

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-90378; S7-16-20)

Notice of Substituted Compliance Application submitted by the Bundesanstalt für Finanzdienstleistungsaufsicht in connection with Certain Requirements Applicable to Security-Based Swap Entities subject to regulation in the Federal Republic of Germany; Proposed Order

AGENCY: Securities and Exchange Commission.

ACTION: Notice of application for substituted compliance determination; proposed order.

SUMMARY: The Securities and Exchange Commission (“Commission” or “SEC”) is soliciting public comment on an application by the Bundesanstalt für Finanzdienstleistungsaufsicht (“BaFin”) requesting that, pursuant to rule 3a71-6 under the Securities Exchange Act of 1934 (“Exchange Act”), the Commission determine that registered security-based swap dealers and registered major security-based swap participants (“SBS Entities”) that are not U.S. persons and that are subject to certain regulation in the Federal Republic of Germany (“Germany”) may comply with certain requirements under the Exchange Act via compliance with corresponding requirements of Germany and the European Union. The Commission also is soliciting comment on a proposed Order providing for the conditional availability of substituted compliance in connection with the application.

DATES: Submit comments on or before December 8, 2020.

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>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-16-20 on the subject line.

Paper comments:

- Send paper comments to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-16-20. 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/proposed.shtml>). Comments are also 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. All comments received will be posted without change. Persons submitting comments are cautioned that the Commission does not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Carol M. McGee, Assistant Director or Laura Compton, Senior Special Counsel at 202-551-5870, Office of Derivatives Policy, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-7010.

SUPPLEMENTARY INFORMATION: The Commission is soliciting public comment on an application by BaFin requesting that the Commission determine that SBS Entities that are not U.S. persons and that are subject to certain regulation in Germany may satisfy certain requirements under the Exchange Act by complying with comparable requirements in Germany including relevant European Union ("EU") requirements. The Commission also is soliciting

comment on a proposed Order, set forth in Attachment A, providing for the conditional availability of substituted compliance in connection with that application.

I. Background

A. Substituted compliance under Exchange Act rule 3a71-6

1. Potential scope of availability

Exchange Act rule 3a71-6 conditionally provides that non-U.S. SBS Entities may satisfy certain requirements under Exchange Act section 15F by complying with comparable regulatory requirements of a foreign jurisdiction.¹ This substituted compliance framework does not constitute exemptive relief, but instead provides an alternative method by which non-U.S. SBS Entities may comply with applicable U.S. requirements.² The non-U.S. SBS Entities accordingly would remain subject to the relevant requirements under section 15F, and the Commission would retain the authority to inspect, examine and supervise those SBS Entities' compliance and take enforcement action as appropriate.³

¹ On August 6, 2021, market participants will begin to count security-based swap positions toward the thresholds for registration with the Commission as a security-based swap dealer or major security-based swap participant. See Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital and Segregation Requirements for Broker-Dealers, 84 FR 43872, 53954 (Aug. 22, 2019); see also Rule Amendments and Guidance Addressing Cross-Border Application of Certain Security-Based Swap Requirements, 85 FR 6270, 6345-49 (Feb. 4, 2020).

² “[I]n the Commission’s view, the potential for substituted compliance will help to promote the effective application of Title VII requirements, by making it less likely that certain market participants that are complying with comparable foreign requirements will determine that they need to choose between modifying their business conduct systems to reflect the requirements of U.S. rules, or else limiting or ceasing their participation in the U.S. market.” Exchange Act Release No. 77617 (Apr. 14, 2016), 81 FR 29960, 30074 (May 13, 2016) (“Business Conduct Adopting Release”).

³ The Commission has the authority to bring an enforcement action against a non-U.S. SBS Entity for failure to comply with applicable requirements under the Exchange Act if the firm has failed to comply with the corresponding foreign requirements. See also section VII.B.3. of this release.

Substituted compliance potentially is available in connection with section 15F requirements regarding: (1) business conduct and supervision⁴; (2) chief compliance officers⁵; (3) trade acknowledgment and verification⁶; (4) capital⁷; (5) margin⁸; (6) recordkeeping and reporting⁹; and (7) portfolio reconciliation, portfolio compression and trading relationship documentation.¹⁰

Substituted compliance is not available for antifraud prohibitions and information-related requirements under section 15F.¹¹ Substituted compliance under rule 3a71-6 also does not

⁴ See Exchange Act rule 3a71-6(d)(1) (providing that substituted compliance generally is available in connection with the business conduct and supervision requirements of Exchange Act sections 15F(h) and (j) and Exchange Act rules 15Fh-3 through 15Fh-6). But see note 11, infra (addressing the fact that substituted compliance does not extend to section 15F antifraud prohibitions and information-related requirements).

⁵ See Exchange Act rule 3a71-6(d)(2) (providing that substituted compliance is available in connection with the chief compliance officer requirements of Exchange Act section 15F(k) and Exchange Act rule 15Fk-1).

⁶ See Exchange Act rule 3a71-6(d)(3) (providing that substituted compliance is available in connection with the trade acknowledgment and verification requirements of Exchange Act section 15F(i) and Exchange Act rule 15Fi-2).

⁷ See Exchange Act rule 3a71-6(d)(4)(i) (providing that substituted compliance is available in connection with the security-based swap dealer capital requirements of Exchange Act section 15F(e)).

⁸ See Exchange Act rule 3a71-6(d)(5)(i) (providing that substituted compliance is available in connection with the security-based swap dealer margin requirements of Exchange Act section 15F(e)).

⁹ See Exchange Act rule 3a71-6(d)(6) (providing that substituted compliance is available in connection with the recordkeeping and reporting requirements of Exchange Act section 15F and Exchange Act rules 18a-5 through 18a-9).

¹⁰ See Exchange Act rule 3a71-6(d)(7) (providing that substituted compliance is available in connection with the portfolio reconciliation, portfolio compression, and trading relationship documentation requirements of Exchange Act section 15F(i) and Exchange Act rules 15Fi-3 through 15Fi-5).

¹¹ See Exchange Act rule 3a71-6(d)(1) (specifying that substituted compliance is not available in connection with the antifraud provisions of Exchange Act section 15F(h)(4)(A) and Exchange Act rule 15Fh-4(a), and the information-related provisions of Exchange Act sections 15F(j)(3) and 15F(j)(4)(B)).

extend to certain other provisions of the Exchange Act that apply to security-based swap transactions.¹² SBS Entities in Germany accordingly must comply directly with those requirements, as applicable, regardless of whether the Commission grants the present application.

2. Prerequisites to substituted compliance

a. Comparability of regulatory outcomes

As a prerequisite to substituted compliance, rule 3a71-6 provides that the Commission must determine that the analogous foreign requirements are “comparable” to the applicable requirements under the Exchange Act, after accounting for factors that 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 authority.¹³

In making those assessments, the Commission has explained that it will “endeavor to take a holistic approach in considering whether regulatory requirements are comparable . . . and will

Substituted compliance also is not available for security-based swap dealer registration requirements pursuant to Exchange Act sections 15F(a) and (b).

¹² Substituted compliance under rule 3a71-6 accordingly is not available in connection with security-based swap dealer requirements such as: (a) additional antifraud prohibitions (see Exchange Act section 10(b), Exchange Act rule 10b-5, and Securities Act of 1933 section 17(a)); (b) requirements related to transactions with counterparties that are not eligible contract participants (“ECPs”) (see Exchange Act section 6(l); Securities Act of 1933 section 5(e)); (c) segregation of customer assets (see Exchange Act section 3E; Exchange Act rule 18a-4); (d) required clearing upon counterparty election (see Exchange Act section 3C(g)(5)); (e) regulatory reporting and public dissemination (see generally Regulation SBSR, 17 CFR 242.900 et seq.); and (f) registration of offerings (see Securities Act of 1933 section 5).

¹³ Exchange Act rule 3a71-6(a)(2)(i).

focus on the comparability of regulatory outcomes rather than predicating substituted compliance on requirement-by-requirement similarity.”¹⁴

b. Memorandum of understanding

Rule 3a71-6 also predicates substituted compliance on the Commission entering into a supervisory and enforcement memorandum of understanding and/or other arrangement with the relevant foreign financial regulatory authority “addressing supervisory and enforcement cooperation and other matters arising under the substituted compliance determination.”¹⁵ The Commission and BaFin are in the process of negotiating a memorandum of understanding to address cooperation matters related to substituted compliance.¹⁶

¹⁴ See Business Conduct Adopting Release, 81 FR at 30078 (further recognizing 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, and that in assessing comparability the Commission may need to take into account the manner in which other regulatory systems are informed by business and market practices in those jurisdictions”). The Commission added that its assessment of a foreign authority’s supervisory and enforcement effectiveness – as part of the broader comparability analysis – would be expected to consider not only overall oversight activities, but also oversight specifically directed at conduct and activity relevant to the substituted compliance determination. “For example, it would be difficult for the Commission to make a comparability determination in support of substituted compliance 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.” *Id.* at 30079 (footnote omitted).

¹⁵ Exchange Act rule 3a71-6(a)(2)(ii). The Commission has explained that this prerequisite “should help ensure that both regulators will cooperate with each other within the substituted compliance framework, such that both regulators have information that will assist them in fulfilling their respective regulatory mandates.” Business Conduct Adopting Release, 81 FR at 30074-75.

