Nevada corporation located in Xi'an, People's Republic of China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). LNBO is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2005. As of May 24, 2013, the common stock of LNBO was quoted on OTC Link (formerly "Pink Sheets") operated by OTC Markets Group Inc., had four market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

¹ The short form of the issuer's name is also its ticker symbol.

B. DELINQUENT PERIODIC FILINGS

2. As discussed in more detail above, the Respondent is delinquent in its periodic filings with the Commission, has repeatedly failed to meet its obligations to file timely periodic reports, and, through its failure to maintain a valid address on file with the Commission as required by Commission rules, failed to receive the delinquency letter sent to it by the Division of Corporation Finance requesting compliance with its periodic filing obligations.

3. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports, and Rule 13a-13 requires domestic issuers to file quarterly reports.

4. As a result of the foregoing, the Respondent failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II hereof are true and, in connection therewith, to afford the Respondent an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondent identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of the Respondent.

IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that the Respondent shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If the Respondent fails to file the directed Answer, or fails to appear at a hearing after being duly notified, the Respondent, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of the Respondent, may be deemed in default and the

proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon the Respondent personally or by certified, registered, or Express Mail, or by other means permitted by the Commission Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

*Commissioner Gallagher
not participating*

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3613 / May 30, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15342

In the Matter of

JOHN ALEXANDER GRANT,

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 203(f) OF THE
INVESTMENT ADVISERS ACT OF 1940,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted against John A. Grant ("Respondent") pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940 as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

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1. John A. ("Jack") Grant, age 70, is a resident of Yarmouth Port, Massachusetts. He is and has been an attorney licensed to practice in the Commonwealth of Massachusetts.

2. On May 20, 2013, a final judgment was entered by consent against Jack Grant, permanently enjoining him from future violations of Sections 206(1) and 206(2) of the Advisers Act, in the civil action entitled Securities and Exchange Commission v. John A. Grant, et al., Civil Action Number 1:11-CV-11583, in the United States District Court for Massachusetts. Jack Grant was also ordered to pay \$50,000 in disgorgement plus prejudgment interest of \$1,392.27, and a \$150,000 civil penalty.

3. The Commission's complaint, filed on September 1, 2011, alleged that in 1988, the Commission obtained a permanent injunction against Jack Grant based on his sale of unregistered securities and misappropriation of investor funds. The Commission then issued an order barring Jack Grant from associating with a broker-dealer, investment adviser, investment company, or municipal securities dealer. It further alleged that since at least the mid-1990s, Jack Grant violated the Commission's bar order by providing investment advice for compensation, including advising clients to place their assets with First Wilshire Securities Management, Inc., and advising them to place their investment using his son Lee Grant, who worked first at First Wilshire itself, then at Wedbush Morgan Securities, and, since 2005, as the founder and sole owner of Sage Advisory Group LLC ("Sage"). Jack Grant is alleged to have continued to provide investment advice for compensation through 2011, advising individuals and small businesses on the management of their assets and investments, and associating with Sage, his son's investment advisory firm. The complaint alleges that Jack Grant, Lee Grant, and Sage did not disclose to Sage's advisory clients that Jack Grant is barred from associating with an investment adviser. In addition, Lee Grant and Sage are alleged not to have disclosed Jack Grant's disciplinary history in Sage's application for investment adviser registration on Form ADV.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanction agreed to in Respondent's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 203(f) of the Advisers Act that John A. Grant be, and hereby is, barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a

customer, whether or not related to the conduct that served as the basis for the Commission order;
and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct
that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: **Jill M. Peterson**
Assistant Secretary

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9406 / May 30, 2013

SECURITIES EXCHANGE ACT OF 1934
Release No. 69668 / May 30, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-14974

In the Matter of

LEWIS J. HUNTER,

Respondent.

**ORDER PURSUANT TO SECTION 8A OF
THE SECURITIES ACT OF 1933, AND
SECTIONS 15(b) AND 21C OF THE
SECURITIES EXCHANGE ACT OF 1934
AND SECTION 9(B) OF THE
INVESTMENT COMPANY ACT, MAKING
FINDINGS AND IMPOSING REMEDIAL
SANCTIONS AND A CEASE-AND-DESIST
ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that an order be issued in this matter pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), and Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), and Section 9(b) of the Investment Company Act against Lewis J. Hunter ("Respondent" or "Hunter").

II.

Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order pursuant to Section 8A of the Securities Act of 1933, Sections 15(b) and 21C of the Securities Exchange Act of 1934, and Section 9(b) of the Investment Company Act, Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

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III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

A. Lewis J. Hunter was a registered representative with registered broker-dealer HD Vest when he misappropriated \$304,000 from brokerage customers by promising guaranteed returns in both foreign and domestic bank investments. In reality, Hunter used the funds to pay for personal and business expenses. Hunter concealed his actions by making false and misleading representations to his clients, including fabricating bank documents that purported to memorialize investments.

B. In or around September 2010 and February 2011, Hunter recommended an investment in a Canadian bank to two long-time, elderly clients (collectively, Victim 1). Hunter repeatedly assured Victim 1 that the investment was guaranteed. Hunter provided Victim 1 with two Guaranteed Investment Certificates ("GICs"), totaling the \$250,000 investment in a Canadian bank. The GICs were purportedly issued by HSBC Bank Canada and guaranteed monthly interest payments of 15% for two years. In reality, Hunter did not make the investment with HSBC Bank Canada, as he had represented to Victim 1. Instead, Hunter fabricated what purported to be documentation of the GICs and used Victim 1's funds to pay for various personal and business expenses. In addition, Hunter used the funds to make interest payments to Victim 1 pursuant to the GICs and repay a personal loan that Victim 1 had made with Hunter.

C. In August 2010, Hunter recommended that a long-time, elderly client (Victim 2), make an investment in US Bank, which Hunter guaranteed would not lose any money. Based on Hunter's representations, Victim 2 provided Hunter with \$54,000 for use in another investment in US Bank. Hunter, however, never invested Victim 2's money in US Bank or any other investment. Instead, Hunter used the funds to pay personal and business expenses, including personal loan repayments to Victim 1.

D. Respondent admits to the jurisdiction of the Commission over him and over the matters set forth in the Order;

E. Respondent consents to the issuance of the Order by the Commission, without otherwise admitting or denying the findings set forth in the Order; and

Based on the above, the Commission finds that the Respondent willfully violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

IV.

In view of the foregoing, the Commission deems it appropriate, and for the protection of investors, to impose the sanctions agreed to in Respondent Hunter's Offer.

Accordingly, pursuant to Section 8A of the Securities Act, and Sections 15(b) and 21C of the Securities Exchange Act, and Section 9(b) of the Investment Company Act, it is hereby ORDERED that:

A. Respondent Hunter cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

B. Respondent Hunter be, and hereby is:

barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, nationally recognized statistical rating organization, or participating in an offering of a penny stock;

prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter; and,

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

C. Respondent shall, within one year of entry of this Order, pay disgorgement of \$295,875 and prejudgment interest of \$19,297.84, for a total of \$315,172.84. Also, Respondent shall, within one year of the entry of this Order, pay a civil penalty in the amount of \$150,000.

Therefore, Respondent shall pay the total of disgorgement, prejudgment interest, and civil penalty due of \$465,172.84 in four installments to the Commission according to the following schedule:

- (1) \$116,293.21 within 90 days of the entry of this Order;
- (2) \$116,293.21 within 180 days of the entry of this Order;
- (3) \$116,293.21 within 270 days of the entry of this Order;
- (4) \$116,293.21 within 360 days of the entry of this Order.

Payments shall be deemed made on the date they are received by the Commission. If Respondent fails to make any payment by the agreed installment dates and/or in the agreed amounts according to the schedule set forth above, all outstanding payments under this Order, minus any payments made, shall become due and payable immediately at the discretion of the staff of the Commission. Interest shall not accrue if timely payments are made in accordance with the schedule above; however, interest shall begin to accrue upon failure to comply in any way with the schedule above, in accordance with SEC Rule of Practice 600 and 31 U.S.C. 3717.

Payment must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Lewis J. Hunter as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to David Peavler, Associate Director, Division of Enforcement, Securities and Exchange Commission, Fort Worth Regional Office, 801 Cherry Street, Suite 1900, Fort Worth, Texas 76102.

D. Such civil money penalty may be distributed pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended ("Fair Fund distribution"). Regardless of whether any such Fair Fund distribution is made, amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, he shall not argue that he is entitled to, nor shall he benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that he shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil

penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

*Commissioner Gallagher
not participating*

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 69667 / May 30, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15343

In the Matter of

JOHN ALEXANDER GRANT,

Respondent.

**ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO RULE 102(e) OF THE
COMMISSION'S RULES OF PRACTICE,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted against John A. Grant ("Respondent") pursuant to Rule 102(e)(3)(i)(A) of the Commission's Rules of Practice.¹

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

¹ Rule 102(e)(3)(i)(A) provides, in relevant part, that:

The Commission, with due regard to the public interest and without preliminary hearing, may, by order, . . . suspend from appearing or practicing before it any attorney . . . who has been by name . . . permanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating or aiding and abetting the violation of any provision of the Federal securities laws or of the rules and regulations thereunder.

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III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. John A. ("Jack") Grant, age 70, is a resident of Yarmouth Port, Massachusetts. He is and has been an attorney licensed to practice in the Commonwealth of Massachusetts.

2. On May 20, 2013, a final judgment was entered by consent against Jack Grant, permanently enjoining him from future violations of Sections 206(1) and 206(2) of the Advisers Act, in the civil action entitled Securities and Exchange Commission v. John A. Grant, et al., Civil Action Number 1:11-CV-11583, in the United States District Court for Massachusetts. Jack Grant was also ordered to pay \$50,000 in disgorgement plus prejudgment interest of \$1,392.27, and a \$150,000 civil penalty.

3. The Commission's complaint, filed on September 1, 2011, alleged that in 1988, the Commission obtained a permanent injunction against Jack Grant based on his sale of unregistered securities and misappropriation of investor funds. The Commission then issued an order barring Jack Grant from associating with a broker-dealer, investment adviser, investment company, or municipal securities dealer. It further alleged that since at least the mid-1990s, Jack Grant violated the Commission's bar order by providing investment advice for compensation, including advising clients to place their assets with First Wilshire Securities Management, Inc., and advising them to place their investment using his son Lee Grant, who worked first at First Wilshire itself, then at Wedbush Morgan Securities, and, since 2005, as the founder and sole owner of Sage Advisory Group LLC ("Sage"). Jack Grant is alleged to have continued to provide investment advice for compensation through 2011, advising individuals and small businesses on the management of their assets and investments, and associating with Sage, his son's investment advisory firm. The complaint alleges that Jack Grant, Lee Grant, and Sage did not disclose to Sage's advisory clients that Jack Grant is barred from associating with an investment adviser. In addition, Lee Grant and Sage are alleged not to have disclosed Jack Grant's disciplinary history in Sage's application for investment adviser registration on Form ADV.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanction agreed to in Respondent's Offer.

Accordingly, it is hereby ORDERED, effective immediately, that John A. Grant is suspended from appearing or practicing before the Commission as an attorney.

By the Commission.

Elizabeth M. Murphy
Secretary

By: 
Jill M. Peterson
Assistant Secretary

*Commissioner Gallagher
Disapproved*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9407 / May 30, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15344

In the Matter of

Scuderi Group, Inc.
and Salvatore Scuderi

Respondents.

**ORDER INSTITUTING CEASE-AND-DESIST
PROCEEDINGS PURSUANT TO SECTION
8A OF THE SECURITIES ACT OF 1933,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS AND A CEASE-
AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), against Scuderi Group, Inc. ("Scuderi Group") and Salvatore Scuderi ("Mr. Scuderi") (collectively, "Respondents").

II.

In anticipation of the institution of these proceedings, Respondents have each submitted an Offer of Settlement (the "Offers") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondents' Offers, the Commission finds that:

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Summary

These proceedings arise out of unregistered, non-exempt stock offerings and misleading disclosures regarding the use of offering proceeds by Scuderi Group and Mr. Scuderi, the company's president. Between 2004 and 2011, Scuderi Group sold more than \$80 million worth of securities through offerings that were not registered with the Commission and did not qualify for any of the exemptions from the Securities Act's registration requirement. The company's private placement memoranda informed investors that Scuderi Group intended to use the proceeds from its offerings for "general corporate purposes, including working capital." In fact, the company was making significant payments to Scuderi family members for non-corporate purposes, including, large, ad hoc bonus payments to Scuderi family employees to cover personal expenses; payments to family members who provided no services to Scuderi; loans to Scuderi family members that were undocumented, with no written interest and repayment terms; large loans to fund \$20 million personal insurance policies for six of the Scuderi siblings for which the company has not been, and will not be, repaid; and personal estate planning services for the Scuderi family. Between 2008 and 2011, a period when Scuderi Group sold more than \$75 million in securities despite not obtaining any revenue, Mr. Scuderi authorized more than \$3.2 million in Scuderi Group spending on such purposes.