¹⁶ The Commission and BaFin will need to have in place a current memorandum of understanding or other arrangement addressing matters related to substituted compliance before the Commission may issue a final order allowing Covered Entities to use substituted compliance to satisfy obligations under the Exchange Act. The Commission expects to publish any such memorandum of understanding or other arrangement on its website at www.sec.gov under the “Substituted Compliance” tab located on the “Security-Based Swap Markets” page.

c. “Adequate assurances”

Finally, rule 3a71-6 states that a foreign regulatory authority may submit a substituted compliance application only if the authority provides “adequate assurances” that no law or policy would impede the ability of any entity that is directly supervised by the authority and that may register with the Commission “to provide prompt access to the Commission to such entity’s books and records or to submit to onsite inspection or examination by the Commission.”¹⁷ In the Commission’s preliminary view, BaFin has satisfied this prerequisite as of the date of the application.¹⁸

B. Commission rule 0-13 and publication of notice for comment

Commission rule 0-13 addresses procedures for filing substituted compliance applications, and provides that the Commission will publish notice when a completed application has been submitted. The rule further provides that any person may submit to the Commission “any information that relates to the Commission action requested in the application.”¹⁹

¹⁷ Exchange Act rule 3a71-6(c)(3) (also stating that for applications by market participants – rather than by foreign regulatory authorities – each applicant must provide the certification and opinion of counsel related to Commission access that is described in the registration application provisions of Exchange Act rule 15Fb2-4(c)). The Commission has explained that this prerequisite (and its analogue for applications submitted by market participants) should promote efficiency by focusing substituted compliance assessments on those jurisdictions that are capable of allowing the Commission to have the requisite access to registered entities. “In other words, if a jurisdiction has blocking statutes or other laws or policies that would preclude the registration of such dealers and major participants with the Commission, there would be no purpose to the Commission considering a substituted compliance application in connection with that jurisdiction.” Business Conduct Adopting Release, 81 FR at 30081.

¹⁸ This took into account information and representations that BaFin provided regarding certain German and EU requirements that are relevant to the Commission’s ability to inspect, and access the books and records of, security-based swap dealers in Germany.

¹⁹ See Commission rule 0-13(h). That paragraph adds that the Commission may take final action on a substituted compliance application no earlier than 25 days following publication of the notice in the Federal Register.

II. Germany's Substituted Compliance Request

BaFin has submitted a completed substituted compliance application to the Commission.²⁰ Pursuant to rule 0-13, the Commission is publishing notice of the application together with a proposed Order to conditionally grant substituted compliance to certain German SBS Entities in connection with certain requirements under the Exchange Act. The Commission will consider public comments on BaFin's application and the proposed Order.

BaFin's application seeks substituted compliance for German market participants in connection with a number of requirements under Exchange Act section 15F.

A. Relevant market participants

The Commission will consider whether to make substituted compliance available to any entity that: (i) is registered with the Commission as a security-based swap dealer or major security-based swap participant; (ii) is not a U.S. person; (iii) has been authorized by BaFin as an investment firm or credit institution; and (iv) is subject to relevant German and EU financial regulatory requirements and to supervision and enforcement by BaFin in connection with its security-based swap activity.

B. Relevant section 15F requirements

BaFin requests that the Commission issue an order determining that – for substituted compliance purposes – applicable requirements in Germany are comparable with the following requirements under Exchange Act section 15F:

²⁰ See Letter from Elisabeth Roegele, Chief Executive Director of Securities Supervision and Deputy President, BaFin, to Vanessa Countryman, Secretary, Commission, dated Nov. 6, 2020 ("BaFin Application"). The application is available on the Commission's website at: <https://www.sec.gov/files/germany-BaFin-complete-application-substituted-compliance-11062020.pdf>.

Risk control requirements – Requirements related to internal risk management systems, trade acknowledgment and verification, portfolio reconciliation and dispute resolution, portfolio compression and trading relationship documentation.²¹

Internal supervision, chief compliance officer and additional section 15F(j) requirements – Requirements related to diligent supervision and chief compliance officers, as well as requirements related to conflicts of interest and information gathering under Exchange Act section 15F(j).²²

Counterparty protection requirements – Requirements related to disclosure of material risks and characteristics and material incentives or conflicts of interest, disclosure of daily marks, fair and balanced communications, disclosure of clearing rights, “know your counterparty” and suitability of recommendations.²³

Recordkeeping, reporting, and notification requirements – Requirements related to making and keeping current certain prescribed records, the preservation of records, reporting, and notification.²⁴

²¹ See part IV, *infra*.

²² See part V, *infra*.

²³ See part VI, *infra*. BaFin is not requesting substituted compliance in connection with: eligible contract participant (“ECP”) verification requirements (Exchange Act section 15F(h)(3)(A) and Exchange Act rule 15Fh-3(a)(1)); “special entity” provisions (Exchange Act sections 15F(h)(4)-(5) and Exchange Act rules 15Fh-3(a)(2)-(3), 15Fh-4(b) and 15Fh-5); and political contribution provisions (Exchange Act rule 15Fh-6).

²⁴ See part VII, *infra*. The application does not seek substituted compliance with respect to capital or margin requirements. The Commission does not administer or oversee capital and margin requirements for prudentially regulated SBS Entities. The Commission has preliminarily determined to focus its analysis on the recordkeeping, reporting, and notification requirements that apply to prudentially regulated SBS entities and is deferring consideration of requirements that apply to non-prudentially regulated SBS Entities until it receives an application seeking substituted compliance for capital and margin requirements. The Commission is seeking commenters’ views on this issue below.

C. Comparability considerations and proposed Order

Because Germany is a member of the European Union, market participants in Germany are subject to German regulations implemented pursuant to EU directives, and to applicable EU

regulations. Those include requirements related to: organization, compliance and conduct²⁵; risk-mitigation²⁶; prudential matters²⁷; and certain other matters relevant to the application.²⁸

²⁵ Relevant elements of the EU’s Markets in Financial Instruments Directive (“MiFID”), Directive 2014/65/EU, have been implemented in Germany via amendments to the Securities Trading Act – Wertpapierhandelsgesetz (“WpHG”). MiFID and WpHG address, *inter alia*, organizational, compliance and conduct requirements applicable to nonbank “investment firms.” In significant part, those requirements also apply to credit institutions that provide investment services or perform investment activities. *See* MiFID art. 1(3); WpHG sec. 2(10) (WpHG definition of “investment services enterprises”). Commission Delegated Regulation (EU) 2017/565 (“MiFID Org Reg”) in part supplements MiFID with respect to organizational requirements for firms. The Markets in Financial Instruments Regulation (“MiFIR”), Regulation (EU) 648/2012, generally addresses trading venues and transparency. Commission Delegated Directive (EU) 2017/593 (“MiFID Delegated Directive”) in part supplements MiFID with regard to safeguarding client property, and in Germany is implemented in relevant part by the WpHG. Directive (EU) 2015/849 (“MLD”) addresses requirements on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and in Germany has been implemented by the Money Laundering Act – Geldwäschegesetz (“GwG”).

²⁶ The European Market Infrastructure Regulation (“EMIR”), Regulation (EU) 648/2012, in part imposes certain risk-mitigation requirements on counterparties in connection with uncleared OTC transactions. Delegated Regulation (EU) 149/2013 (“EMIR RTS”) supplements EMIR with various regulatory technical standards, including standards addressing confirmations, portfolio reconciliation, portfolio compression and dispute resolution. Delegated Regulation (EU) 2016/2251 (“EMIR Margin RTS”) further supplements EMIR with regulatory technical standards related to risk mitigation techniques.

²⁷ The EU’s Capital Requirements Directive IV (“CRD”), Directive 2013/36/EU has been adopted in Germany via amendments to the Banking Act – Gesetz über das Kreditwesen (“KWG”). CRD and KWG set forth prudential requirements and certain related requirements applicable to credit institutions and certain nonbank investment firms. Certain CRD requirements regarding reporting obligations have been incorporated into German law by the Finanzdienstleistungsaufsichtsgesetz (“FinDAG”). The Capital Requirements Regulation (“CRR”), Regulation (EU) 575/2013 further addresses prudential requirements and related recordkeeping requirements for credit institutions and certain investment firms. Commission Implementing Regulation (EU) 680/2014 (“CRR Reporting ITS”) sets forth implementing technical standard regarding supervisory reporting. Pursuant to amendments that will become effective in June 2021, the requirements of CRD and the CRR will apply to credit institutions and to certain nonbank undertakings (that carry on activities involving dealing, portfolio management, investment advice and underwriting/placing) that meet specified thresholds (*e.g.*, consolidated assets of €30 billion or more). *See generally* Investment Firms Regulation (“IFR”), Regulation (EU) 2019/2033, art. 62 (amending certain definitions in the CRR).

²⁸ The Market Abuse Regulation (“MAR”), Regulation (EU) 596/2014, sets forth requirements to enhance market integrity and investor protection. The MAR Investment Recommendations Regulation, Commission Delegated Regulation (EU) 2016/958, supplements MAR with respect to regulatory technical standards regarding investment recommendations.

In the view of BaFin, German and EU requirements taken as a whole produce regulatory outcomes that are comparable to those of the relevant requirements under the Exchange Act. In support, the application incorporates and relies on a series of European Commission analyses that compare EU requirements with applicable requirements under the Exchange Act, in addition to analyses specific to German law and practices.²⁹

In the Commission's preliminary view, requirements under the Exchange Act and German/EU requirements maintain similar approaches with respect to achieving regulatory goals in several respects, but follow differing approaches or incorporate disparate elements in certain other respects. The Commission has considered those similarities and differences when analyzing comparability and developing preliminary views in light of the Commission's holistic, outcomes-oriented framework for assessing comparability.

In this context, the Commission recognizes that other regulatory regimes will have exclusions, exceptions and exemptions that may not align perfectly with the corresponding requirements under the Exchange Act. Where the Commission preliminarily has found that the German regime produces comparable outcomes notwithstanding those particular differences, the Commission proposes to make a positive determination on substituted compliance. Where the Commission preliminarily has found that those exclusions, exemptions and exceptions lead to outcomes that are not comparable, however, the proposal would not provide for substituted compliance.

²⁹ BaFin's application incorporates and builds upon European Commission analyses related to: risk control (see BaFin application Annex A category 1), books and records (see BaFin application Annex A category 2), internal supervision and compliance (see BaFin application Annex A category 3), and counterparty protection (see BaFin application Annex A category 4). These analyses are available on the Commission's website along with the remainder of BaFin's application. See note 20, supra.