Respondents

1. At all times relevant to this Order, Scuderi Group's predecessor entity did business as The Scuderi Group, LLC, a private, family-run company based in Massachusetts. Since its original formation in 2002, Scuderi Group has been in the business of developing an internal combustion engine that uses "split cycle" and "air hybrid" technologies to reduce fuel consumption and the emission of pollution. Scuderi Group's business plan is to develop, patent, and license its engine technology to automobile companies and other large engine manufacturers. In January 2013, Respondent Scuderi Group re-incorporated itself as a Delaware corporation named Scuderi Group, Inc.

2. Respondent Salvatore Scuderi is the President and Chief Financial Officer of Scuderi Group. He has led the company's capital raises, prepared its offering memoranda, and signed every Scuderi Group Form D filing since 2002. Mr. Scuderi, 60 years old, is a resident of Westfield, Massachusetts.

Background of Scuderi Group's Unregistered Offerings

3. Founded in 2002, Scuderi Group has been in the business of developing a new internal combustion engine design. Scuderi Group's business plan is to develop, patent, and license its engine technology to automobile companies and other large engine manufacturers. Scuderi Group, which considers itself a development stage company, has not generated any revenue.

4. Scuderi Group has funded its operations by raising \$80 million from individual investors and investment clubs from 2002 to 2012. Scuderi Group raised these funds through at least six offerings in which it sold "preferred units" to at least 415 investors. Scuderi Group never

registered any of its offerings with the Commission, claiming that they were exempt under Securities Act Section 4(2) and/or the Regulation D Rule 504 or 506 safe harbors. In fact, Scuderi Group's offerings failed to qualify for the registration exemptions because Scuderi Group made offerings that substantially exceeded the Regulation D investor limits; failed to provide investors audited financial statements; and, at Mr. Scuderi's direction, engaged in a plan to evade the registration requirements.

Scuderi Group Exceeded the Regulation D Investor Limits

5. Scuderi Group's private placement memoranda (PPMs) and subscription agreements with investors reflect the following sales of Scuderi Group preferred units during the period 2004-2012:

PPM Date	Date of First Sale in Offering	Date of Last Sale in Offering
January 2004	January 2004	October 2005
July 2004	September 2004	December 2004
January 2005	December 2004	July 2008
December 2005	July 2005	August 2006
December 2007	January 2008	July 2010
January 2010	February 2010	July 2012

6. In connection with these offerings, Scuderi Group disseminated more than 3,000 PPMs to potential investors, directly and through third parties. Scuderi Group found these potential investors by, among other things, conducting hundreds of roadshows across the U.S.; hiring a registered broker-dealer to find investors; and paying numerous intermediaries to encourage people to attend meetings that Scuderi Group arranged for potential investors.

7. Although ostensibly comprised of discrete offerings, Scuderi Group's offers and sales of securities constituted one integrated offering. Scuderi Group conducted, in essence, one continuous offering for over eight years, from January 2004 through July 2012.

8. Scuderi Group sold its preferred units pursuant to a single plan of financing. Scuderi Group funded its research, operations, and marketing exclusively through the sale of these units. Scuderi Group's stock sales have been for the same general purpose the company identified in 2002: building business by developing patents; building a working engine prototype; negotiating licensing agreements; and expanding corporate operations. The company has always sold the same class of securities and received cash consideration for the vast majority of its shares.

9. Scuderi Group's own documents reflect that, in total, over 90 of the company's investors were non-accredited investors, which exceeded the Regulation D Rule 506 limit of 35 non-accredited investors when the offerings are integrated.

10. Scuderi Group engaged in several practices that improperly reduced the number of non-accredited investors recorded on its books. In connection with its 2007 and 2010 offerings, Scuderi Group only avoided exceeding Regulation D's limit of 35 non-accredited investors by facilitating the formation of investment entities created for the purpose of investing in the company. Mr. Scuderi reviewed operating agreements and investor subscription questionnaires subsequently used by the supposedly independent investment entities. In one instance, Scuderi Group sold more than \$3.8 million in preferred units to three non-accredited "Air Hybrid Investment" clubs whose operating agreements said they were "organized to invest in the Scuderi Group" and provided a "one to one equivalency between a unit in [the club] and a [Scuderi Group] unit. . ." Scuderi Group tallied only the three non-accredited clubs on its shareholder list, even though more than 140 individual investors purchased company preferred units through the clubs.

11. In addition, Scuderi Group repeatedly sold stock to multiple tenants in common while recording only one owner of record. Scuderi Group also classified more than a dozen investors as accredited even though they had submitted documents indicating they were non-accredited investors.