Accordingly, based on the Commission’s analysis of the application and review of relevant German and EU requirements, the Commission is proposing an Order, located at Attachment A, granting substituted compliance subject to specific conditions and limitations. When SBS Entities seek to rely on substituted compliance to satisfy particular requirements under the Exchange Act, non-compliance with the applicable German and EU requirements would lead to a violation of those requirements under the Exchange Act and potential enforcement action by the Commission (as opposed to automatic revocation of the substituted compliance order).

III. Applicable Entities and General Conditions

A. Entities for which conditional substituted compliance is available

Under the proposed Order, substituted compliance would be available to “Covered Entities” – a term that limits the availability of substituted compliance to SBS Entities that are subject to applicable German and EU requirements and oversight. Consistent with the parameters of substituted compliance under Exchange Act rule 3a71-6, the proposed “Covered Entity” definition provides that the relevant entities must be security-based swap dealers or major security-based swap participants registered with the Commission, and that those entities cannot be U.S. persons.³⁰

The proposed “Covered Entity” definition further would provide that the entities must be investment firms or credit institutions that BaFin has authorized to provide investment services or perform investment activities in Germany.³¹ This is intended to help ensure that those entities are subject to relevant German and EU requirements and oversight.

³⁰ See para. (f)(1)(i)-(ii) to the proposed Order.

³¹ See para. (f)(1)(iii) to the proposed Order.

B. General conditions and prerequisites

Substituted compliance under the proposed Order would be subject to a number of conditions and other prerequisites, in part to help ensure that the relevant German and EU requirements that form the basis for substituted compliance in practice will apply to the SBS Entity's security-based swap business and activities.

1. "Subject to and complies with" applicability provisions

Each relevant section of the proposed Order would be subject to the condition that the Covered Entity "is subject to and complies with" the applicable German and EU requirements that are needed to establish comparability.³² Accordingly, the proposed Order would not provide substituted compliance when an SBS Entity is excused from compliance with relevant foreign provisions, such as, for example, would be the case if the German or EU requirements that the Commission has deemed comparable for purposes of the proposed Order do not apply to the security-based swap activities of a third-country branch of a German SBS Entity. In that event, the Covered Entity would not be "subject to" those requirements, and the Covered Entity could not rely on substituted compliance in connection with those activities.³³

³² E.g., para. (d)(1) to the proposed Order (providing for conditional substituted compliance in connection with certain disclosure provisions provided that the Covered Entity "is subject to and complies" with specified German and EU requirements related to disclosure).

³³ A SBS Entity's "voluntary" compliance with the relevant German and EU requirements would not suffice for these purposes. Substituted compliance reflects an alternative means by which an SBS Entity may comply with applicable requirements under the Exchange Act, and thus mandates that the SBS Entity be subject to the requirements needed to establish comparability and face consequences arising from any failure to comply with those requirements. Moreover, the comparability assessment takes into account the effectiveness of the supervisory compliance program administered and the enforcement authority exercised by BaFin, which would not be expected to promote comparable outcomes when compliance merely is "voluntary."

2. Additional general conditions

Substituted compliance under the proposed Order further would be subject to general conditions intended to help ensure the applicability of relevant German and EU requirements. In particular:

- MiFID “investment services or activities” – The SBS Entity’s security-based swap activities must constitute “investment services or activities” for purposes of applicable provisions under MiFID, WpHG and/or other EU and German requirements adopted pursuant to those provisions, and must fall within the scope of the firm’s authorization from BaFin.³⁴
- MiFID “clients” – The SBS Entity’s counterparties (or potential counterparties) must be “clients” (or potential “clients”) for purposes of applicable provisions under MiFID, WpHG and/or other EU and German requirements adopted pursuant to those provisions.³⁵
- MiFID “financial instruments” – The relevant security-based swaps must be “financial instruments” for purposes of MiFID, the WpHG and/or other EU and German requirements adopted pursuant to those provisions.³⁶

³⁴ See paragraph (a)(1) to the proposed Order (requiring that relevant activities constitute “investment services” or “investment activities” as defined in MiFID art. 4(1)(2) and WpHG sec. 2(8) in connection with applicable provisions).

³⁵ See paragraph (a)(2) to the proposed Order (requirement that relevant counterparties or potential counterparties be “clients” or potential “clients” as defined in MiFID art. 4(1)(9) and WpHG sec. 67(1) in connection with applicable provisions).

³⁶ See paragraph (a)(3) to the proposed Order (requirement that relevant security-based swaps be “financial instruments” as defined in MiFID art. 4(1)(15) and WpHG sec. 2(4) in connection with applicable provisions).

- CRD “institutions” – The Covered Entity must be an “institution” for purposes of applicable provisions under CRD, KWG and CRR and/or other EU and German requirements adopted pursuant to those provisions.³⁷
- Memorandum of Understanding – The Commission and BaFin have an applicable memorandum of understanding or other arrangement addressing cooperation with respect to the substituted compliance Order at the time the Covered Entity makes use of substituted compliance.³⁸
- Notice of reliance on substituted compliance – An SBS Entity relying on the substituted compliance order must provide notice of its intent to rely on the order by notifying the Commission in writing.³⁹

3. European Union cross-border matters

For some EU requirements under MiFID (and other EU and German requirements adopted pursuant to MiFID), EU law allocates the responsibility for supervising and enforcing those requirements to authorities of the Member State in whose territory a Covered Entity provides certain services.⁴⁰ To help ensure that the prerequisites to substituted compliance with respect to supervision and enforcement are satisfied in fact, the proposed Order would provide substituted compliance only if BaFin is the authority responsible for supervision and enforcement of those EU requirements under MiFID (and other EU and German requirements

³⁷ See para. (a)(4) to the proposed Order (requirement that relevant Covered Entities must be “institutions” as defined in CRD art. 3(1)(3), CRR art. 4(1)(3) and KWG sec. 1(1b)).

³⁸ See para. (a)(5) to the proposed Order; see also part I.A.2.b, supra.

³⁹ See para. (a)(6) to the proposed Order.

⁴⁰ See MiFID art. 35(8).

adopted pursuant to MiFID) in relation to the particular service for which substituted compliance is used.

Similarly, for some of the EU requirements under MAR (and other EU requirements adopted pursuant to MAR), EU law allocates the responsibility for supervising and enforcing those requirements to authorities of potentially multiple Member States. For those EU requirements under MAR (and other EU requirements adopted pursuant to MAR), to help ensure that the prerequisites to substituted compliance with respect to supervision and enforcement are satisfied in fact, the proposed Order would provide substituted compliance only if one of those authorities is BaFin.⁴¹

IV. Substituted Compliance for Risk Control Requirements

A. BaFin request and associated analytic considerations

BaFin's application in part requests substituted compliance in connection with risk control requirements under the Exchange Act relating to:

- Risk management systems – An internal risk management system is required pursuant to Exchange Act section 15F(j)(2) and relevant aspects of Exchange Act rule 15Fh-3(h)(2)(iii)(I).⁴² These provisions address the obligation of registered entities to follow policies and procedures reasonably designed to help manage the risks associated with their business activities.⁴³

⁴¹ See para. (a) to the proposed Order.

⁴² BaFin is not requesting substituted compliance in connection with Exchange Act rules 18a-1(f) and 18a-2(c), which set forth additional internal risk management system requirements for nonbank security-based swap dealers and nonbank major security-based swap participants.

⁴³ See Exchange Act Release No. 68071 (Oct. 18, 2012), 77 FR 70214, 70250 (Nov. 23, 2012) (proposing capital and margin requirements for security-based swap dealers and major security-based swap participants). BaFin's application discusses German and EU requirements that

- Trade acknowledgment and verification – Trade acknowledgment and verification is required pursuant to Exchange Act section 15F(i) and Exchange Act rule 15Fi-2. These provisions help avoid legal and operational risks by requiring definitive written records of transactions and for procedures to avoid disagreements regarding the meaning of transaction terms.⁴⁴
- Portfolio reconciliation and dispute reporting – Portfolio reconciliation and dispute reporting is required pursuant to Exchange Act section 15F(i) and Exchange Act rule 15Fi-3. These provisions require that counterparties engage in portfolio reconciliation and resolve discrepancies in connection with uncleared security-based swaps. These also require prompt notification of the Commission and applicable prudential regulators regarding certain valuation disputes.⁴⁵
- Portfolio compression – Portfolio compression is required pursuant to Exchange Act section 15F(i) and Exchange Act rule 15Fi-4. These provisions require that SBS Entities have procedures addressing bilateral offset, bilateral compression and multilateral compression in connection with uncleared security-based swaps.⁴⁶

address SBS Entities’ obligations related to risk management. See BaFin application Annex A category 1 at 9-21.

⁴⁴ Exchange Act Release No. 78011 (Jun. 8, 2016), 81 FR 39808, 39809 & 39820 (Jun. 17, 2019) (“Trade Acknowledgment and Verification Adopting Release”). BaFin’s application discusses German and EU requirements that address SBS Entities’ obligations related to confirmations and to information to be provided to clients regarding executed orders. See BaFin application Annex A category 1 at 22-39.

⁴⁵ See Exchange Act Release No. 87782 (Dec. 18, 2019), 85 FR 6359, 6360-61 (Feb. 4, 2020) (“Risk Mitigation Adopting Release”). BaFin’s application discusses German and EU requirements that address portfolio reconciliation and dispute resolution and reporting. See BaFin application Annex A category 1 at 40-53.

⁴⁶ See Risk Mitigation Adopting Release, 85 FR at 6361. BaFin’s application discusses EU portfolio compression requirements. See BaFin application Annex A category 1 at 54-56.

- Trading relationship documentation – Trading relationship documentation is required pursuant to Exchange Act section 15F(i) and Exchange Act rule 15Fi-5. These provisions require that SBS Entities have procedures to execute written security-based swap trading relationship documentation with their counterparties prior to, or contemporaneously with, executing certain security-based swaps.⁴⁷

Taken as a whole, these risk control requirements help to promote market stability by mandating that registered entities follow practices that are appropriate to manage the market, counterparty, operational and legal risks associated with their security-based swap businesses. The Commission’s comparability assessment accordingly focuses on whether the analogous foreign requirements – taken as a whole – produce comparable outcomes with regard to providing that registered entities follow financial responsibility, risk mitigation and documentation practices that are appropriate to the risks associated with their security-based swap businesses.

B. Preliminary views and proposed Order

1. General considerations

In the Commission’s preliminary view based on BaFin’s application and the Commission’s review of applicable provisions, relevant German and EU requirements in general would produce regulatory outcomes that are comparable to those associated with the above risk control requirements, by subjecting German SBS Entities to financial responsibility, risk mitigation and documentation practices that are appropriate to the risks associated with their

⁴⁷ See Risk Mitigation Adopting Release, 85 FR at 6361. BaFin’s application discusses German and EU requirements regarding records of rights, obligations and terms of investment firm services. See BaFin application Annex A category 1 at 56-62.

security-based swap businesses. Substituted compliance accordingly would be conditioned on SBS Entities being subject to the German and EU provisions that in the aggregate establish a framework that produces outcomes comparable to those associated with the risk control requirements under the Exchange Act.⁴⁸

In reaching these preliminary views, the Commission recognizes that there are certain differences between those German and EU requirements and the applicable risk control

⁴⁸ In connection with risk management system requirements, Covered Entities particularly must comply with: MiFID art. 16(4)-(5) and WpHG sec.80 (addressing administrative and accounting procedures, internal control mechanisms, risk assessment procedures and information processing system safeguards); MiFID Org Reg art. 21-24 (addressing risk management and internal audit); CRD art. 74, 76 and 79-87 and KWG sections 25a, 25b, 25c (other than 25c(2)), 25d (other than 25d(3) and 25d(11)) (addressing internal governance and the treatment of various categories of risk); and EMIR Margin RTS art. 2 (addressing required risk management procedures for the exchange of collateral for non-centrally cleared over-the-counter derivatives contracts); CRR art. 286-88 and 293 (addressing counterparty credit risk management and risk management systems); EMIR Margin RTS art. 2 (addressing general provisions for risk management procedures). See para. (b)(1) to the proposed Order. In connection with trade acknowledgement and verification requirements, firms must comply with MiFID art. 25(6) and WpHG sec. 63(12) (addressing reports on services), MiFID Org Reg art. 59-61 (addressing essential information regarding executed orders and portfolio management), EMIR art. 11(1)(a) (addressing required bilateral confirmations for uncleared over-the-counter derivatives) and EMIR RTS art. 12 (addressing timeliness of confirmations). See para. (b)(2) to the proposed Order. In connection with portfolio reconciliation and dispute reporting requirements, firms must comply with EMIR art. 11(1)(b) (addressing required portfolio reconciliation and dispute resolution for uncleared over-the-counter derivatives) and EMIR RTS art. 13 and 15 (addressing further requirements related to portfolio reconciliation and dispute resolution). See para. (b)(3) to the proposed Order. In connection with portfolio compression requirements, firms must comply with EMIR RTS art. 14 (also addressing portfolio protection). See para. (b)(4) to the proposed Order. In connection with trading relationship documentation requirements, firms must comply with: MiFID art. 25(5) and WpHG sec. 83(2) (addressing required records of documents regarding parties' rights and obligations and other terms on which the investment firm will provide services); MiFID Org Reg art. 24, 56, 58, 73 and applicable parts of Annex I (addressing audit requirements, records related to appropriateness assessments, client agreements and parties' rights and obligations); and EMIR Margin RTS art. 2 (addressing general provisions for risk management procedures, including procedures providing for or specifying the terms of agreements). See para. (b)(5) to the proposed Order. The above EMIR requirements apply only to "OTC derivatives contracts," which are defined as derivatives contracts not executed on certain "regulated markets" or equivalent "third-country markets." See EMIR art. 2(7). The EMIR-related conditions accordingly will not impede substituted compliance in connection with exchange-traded or market-traded security-based swaps that do not constitute "OTC derivatives contracts."

requirements under the Exchange Act. In the Commission’s preliminary view, on balance, those differences would not be inconsistent with substituted compliance for these requirements. As noted, requirement-by-requirement similarity is not needed for substituted compliance.⁴⁹

2. Additional conditions

Substituted compliance in connection with these requirements would be subject to certain additional conditions to help ensure the comparability of outcomes:

- a. Trading relationship documentation – MiFID “eligible counterparty” exception not applicable

Under the proposed Order, substituted compliance in connection with the trading relationship documentation provisions of Exchange Act rule 15Fi-5 would be conditioned on the requirement that the non-U.S. firm not treat its counterparties as “eligible counterparties” for purposes of the relevant MiFID provisions needed to establish comparability.⁵⁰

Certain of the relevant German and EU requirements that provide for this type of documentation⁵¹ do not apply to investment firms’ transactions with “eligible counterparties.”⁵²

⁴⁹ See note 14, *supra*, and accompanying text.

⁵⁰ See para. (b)(5)(ii) to the proposed Order (incorporating condition that the Covered Entity cannot treat applicable counterparties as “eligible counterparties” for purpose of MiFID art. 30 or WpHG sec. 68). Because trading relationship documentation is an entity-level requirement, this condition generally would disapply the “eligible counterparty” exception in connection with all of the entity’s applicable counterparties, including non-U.S. counterparties. Rule 15Fi-5, however, does not apply to existing security-based swaps, or to cleared and certain security-based swaps executed anonymously on a national security exchange or a security-based swap execution facility. See rule 15Fi-5(a)(1).

⁵¹ *E.g.*, MiFID art. 25(5) (requiring that investment firms establish a record that includes documents “that set out the rights and obligations of the parties, and the other terms on which the investment firm will provide services to the client”); WpHG sec. 83(2); MiFID Org Reg art. 58.

⁵² See MiFID art. 30(1); WpHG sec. 68. On the other hand, certain relevant EU provisions are not subject to this “eligible counterparty” exclusion. See EMIR Margin RTS art. 2 (requiring risk management procedures associated with the exchange of collateral, including procedures providing for or specifying “the terms of all necessary agreements to be entered into by counterparties” in connection with non-cleared OTC derivatives including terms of netting and collateral exchange agreements); MiFID art. 25(6) and MiFID Org Reg art. 59 (addressing required reports of services, including confirmations).

The Commission is concerned that a foreign framework which completely excludes compliance in connection with a particular category of security-based swap counterparties may not promote the risk control purpose of the trading relationship documentation requirement sufficiently to produce a comparable regulatory outcome.

The Commission is mindful that compliance with this condition may require German SBS Entities that wish to rely on substituted compliance to supplement their existing practices, and incur additional time and cost burdens, to follow relevant German and EU documentation requirements in connection with their security-based swap business involving “eligible counterparties.” On balance, however, in the Commission’s preliminary view, this prerequisite to substituted compliance is necessary to promote comparability in light of the risk control purposes of the trading relationship documentation requirement, and the requirement’s lack of a comparable carveout based on counterparty categories.

b. Trading relationship documentation - Disclosure regarding legal and bankruptcy status

Under the proposed Order, substituted compliance in connection with trading relationship documentation would not extend to disclosures required by rule 15F(b)(5) regarding the status of the SBS Entity or its counterparty as an insured depository institution or financial counterparty, and regarding the possibility that in certain circumstances the SBS Entity or its counterparty may be subject to the insolvency regime set forth under Title II of the Dodd-Frank Act or the Federal Deposit Insurance Act, which may affect rights to terminate, liquidate or net security-based swaps.⁵³ Documentation requirements under applicable German and EU law would not be

⁵³ See Risk Mitigation Adopting Release, 85 FR at 6374 (discussing potential application of alternatives to the liquidation schemes established under the Securities Investor Protection Act of 1970 or the U.S. Bankruptcy Code).

expected to address the disclosure of information related to insolvency procedures under U.S. law.

- c. Dispute reporting – provision of dispute reports consistent with EU law

Under the proposed Order, substituted compliance also would be conditioned on SBS Entities having to provide the Commission with reports regarding disputes between counterparties, on the same basis as the SBS Entities provide those reports to competent authorities pursuant to EU law.⁵⁴ This condition promotes comparability with the Exchange Act requirement, which requires reporting to the Commission regarding significant valuation disputes,⁵⁵ while efficiently leveraging EU reporting provisions to avoid the need for SBS Entities to create additional de novo reporting frameworks.⁵⁶

⁵⁴ See para. (b)(3)(ii) to the proposed Order (requiring that the Covered Entity provide the Commission with reports regarding counterparty disputes on the same basis that it provides those reports to competent authorities pursuant to EMIR RTS art. 15(2)).

⁵⁵ In proposing the notice provision, the Commission recognized that valuation inaccuracies may lead to uncollateralized credit exposure and the potential for loss in the event of default. See Exchange Act Release No. 84861 (Dec. 19, 2018), 84 FR 4614, 4621 (Feb. 15, 2019). It thus is important that the Commission be informed regarding valuation disputes affecting registered entities.

⁵⁶ The principal difference between the two sets of requirements concerns the timing of notices. Under Exchange Act rule 15Fi-3, SBS Entities must promptly report, to the Commission, valuation disputes in excess of \$20 million that have been outstanding for three or five business days (depending on counterparty types). Under EMIR RTS art. 15(2), firms must report at least monthly, to competent authorities, disputes between counterparties in excess of €15 million and outstanding for at least 15 business days. BaFin states that these reports regarding outstanding disputes must be provided on a monthly basis within 14 days of the end of the reporting period. See BaFin, “EMIR – Requirements for financial counterparties” (https://www.bafin.de/EN/Aufsicht/BoersenMaerkte/Derivate/EMIR/FinanzielleGegenparteien/finanzielle_gegenparteien_artikel_en.html). The Commission is mindful that the EU provision does not provide for notice as quickly as rule 15Fi-3(c), but in the Commission’s preliminary view, on balance this difference would not be inconsistent with the conclusion that the two sets of risk control requirements – taken as a whole – produce comparable regulatory outcomes.