Scuderi Group Fails to Provide Investors Audited Financial Statements

12. Issuers of more than \$1 million in securities can only obtain the Regulation D registration exemption if they provide non-accredited investors audited financial statements material to their investment. Scuderi Group never obtained audited financial statements or balance sheets and never provided them to its non-accredited investors. This would have been material to investors because audited financial statements would have revealed that Scuderi Group engaged in significant related-party transactions; including, among other things, loans to Scuderi family members, without documented interest or repayment terms, and payments to family members who were not employees.

13. As a result of the conduct described above, Scuderi Group and Mr. Scuderi committed violations of Sections 5(a) and 5(c) of the Securities Act, which prohibits the offer or sale of securities without a registration statement in effect or an exemption from registration.

Scuderi Group Fails to Comply with Rule 503 of Regulation D

14. Scuderi Group failed to comply with Rule 503 by making inaccurate statements in five Forms D filed with the Commission. In Forms D filed in January 2008 and April 2008, Scuderi Group incorrectly stated that it had not sold any securities to non-accredited investors in connection with those offerings. In Forms D filed in February 2005, December 2005, and February 2010, Scuderi Group incorrectly stated that the company had not sold securities to any investors as of the filing dates.

15. Scuderi Group also failed to comply with Rule 503 by failing to file Forms D within fifteen days of the first sale of securities in connection with the company's January 2005 and December 2005 offerings and failing to file an amended Form D in February 2011 for an offering that had continued for a year.

Background of Scuderi Group's Materially Misleading Disclosures

16. Scuderi Group and Mr. Scuderi made materially misleading disclosures regarding the use of offering proceeds. In PPMs dated December 21, 2007 and January 25, 2010 that Mr. Scuderi prepared, Scuderi Group said that it planned to use the net proceeds from the offerings "for general corporate purposes, including working capital." The PPMs provided that Scuderi Group could pay management bonuses at the discretion of its Board of Directors. Scuderi Group sold securities pursuant to these PPMs from 2008 to 2012, raising approximately \$75 million. Scuderi Group's disclosures gave investors the misleading impression that the company would use the offering proceeds only for the direct benefit of the company. Instead, at Mr. Scuderi's direction, Scuderi Group used a material portion of the proceeds for the direct benefit of the Scuderi family.

17. Scuderi Group's disclosures were materially misleading because they failed to inform investors that the company, at Mr. Scuderi's direction, had been, and was planning to continue, using a significant portion of the proceeds from securities offerings to make large, ad hoc bonus payments to Scuderi family employees to cover personal expenses; payments to family members who provided no services to the company; loans to Scuderi family members, without documented interest or repayment terms; large loans to fund \$20 million personal "split-dollar" insurance policies for six of the Scuderi siblings for which the company has not been, and will not be, repaid; and personal estate planning services for the Scuderi family. Scuderi Group did not have a Board of Directors; all payments were made at Mr. Scuderi's sole direction. In total, from 2008 to 2011, Scuderi Group, at Mr. Scuderi's direction, used \$3.2 million, or 4.3% percent, of the offering proceeds to personally benefit the Scuderi family over and above the usual compensation that the Scuderi family employees received.

Scuderi Group Fails to Disclose Payments and Loans to Family Members

18. Seven Scuderi family members who were Scuderi Group employees received \$2.9 million in salaries in 2008 to 2011. Though the company had not generated any revenue, between 2008 and 2011, Mr. Scuderi authorized the issuance of hundreds of checks totaling \$1.6 million as ad hoc bonuses to Scuderi family members who were Scuderi Group employees to cover personal expenses.

19. In addition, between 2008 and 2011, Mr. Scuderi directed that Scuderi Group make payments totaling more than \$330,000 to his mother, the widow of Scuderi Group founder, Carmelo Scuderi. Scuderi Group had no legal or contractual obligation to make any of these payments. She was not a Scuderi Group employee, and she provided no services to the company.

20. Between 2008 and 2011, Mr. Scuderi also directed that Scuderi Group make payments totaling \$240,000 to one of his brothers. Scuderi Group had no legal or contractual obligation to make any payments to this brother. During this period, this brother was not an active Scuderi Group employee, and he provided no services to the company.

21. At Mr. Scuderi's direction, Scuderi Group also made over \$500,000 in loans to Scuderi family employees in 2010. These loans were issued without documented interest or repayment terms. None of these loans has been repaid, in whole or in part.