V. **Substituted Compliance for Internal Supervision, Chief Compliance Officers and Additional Exchange Act Section 15F(j) Requirements**

A. BaFin request and associated analytic considerations

BaFin also requests substituted compliance in connection with requirements under the Exchange Act relating to:

- Internal supervision – Diligent supervision is required pursuant to Exchange Act section 15F(h)(1)(B) and Exchange Act rule 15Fh-3(h), and additional conflict of interest provisions under Exchange Act section 15F(j)(5). These provisions generally require that SBS Entities establish, maintain and enforce supervisory policies and procedures that reasonably are designed to prevent violations of applicable law, and implement certain systems and procedures related to conflicts of interest.⁵⁷
- Chief compliance officers – Chief compliance officer requirements are set out in Exchange Act section 15F(k) and Exchange Act rule 15Fk-1. These provisions in general require that SBS Entities designate individuals with the responsibility and authority to establish, administer and review compliance policies and procedures, to resolve conflicts of interest, and to prepare and certify an annual compliance report to the Commission.⁵⁸
- Additional Exchange Act section 15F(j) requirements – There are certain additional requirements related to information-gathering pursuant to Exchange Act section

⁵⁷ BaFin's application addresses German and EU provisions that address firms' supervisory frameworks, persons with supervisory authority, supervisory policies and procedures, general compliance and internal recordkeeping, investigation of personnel, conflicts of interest, personal trading and remuneration. See BaFin application Annex A category 3 at 4-24, 27-64.

⁵⁸ BaFin's application discusses German and EU requirements that address compliance officers and their responsibilities, compliance officer appointment, removal and compensation, related conflict of interest provisions, and compliance-related reports. See BaFin application Annex A category 3 at 65-98.

15F(j)(4)(A), and certain antitrust prohibitions specified by Exchange Act section 15F(j)(6).⁵⁹

Taken as a whole, these internal supervision, chief compliance officer and additional Exchange Act section 15F(j) requirements help to promote SBS Entities' use of structures, processes and responsible personnel reasonably designed to promote compliance with applicable law, to identify and cure instances of non-compliance, and to manage conflicts of interest. The comparability assessment accordingly may focus on whether the analogous foreign requirements – taken as a whole – produce comparable outcomes with regard to providing that registered entities have structures and processes reasonably designed to promote compliance with applicable law, identify and cure instances of non-compliance, and to manage conflicts of interest, in part through the designation of an individual with responsibility and authority over compliance matters.

B. Preliminary views and proposed Order

1. General considerations

Based on BaFin's application and the Commission's review of applicable provisions, in the Commission's preliminary view, the relevant German and EU requirements in general would produce regulatory outcomes that are comparable to those associated with the above-described internal supervision, chief compliance officer, conflict of interest and information-related requirements by providing that German SBS Entities have structures and processes that

⁵⁹ Section 15F(j)(4)(A) particularly requires firms to have systems and procedures to obtain necessary information to perform functions required under section 15F. BaFin's application in turn discusses German and EU provisions generally addressing information gathering and disclosure. See BaFin application Annex A category 3 at 24-27. Section 15F(j)(6) prohibits firms from adopting any process or taking any action that results in any unreasonable restraint of trade, or to impose any material anticompetitive burden on trading or clearing. BaFin's application addresses EU antitrust requirements. See BaFin application Annex A category 3 at 28.

reasonably are designed to promote compliance with applicable law and to identify and cure instances of non-compliance and manage conflicts of interest.

This portion of the proposed Order would extend generally to the internal supervision provisions of Exchange Act rule 15Fh-3(h), the information gathering provisions of Exchange Act section 15F(j)(4)(A), and the conflict of interest provisions of Exchange Act section 15F(j)(5),⁶⁰ and to the chief compliance officer provisions of Exchange Act section 15F(k) and Exchange Act rule 15Fk-1.⁶¹

In taking this proposed approach, the Commission recognizes that certain differences are present between those German and EU requirements and the applicable requirements under the Exchange Act. In the Commission's preliminary view, on balance, however, those differences would not be inconsistent with substituted compliance within the relevant outcomes-oriented context. As elsewhere, this part of the proposed Order conditions substituted compliance on SBS Entities complying with specified German and EU requirements that are necessary to establish comparability.⁶²

⁶⁰ See proposed para. (c)(1) to the Order. This portion of the proposed Order does not extend to applicable portions of rule 15Fh-3(h) as that rule mandates supervisory policies and procedures in connection with: the risk management system provisions of Exchange Act section 15F(j)(2) (which are addressed by proposed paragraph (b)(1) to the Order in connection with internal risk management); the information-related provisions of Exchange Act sections 15F(j)(3) and (j)(4)(B) (for which substituted compliance is not available); and the antitrust provisions of Exchange Act section 15F(j)(6) (for which the Commission is not proposing to provide substituted compliance). See proposed para. (c)(1)(iii) to the Order.

⁶¹ See proposed para. (c)(2) to the Order.

⁶² In connection with these internal supervision, chief compliance officer and conflict of interest and information gathering provisions, SBS Entities particularly must comply with: MiFID art. 16 and 23 and WpHG sec. 63, 80 and 83-84 (addressing organizational requirements and conflicts of interest); MiFID Org Reg art. 21-37 (addressing organizational requirements, compliance, risk management, internal audit, senior management responsibility, complaints handling, remuneration policies and practices, personal transaction restrictions, outsourcing, conflicts of interest and investment research and marketing); MiFID Org Reg 72-76 and Annex IV (addressing recordkeeping, including records of orders, transactions and communications); and

2. Additional conditions and scope issues

Substituted compliance in connection with these requirements would be subject to certain additional conditions to help ensure the comparability of outcomes:

- a. Application of German and EU supervisory and compliance requirements to residual U.S. requirements and Order conditions.

Under the proposed Order, substituted compliance with the relevant internal supervision requirements would be conditioned with relevant German SBS Entities complying with applicable German and EU supervisory and compliance provisions as if those provisions also require SBS Entities to comply with applicable requirements under the Exchange Act and the other conditions to the Order.⁶³

This condition addresses the fact that, even with substituted compliance, SBS Entities still would be subject directly to a number of requirements under the Exchange Act and to the conditions to the final Order. In some cases, particular requirements under the Exchange Act are outside the ambit of substituted compliance.⁶⁴ In other cases, certain requirements under the Exchange Act may not have comparable German or EU requirements, or may be outside the scope of BaFin's request.⁶⁵ While the German and EU regulatory frameworks in general

CRD articles 74, 76, 79-87, 88(1) and 91(1)-(2), 91(7)-(9), 92-95 and KWG sections 25a, 25b, 25c (other than 25c(2)), 25d (other than 25d(3) and 25d(11)), 25e and 25f (addressing internal governance, recovery and resolution plans, risk management policies, and management body and remuneration policies).

⁶³ See para. (c)(4) to the proposed Order.

⁶⁴ As discussed above, see notes 11 and 12, supra, substituted compliance does not extend to certain Exchange Act antifraud prohibitions and other requirements under the Exchange Act (e.g., requirements related to transactions with non-ECPs, and segregation requirements). Substituted compliance also does not extend to requirements under the Exchange Act that are outside of the scope of BaFin's request (e.g., ECP verification and special entity requirements), or to requirements under the Exchange Act for which the Commission has not found comparability.

⁶⁵ For example, BaFin is not requesting substituted compliance in connection with ECP verification requirements, "special entity" provisions and political contribution provisions. See note 23, supra.

reasonably appear to promote SBS Entities' compliance with applicable German and EU laws, those requirements do not – and would not be expected to – appear to promote SBS Entities' compliance with requirements under the Exchange Act that are not subject to substituted compliance, or promote SBS Entities' compliance with the conditions to substituted compliance.

This condition would allow SBS Entities to use their existing internal supervision and compliance frameworks to comply with the relevant Exchange Act requirements and order conditions, rather than having to establish separate special-purpose supervision and compliance frameworks. In practice, compliance with this condition likely would require SBS Entities to comprehensively identify all applicable requirements under the Exchange Act with which they must comply directly even with substituted compliance (as well as the other conditions to the Order), and augment their existing internal supervision and compliance frameworks to the extent necessary to incorporate reasonable policies and processes to help ensure that they follow those requirements.⁶⁶

b. Compliance reports

Under the proposed Order, substituted compliance in connection with the compliance report requirements under Exchange Act section 15F(k)(3) and Exchange Act rule 15Fk-1(c) also would be conditioned on the requirement that the compliance reports required pursuant to MiFID Org Reg article 22(2)(c) must: (a) be provided to the Commission annually and in the English

⁶⁶ For example, MiFID Org Reg art. 22 addresses several aspects of firms' compliance with requirements under MiFID, and includes provisions that the compliance function: monitor the adequacy and effectiveness of compliance measures, policies and procedures; advise and assist relevant persons in compliance with MiFID; and report on implementation and effectiveness. Under the proposed condition, SBS Entities would have to apply those article provisions in a manner that also promotes compliance with the applicable requirements under the Exchange Act and the conditions to the Order.

language, (b) include a certification under penalty of law that the report is accurate and complete, and (c) address the SBS Entity's compliance with other conditions to this Order.⁶⁷

Although certain German and EU requirements address firms' use of internal compliance reports, the requirements do not – and would not be expected to – require those entities to submit compliance reports to the Commission.⁶⁸ Under this condition, SBS Entities could leverage the compliance reports that they otherwise are required to produce, by extending those reports to address compliance with the conditions to the Order.⁶⁹

c. Antitrust considerations

Under the proposed Order, substituted compliance would not extend to Exchange Act section 15F(j)(6) (and related internal supervision requirements of Exchange Act rule 15Fh-3(h)(2)(iii)(I)). Section 15F(j)(6) prohibits SBS Entities from adopting any process or taking any action that results in any unreasonable restraint of trade, or to impose any material anticompetitive burden on trading or clearing.⁷⁰ In the Commission's preliminary view,

⁶⁷ See para. (c)(2)(ii) to the proposed Order. MiFID Org Reg art. 22(2)(c) particularly requires that a firm's compliance function "report to the management body, on at least an annual basis, on the implementation and effectiveness of the overall control environment for investment services and activities, on the risks that have been identified and on the complaints-handling reporting as well as remedies undertaken or to be undertaken[.]" Under the proposed condition, those reports, as submitted to the Commission and the firm's management body, also would address SBS Entities' compliance with the other conditions to the Order (in addition to addressing those firms' compliance with applicable German and EU provisions).

⁶⁸ The application also indicates that there is no EU requirement to submit compliance reports to a regulator. See EU supervision and compliance analysis at 75.

⁶⁹ In practice, SBS Entities may satisfy this condition by identifying relevant Order conditions, and reporting on the implementation and effectiveness of their controls with regard to compliance with those Order conditions.

⁷⁰ See para. (c)(1)(ii) to the proposed Order.

allowing an alternative means of compliance would not lead to outcomes comparable to that statutory prohibition.⁷¹

VI. Substituted Compliance for Counterparty Protection Requirements

A. BaFin request and associated analytic considerations

BaFin further requests substituted compliance in connection with provisions under the Exchange Act relating to:

- Disclosure of material risks and characteristics and material incentives or conflicts of interest – Exchange Act rule 15Fh-3(b) requires that SBS Entities disclose to certain counterparties to a security-based swap certain information about the material risks and characteristics of the security-based swap, as well as material incentives or conflicts of interest that the SBS Entity may have in connection with the security-based swap. These provisions address the need for security-based swap market participants to have information that is sufficient to make informed decisions regarding potential transactions involving particular counterparties and particular financial instruments.⁷²
- Daily mark disclosure – Exchange Act rule 15Fh-3(c) requires that SBS Entities provide daily mark information to certain counterparties. These provisions address the need for

⁷¹ The Commission is not taking any position regarding the applicability of the section 15F(j)(6) antitrust prohibitions in the cross-border context. Non-U.S. SBS Entities should assess the applicability of those prohibitions to their security-based swap businesses.

⁷² See Business Conduct Adopting Release, 81 FR at 29983-86. BaFin's application discusses German and EU requirements that address disclosure of product information and firm information. See BaFin application Annex A category 4 at 27-47.

market participants to have effective access to daily mark information necessary to manage their security-based swap positions.⁷³

- Fair and balanced communications – Exchange Act rule 15Fh-3(g) requires that SBS Entities communicate with counterparties in a fair and balanced manner based on principles of fair dealing and good faith. These provisions promote complete and honest communications as part of SBS Entities’ security-based swap businesses.⁷⁴
- Clearing rights disclosure – Exchange Act rule 15Fh-3(d) requires that SBS Entities provide certain counterparties with information regarding clearing rights under the Exchange Act.⁷⁵
- “Know your counterparty” – Exchange Act rule 15Fh-3(e) requires that SBS Entities establish, maintain and enforce written policies and procedures to obtain and retain certain information regarding a counterparty that is necessary for conducting business with that counterparty. This provision accounts for the need that SBS Entities obtain

⁷³ See Business Conduct Adopting Release, 81 FR at 29986-91. BaFin’s application discusses German and EU requirements that address valuation, portfolio reconciliation and trade reporting. See BaFin application Annex A category 4 at 48-60.

⁷⁴ See Business Conduct Adopting Release, 81 FR at 30000-02. BaFin’s application discusses German and EU requirements that address communications standards. See BaFin application Annex A category 4 at 3-26.

⁷⁵ Exchange Act section 3C(g)(5) [15 U.S.C. 78c-3(g)(5)] provides certain rights for counterparties to select the clearing agency at which a security-based swap is cleared. For all security-based swaps that an SBS Entity enters into with certain counterparties, the counterparty has the sole right to select the clearing agency at which the security-based swap is cleared. For security-based swaps that are not subject to mandatory clearing (pursuant to Exchange Act sections 3C(a)-(b)) and that an SBS Entity enters into with certain counterparties, the counterparty also may elect to require clearing of the security-based swap. Substituted compliance is not available in connection with this provision. BaFin’s application discusses German and EU provisions that address clearing rights. See BaFin application Annex A category 4 at 85-92.

essential counterparty information necessary to promote effective compliance and risk management.⁷⁶

- Suitability – Exchange Act rule 15Fh-3(f) requires a security-based swap dealer that recommends to certain counterparties a security-based swap or trading strategy involving a security-based swap, to undertake reasonable diligence to understand the potential risks and rewards associated with the recommendation and to have a reasonable basis to believe that the recommendation is suitable for the counterparty.⁷⁷ This provision accounts for the need to guard against security-based swap dealers making unsuitable recommendations.⁷⁸

Taken as a whole, the counterparty protection requirements under section 15F of the Exchange Act help to “bring professional standards of conduct to, and increase transparency in, the security-based swap market and to require registered [entities] to treat parties to these transactions fairly.”⁷⁹ The comparability assessment accordingly may focus on whether the

⁷⁶ See Business Conduct Adopting Release, 81 FR at 29993-94. BaFin’s application discusses German and EU suitability requirements regarding information that firms must obtain regarding counterparties. See BaFin application Annex A category 4 at 71-84.

⁷⁷ See Business Conduct Adopting Release, 81 FR at 29994-30000. A security-based swap dealer may satisfy its counterparty-specific suitability obligation with respect to an “institutional counterparty,” as defined in Exchange Act rule 15Fh-3(f)(4), if the security-based swap dealer reasonably determines that the counterparty or its agent is capable of independently evaluating relevant investment risks, the counterparty or its agent represents in writing that it is exercising independent judgment in evaluating the recommendation, and the security-based swap dealer discloses that it is acting as counterparty and is not undertaking to assess the suitability of the recommendation for the counterparty. See Exchange Act rule 15Fh-3(f)(2)-(3).

⁷⁸ See Business Conduct Adopting Release, 81 FR at 29997. BaFin’s application discusses German and EU suitability requirements that are more targeted for transactions with “professional clients.” See BaFin application Annex A category 4 at 71-84.

⁷⁹ See Business Conduct Adopting Release, 81 FR at 30065. These transaction-level requirements generally apply only to a non-U.S. SBS Entity’s activities involving U.S. counterparties (unless the transaction is arranged, negotiated or executed in the United States). In particular, for non-U.S. SBS Entities, the counterparty protection requirements under Exchange Act section 15F(h) apply only to the SBS Entity’s transactions with U.S. counterparties (apart from certain

analogous foreign requirements – taken as a whole – produce similar outcomes with regard to promoting professional standards of conduct, increasing transparency and requiring SBS Entities to treat parties fairly.

B. Preliminary views and proposed Order

1. General considerations

Based on BaFin’s application and the Commission’s review of applicable provisions, in the Commission’s preliminary view, the relevant German and EU requirements produce regulatory outcomes that are comparable to counterparty protection requirements under Exchange Act section 15F(h) related to fair and balanced communications; disclosure of material risks and characteristics; disclosure of material incentives or conflicts of interest; “know your counterparty”; suitability; and daily mark disclosure, by subjecting German SBS Entities to obligations that promote standards of professional conduct, transparency and the fair treatment of parties.

The proposed Order accordingly would provide conditional substituted compliance in connection with those requirements.⁸⁰ The proposed Order preliminarily does not provide substituted compliance in connection with requirements related to clearing rights disclosure, however, for reasons addressed below.

In taking this proposed approach, the Commission recognizes that there are certain differences between relevant German and EU requirements, on the one hand, and the relevant

transactions conducted through a foreign branch of the U.S. counterparty), or to transactions arranged, negotiated or executed in the United States. See Exchange Act rule 3a71-3(c) [17 CFR 240.3a71-3(c)] (exception from business conduct requirements for a security-based swap dealer’s “foreign business”); see also Exchange Act rules 3a71-3(a)(3), (8) and (9) [17 CFR 240.3a71-3(a)(3), (8) and (9)] (definitions of “transaction conducted through a foreign branch,” “U.S. business” and “foreign business”).

⁸⁰ See generally para. (d) to the proposed Order.

communications, disclosure, “know your counterparty” and suitability requirements under the Exchange Act, on the other hand. On balance, however, in the Commission’s preliminary view, those differences, when coupled with the conditions in the proposed Order, are not so material as to be inconsistent with substituted compliance within the requisite outcomes-oriented context. As elsewhere, the counterparty protection provisions of the proposed Order in part condition substituted compliance on SBS Entities being subject to, and complying with, specified German and EU requirements that are necessary to establish comparability.⁸¹ Substituted compliance in