Scuderi Group Fails to Disclose Insurance and Estate Planning Payments

22. At Mr. Scuderi's direction, Scuderi Group made additional loans that enabled Mr. Scuderi and five of his siblings to pay monthly premiums on \$20 million "split-dollar" life insurance policies whose beneficiaries were the Scuderi siblings' personal trusts. These arrangements provided that the company would be repaid upon the death of an insured, at which time the insurer would make a payment to the beneficiary and the beneficiary would repay the loan they received from the company. Scuderi Group and Mr. Scuderi failed to disclose that the company lent more than \$605,000 for premiums on insurance policies for Scuderi family members where the only collateral for the loans was the policies themselves.

23. After the Scuderi Group subsequently canceled their policies, it lost all the value of its insurance loans when the company decided to stop paying the tens of thousands of dollars in monthly premiums required to protect its collateral by keeping the policies active until the insureds died.

24. In addition, Scuderi Group, at Mr. Scuderi's direction, paid more than \$230,000 in trust and estate planning expenses for six Scuderi family members, one of whom never worked for the company.

25. As a result of the conduct described above, Scuderi Group and Mr. Scuderi committed violations of Section 17(a)(2) of the Securities Act, which in the offer or sale of securities prohibits obtaining money or property by means of any untrue statement of a material

fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

Undertakings

Respondent Scuderi Group undertakes to:

26. In connection with any future offerings or sales of securities, disclose to potential investors all compensation or payments made to any known Scuderi family member in the preceding calendar year.

27. Within 15 days of the date the Order is approved by the Commission, inform every known holder of Scuderi Group securities of the settlement between the Commission, Scuderi Group, and Mr. Scuderi and provide them with a URL where they can review a copy of the Order.

28. In connection with all loans provided by Scuderi Group to any known Scuderi family member, memorialize in writing all loan terms including the amount, duration, interest rate, repayment terms, and recourse or collateral available to Scuderi Group in the event of non-payment.

29. Certify, in writing, compliance with the undertakings set forth above. The certification shall identify the undertakings, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and Respondents agree to provide such evidence. The certification and supporting material shall be submitted to Rami Sibay, with a copy to the Office of Chief Counsel of the Enforcement Division, no later than sixty (60) days from the date of the completion of the undertakings.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondents' Offers.

Accordingly, pursuant to Section 8A of the Securities Act, it is hereby ORDERED that:

A. Respondents Scuderi Group and Mr. Scuderi shall cease and desist from committing or causing any violations and any future violations of Sections 5(a), 5(c) and 17(a)(2) of the Securities Act.

B. Respondent Mr. Scuderi shall pay a civil money penalty in the amount of \$100,000 to the Commission. Payment shall be made according to the following schedule: (1) \$25,000, within 20 days from the entry of this Order; (2) \$25,000, within 180 days from the entry of this Order; (3) \$25,000 within 270 days from the entry of this Order; and (4) \$25,000 within 365 days from the entry of this Order. Payments shall be deemed made on the date they are received by the Commission and shall be applied first to post-Order interest, which accrues pursuant to 31 U.S.C. §

3717 on any unpaid amounts due after 30 days from the entry of this Order. Prior to making the final payment set forth herein, Respondent Mr. Scuderi shall contact the staff of the Commission for the amount due for the final payment.

If Respondent Mr. Scuderi fails to make any payment by the date agreed and/or in the amount agreed according to the schedule set forth above, all outstanding payments under this Order, including post-Order interest, minus any payments made, shall become due and payable immediately at the discretion of the staff of the Commission without further application. Payment must be made in one of the following ways:

- (1) Respondent Mr. Scuderi may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (2) Respondent Mr. Scuderi may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Salvatore Scuderi as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Stephen L. Cohen, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549-5521.

C. Pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended, the Commission may order that any civil money penalty paid by Mr. Scuderi be used to create a Fair Fund for the benefit of injured investors. If the Commission does not create a Fair Fund, the Commission will order the transfer of any civil money penalty paid by Mr. Scuderi to the United States Treasury in accordance with Section 21F(g) of the Securities Exchange Act of 1934 for the Investor Protection Fund. Regardless of whether any such Fair Fund distribution is made, amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent Mr. Scuderi agrees that in any Related Investor Action, he shall not argue that he is entitled to, nor shall he benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that he shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action"

means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

D. Respondent Scuderi Group shall comply with the undertakings enumerated in Section III. above.

By the Commission.

Elizabeth M. Murphy
Elizabeth M. Murphy
Secretary