⁸¹ In connection with requirements related to disclosure of information regarding material risks and characteristics, Covered Entities must be subject to and comply with: MiFID art. 24(4); WpHG sections 63(7) and 64(1); and MiFID Org Reg art. 48-50, in each case in relation to the security-based swap for which substituted compliance is applied. See para. (d)(1) to the proposed Order. In connection with requirements related to disclosure of information regarding material incentives or conflicts of interest, Covered Entities must be subject to and comply with either: (i) MiFID art. 23(2)-(3); WpHG section 63(2); and MiFID Org Reg art. 33-35; (ii) MiFID art. 24(9); WpHG section 70; and MiFID Delegated Directive art. 11(5); or (iii) Market Abuse Regulation art. 20(1), in each case in relation to the security-based swap for which substituted compliance is applied. See para. (d)(2) to the proposed Order. In connection with “know your counterparty” requirements, Covered Entities must be subject to and comply with: MiFID art. 16(2); WpHG section 80(1); MiFID Org Reg art. 21-22, 25-26 and applicable parts of Annex I; CRD art. 74(1) and 85(1); KWG section 25a; MLD art. 11 and 13; GwG sections 10-11; MLD art. 8(3) and 8(4)(a) as applied to internal policies, controls and procedures regarding recordkeeping of customer due diligence activities; GwG section 6(1)-(2) as applied to principles, procedures and controls regarding recordkeeping of customer due diligence activities, in each case in relation to the security-based swap for which substituted compliance is applied. See para. (d)(3) to the proposed Order. In connection with suitability requirements, Covered Entities must be subject to and comply with: MiFID art. 24(2)-(3) and 25(1)-(2); WpHG sections 63(5)-(6), 80(9)-(13) and 87(1)-(2); and MiFID Org Reg art. 21(1)(b) and (d), 54 and 55, in each case in relation to the recommendation for which substituted compliance is applied. See para. (d)(4)(i) to the proposed Order. In connection with fair and balanced communications requirements, Covered Entities must be subject to and comply with: (i) either MiFID art. 24(1), (3) and WpHG sections 63(1), (6) or MiFID art. 30(1) and WpHG section 68(1); and (ii) MiFID art. 24(4)-(5); WpHG sections 63(7) and 64(1); MiFID Org Reg art. 46-48; Market Abuse Regulation art. 12(1)(c) and 15; and MAR Investment Recommendations Regulation art. 5, in each case in relation to the communication for which substituted compliance is applied. See para. (d)(5) to the Proposed Order. In connection with daily mark disclosure requirements, Covered Entities must be required to reconcile, and in fact reconcile, the portfolio containing the security-based swap for which substituted compliance is applied, on each business day pursuant to EMIR articles 11(1)(b) and 11(2) and EMIR RTS article 13. See para. (d)(6) to the Proposed Order.

connection with these counterparty protection requirements also would be subject to specific conditions and limitations necessary to promote consistency in regulatory outcomes.

2. Additional conditions and scope issues

a. Daily mark disclosure

The proposed Order would provide substituted compliance in connection with daily mark disclosure requirements pursuant to Exchange Act rule 15Fh-3(c) to the extent that the Covered Entity participates in daily portfolio reconciliation exercises that include the relevant security-based swap pursuant to German and EU requirements. BaFin's application takes the view that EU requirements directing certain types of derivatives counterparties to mark-to-market (or mark-to-model) uncleared transactions each day are comparable to Exchange Act requirements. In the Commission's preliminary view, however, these EU mark-to-market (or mark-to-model) requirements are not comparable to Exchange Act requirements because the EU requirements do not require disclosure to counterparties. In the alternative, BaFin's application notes that certain derivatives counterparties must report to an EU trade repository updated daily valuations for each OTC derivative contract and that all counterparties have the right to access these valuations at the relevant EU trade repository. In the Commission's preliminary view, in practice U.S. counterparties may encounter challenges when attempting to access daily marks for different security-based swaps reported to multiple EU trade repositories with which they may not otherwise have business relationships. In addition, the information may be less current, given the time necessary for reporting and for the trade repository to make the information available. For these reasons, in the Commission's preliminary view, these EU reporting requirements also are not comparable to Exchange Act requirements. Finally, BaFin's application describes the EU's portfolio reconciliation requirements for uncleared OTC derivative contracts, which include a requirement to exchange valuations of those contracts directly between counterparties.

The required frequency of portfolio reconciliations varies depending on the types of counterparties and the size of the portfolio of OTC derivatives between them, with daily reconciliation required only for the largest portfolios. For security-based swaps to which the EU's daily portfolio reconciliation requirements apply (i.e., security-based swaps of a financial counterparty or non-financial counterparty subject to the clearing obligation in EMIR, if the counterparties have 500 or more OTC derivatives contracts outstanding with each other⁸²), the Commission preliminarily views these requirements as comparable to Exchange Act requirements. For all other security-based swaps in portfolios that are not required to be reconciled on each business day, the Commission preliminarily views the EU's portfolio reconciliation requirements as not comparable to Exchange Act requirements.

b. No substituted compliance in connection with clearing rights disclosure

The proposed Order would not provide substituted compliance in connection with clearing rights disclosure requirements pursuant to Exchange Act rule 15Fh-3(d). For those requirements, BaFin's application cites certain provisions related to clearing rights in the EU that are unrelated to the clearing rights provided by Exchange Act section 3C(g)(5).⁸³ The section 3C(g)(5) clearing rights are not eligible for substituted compliance, and the EU provisions do not require disclosure of these section 3C(g)(5) clearing rights. In the Commission's preliminary view, substituted compliance based on EU clearing provisions would not lead to comparable disclosure of a counterparty's clearing rights under the Exchange Act.

⁸² See EMIR RTS article 13(3)(a)(i); EMIR article 10.

⁸³ See note 75, *supra*.

c. Suitability

Under the proposed Order, substituted compliance in connection with the suitability provisions of Exchange Act rule 15Fh-3(f) in part would be conditioned on the requirement that the counterparty be a per se “professional client” as defined in MiFID and not be a “special entity” as defined in Exchange Act section 15F(h)(2)(C) and Exchange Act rule 15Fh-2(d).⁸⁴ Accordingly, the proposed Order would not provide substituted compliance for Exchange Act suitability requirements for a recommendation made to a counterparty that is a “retail client” or an elective “professional client,” as such terms are defined in MiFID,⁸⁵ or for a “special entity” as defined in the Exchange Act. In the Commission’s preliminary view, absent such a condition the MiFID suitability requirement would not be expected to produce a counterparty protection outcome that is comparable with the outcome produced by the suitability requirements under the Exchange Act.⁸⁶

⁸⁴ See para. (d)(4)(ii) to the proposed Order.

⁸⁵ Annex II of MiFID describes which clients are “professional clients.” Section I of Annex II describes the types of clients considered to be professional clients unless the client elects non-professional treatment; these clients are per se professional clients. Section II of Annex II describes the types of clients who may be treated as professional clients on request; these clients are elective professional clients. See MiFID Annex II.

⁸⁶ The Commission recognizes that Exchange Act rules permit security-based swap dealers, when making a recommendation to an “institutional counterparty,” to satisfy some elements of the suitability requirement if the security-based swap dealer reasonably determines that the counterparty or its agent is capable of independently evaluating relevant investment risks, the counterparty or its agent represents in writing that it is exercising independent judgment in evaluating recommendations, and the security-based swap dealer discloses to the counterparty that it is acting as counterparty and is not undertaking to assess the suitability of the recommendation for the counterparty. See Exchange Act rule 15Fh-3(f)(2). However, the institutional counterparties to whom this alternative applies are only a subset of the “professional clients” to whom more narrowly tailored suitability requirements apply under MiFID. The Commission notes that the institutional counterparty alternative under the Exchange Act would remain available, in accordance with its terms, for recommendations that are not eligible for, or for which a Covered Entity does not rely on, substituted compliance.

VII. Substituted Compliance for Recordkeeping, Reporting, and Notification Requirements

A. BaFin request and associated analytic considerations

BaFin's application in part requests substituted compliance for requirements applicable to SBS Entities under the Exchange Act relating to:

- Recordmaking – Exchange Act rule 18a-5 requires prescribed records to be made and kept current.⁸⁷
- Record Preservation – Exchange Act rule 18a-6 requires preservation of records.⁸⁸
- Reporting – Exchange Act rule 18a-7 requires certain reports.⁸⁹
- Notification – Exchange Act rule 18a-8 requires notification of the Commission when certain financial or operational problems occur.⁹⁰

The Commission does not administer or oversee capital and margin requirements for prudentially regulated SBS Entities.⁹¹ Taken as a whole, the recordkeeping, reporting, and

⁸⁷ BaFin's application discusses German and EU requirements that address firms' record creation obligations related to matters such as transactions, counterparties and their property, personnel and business conduct. See BaFin application Annex A category 2 at 4-34.

⁸⁸ BaFin's application discusses German and EU requirements that address firms' record preservation obligations related to records that firms are required to create, as well as additional records such as records of communications. See BaFin application Annex A category 2 at 35-79.

⁸⁹ BaFin's application discusses German and EU requirements that address firms' obligations to make certain reports. See BaFin application Annex A category 2 at 80-91 and 96-102.

⁹⁰ BaFin's application discusses German and EU requirements that address firms' obligations to make certain notifications. See BaFin application Annex A category 2 at 92-96 and 102.

⁹¹ Because of the close relationship between many of the recordkeeping, reporting, and notification requirements and the administration and oversight of capital and margin requirements, the Commission preliminarily believes that it would be appropriate to consider substituted compliance for recordkeeping, reporting and notification requirements applicable to nonbank SBS Entities in connection with a potential substituted compliance request for capital and margin requirements. The Commission is seeking commenters' views on this issue below.

notification requirements that apply to prudentially regulated SBS Entities are designed to promote the prudent operation of the firm's security-based swap activities, assist the Commission in conducting compliance examinations of those activities, and alert the Commission to potential financial or operational problems that could impact the firm and its customers. The comparability assessment accordingly may focus on whether the analogous foreign requirements – taken as a whole – produce comparable outcomes with regard to recordkeeping, reporting, and notification and related practices that support the Commission's oversight of these registrants. A foreign jurisdiction need not have analogues to every requirement under Commission rules.⁹²

For certain of the recordkeeping and notification requirements, the comparability assessment also appropriately may consider the extent to which those requirements are linked to separate requirements in the Exchange Act that may be subject to a substituted compliance application. In particular, a number of recordkeeping requirements serve a primary purpose of promoting and/or documenting SBS Entities' compliance with associated Exchange Act requirements.⁹³ When substituted compliance is permitted for the associated Exchange Act

⁹² Rule 3a71-6 sets forth additional analytic considerations in connection with substituted compliance for the Commission's recordkeeping, reporting, and notification requirements. In particular, Exchange Act rule 3a71-6(d)(6) provides that the Commission intends to consider (in addition to any conditions imposed) "whether the foreign financial regulatory system's required records and reports, the timeframes for recording or reporting information, the accounting standards governing the records and reports, and the required format of the records and reports" are comparable to applicable provisions under the Exchange Act, and whether the foreign provisions "would permit the Commission to examine and inspect regulated firms' compliance with the applicable securities laws."

⁹³ Recordkeeping and notification rules that are linked to other Exchange Act rules include provisions that address: (1) unverified security-based swap transactions (Exchange Act rules 18a-5(b)(11) and 18a-6(b)(2)(i)); (2) compliance with business conduct requirements (Exchange Act rules 18a-5(b)(12) and (13), 18a-6(b)(2)(i), and 18a-6(b)(2)(vii)); (3) preservation of records relating to certain risk mitigation requirements (Exchange Act rules 18a-6(d)(4) and (5); and (4) segregation requirements (Exchange Act Rules 18a-5(b)(9) and (10), 18a-6(b)(2)(v), and 18a-8(g)).

requirements, substituted compliance also may be appropriate for the linked recordkeeping and notification requirements. Conversely, when substituted compliance is not available or requested for Exchange Act requirements, substituted compliance may not be appropriate for linked recordkeeping or notification requirements.

B. Preliminary views and proposed Order

1. General considerations

Based on BaFin's application and Commission's review of applicable provisions, in the Commission's preliminary view, the relevant German and EU requirements, subject to the conditions and limitations of the proposed Order, would produce regulatory outcomes that are comparable to the outcomes associated with the recordkeeping and notification requirements under the Exchange Act applicable to prudentially regulated SBS Entities pursuant to Exchange Act rules 18a-5, 18a-6, 18a-7, and 18a-8.

In reaching this preliminary conclusion, the Commission recognizes that there are certain differences between those German and EU requirements and the applicable recordkeeping and notification requirements under the Exchange Act. In the Commission's preliminary view, on balance, those differences generally would not be inconsistent with substituted compliance for these requirements. As noted, "requirement-by-requirement similarity" is not needed for substituted compliance.

As discussed below, in select areas, substituted compliance in connection with these requirements is subject to specific conditions necessary to promote consistency in regulatory outcomes, or to reflect the scope of substituted compliance that would be available in connection with associated Exchange Act rules.

2. Additional conditions

i. Additional conditions applicable to Exchange Act rule 18a-5

Under the proposed Order, substituted compliance in connection with the recordmaking requirements of Exchange Act rule 18a-5 is subject to the condition that the SBS Entity: (1) preserves all of the data elements necessary to create the records required by Exchange Act rules 18a-5(b)(1), (2), (3), and (7); and (2) upon request furnishes promptly to representatives of the Commission the records required by those rules. This condition is modeled on the alternative compliance mechanism in paragraph (c) of Exchange Act rule 18a-5. In effect, a firm will not be required to create a record formatted pursuant to the Commission's rules each day, but instead only when requested to do so by Commission staff. The objective is to require – on a very limited basis – the production of a record that consolidates the information required by Exchange Act rule 18a-5(b)(1), (2), (3), or (7) in a single record and, as applicable, in a blotter or ledger format. This will assist the Commission staff in reviewing the information on the record.

Under the proposed Order, substituted compliance in connection with the recordmaking requirements of Exchange Act rule 18a-5 is subject to the condition that the prudentially regulated SBS Entity make and keep current the records required by rules 18a-5(b)(9) and (10) if the firm is not exempt from the requirements of Exchange Act rule 18a-4.⁹⁴ These rules require the SBS Entity to make a record of compliance with the possession or control requirements of Exchange Act rule 18a-4 and a record of the reserve computation required by Exchange Act rule 18a-4, respectively. Substituted compliance is not available with respect to Exchange Act rule 18a-4. Instead, provisions of the rule address cross-border transactions and provide exemptions from its requirements depending on the nature of the transaction.⁹⁵ For example, a security-based swap dealer that is a foreign bank is subject to the possession or control and reserve

⁹⁴ 17 CFR 240.18a-4.

⁹⁵ See 17 CFR 240.18a-4(e).

account requirements of Exchange Act rule 18a-4 with respect to a security-based swap customer that is a U.S. person or, in the case of a non-U.S. person, if the security-based swap dealer holds funds or other property arising out of a transaction had by such non-U.S. person with a branch or agency in the United States of the foreign security-based swap dealer. Further, Exchange Act rule 18a-4 contains a complete exemption from its requirements if the security-based swap dealer limits its business activities and meets certain conditions.⁹⁶ Prudentially regulated security-based swap dealers that are not subject to the requirements of Exchange Act rule 18a-4 will not need to make the records required by Exchange Act rules 18a-5(b)(9) and (10) under this condition in the proposed Order. However, if a firm is subject to Exchange Act rule 18a-4, it will need to make these records under this condition of the Order.

Under the proposed Order, substituted compliance in connection with the recordmaking requirements of Exchange Act rule 18a-5 is subject to the condition that the prudentially regulated SBS Entity makes and keeps current the records required by Exchange Act rule 18a-5(b)(12). This rule requires the firm to document compliance with Exchange Act rule 15Fh-6, which imposes restrictions related to political contributions to municipal entities. BaFin has not requested substituted compliance with respect to Exchange Act rule 15Fh-6.

Finally, under the proposed Order, substituted compliance in connection with the recordmaking requirements of Exchange Act rule 18a-5 is subject to the condition that the SBS Entity makes and keeps current records documenting compliance with requirements referenced in Exchange Act rule 18a-5(b)(13) for which substituted compliance is not available. Exchange Act rule 18a-5(b)(13) requires the firm to document compliance with Exchange Act rules 15Fh-1 through 15Fh-5 and Exchange Act rule 15Fk-1 – which, as discussed more fully in sections V

⁹⁶ See 17 CFR 240.18a-4(f).

and VI of this notice, establish certain obligations with respect to diligent supervision, compliance, and counterparty protection. Under the proposed Order, when substituted compliance is available with respect to such an obligation, substituted compliance also would be available with respect to the corresponding recordmaking requirement of Exchange Act rule 18a-5(b)(13). In circumstances where substituted compliance is not permitted,⁹⁷ has not been requested,⁹⁸ or is otherwise not available under the proposed Order, direct compliance with the relevant Exchange Act obligation would be required, and so, too, would direct compliance with the corresponding recordmaking requirement of Exchange Act rule 18a-5(b)(13).

ii. Additional conditions applicable to Exchange Act rule 18a-6

Under the proposed Order, substituted compliance in connection with the record preservation requirements of Exchange Act rule 18a-6 is subject to the condition that the security-based swap dealer or major security-based swap participant, with respect to a security-based swap transaction, preserves the information required by Exchange Act rule 18a-6(b)(2)(vi) if the transaction is required to be reported to a registered security-based swap data repository pursuant to Regulation SBSR (or pursuant to any substituted compliance order addressing Regulation SBSR).⁹⁹ This condition is designed to ensure that the firm preserves information it reports to a security-based swap data repository registered under the Exchange Act pursuant to Regulation SBSR (or pursuant to any substituted compliance order addressing Regulation SBSR)

⁹⁷ See Exchange Act rule 3a71-6(d)(1) (specifying that substituted compliance is not available in connection with the antifraud provisions of Exchange Act rule 15Fh-4(a)).

⁹⁸ BaFin has not requested substituted compliance in connection with the ECP verification requirements of Exchange Act rule 15Fh-3(a)(1) or the “special entity” provisions of Exchange Act rules 15Fh-3(a)(2)-(3), 15Fh-4(b) and 15Fh-5.

⁹⁹ 17 CFR 242.900-909.

in addition to preserving information it reports to a data repository pursuant to German and EU laws.

Under the proposed Order, substituted compliance in connection with the record preservation requirements of Exchange Act rule 18a-6 is subject to the condition that the prudentially regulated SBS Entity preserves the records required by Exchange Act rule 18a-6(b)(2)(v) if the firm is not exempt from the requirements of Exchange Act rule 18a-4. Exchange Act rule 18a-6(b)(2)(v) requires the preservation of detail relating to information for the possession or control requirements of Exchange Act rule 18a-4. As discussed above, substituted compliance is not available for Exchange Act rule 18a-4. Consequently, under this condition, a prudentially regulated SBS Entity will need to preserve the records required by Exchange Act rule 18a-6(b)(2)(v), but only if the firm is not exempt from Exchange Act rule 18a-4.

Under the proposed Order, substituted compliance in connection with the record preservation requirements of Exchange Act rule 18a-6 is subject to the condition that the prudentially regulated SBS Entity preserves records with respect to requirements referenced in Exchange Act rule 18a-6(b)(2)(vii) for which substituted compliance is not available. Under Exchange Act rule 18a-6(b)(2)(vii), the firm must preserve copies of documents, communications, disclosures, and notices required pursuant to Exchange Act rules 15Fh-1 through 15Fh-6 and Exchange Act rule 15Fk-1 - which establish certain obligations with respect to diligent supervision, compliance, and counterparty protection. Under the proposed Order, when substituted compliance is available with respect to such an obligation, substituted compliance also would be available with respect to the corresponding record preservation requirement of Exchange Act rule 18a-6(b)(2)(vii). In circumstances where substituted

compliance is not permitted, has not been requested, or is otherwise not available under the proposed Order, direct compliance with the relevant Exchange Act obligation would be required, and so, too, would direct compliance with the corresponding record preservation requirement of Exchange Act rule 18a-6(b)(2)(vii).

Under the proposed Order, substituted compliance in connection with the record preservation requirements of Exchange Act rule 18a-6 is subject to the condition that the SBS Entity preserves the records required by Exchange Act rule 18a-6(b)(2)(viii). This rule requires the preservation of documents used to make a reasonable determination with respect to special entities, including information relating to the financial status, the tax status, and the investment or financing objectives of the special entity as required under Exchange Act sections 15F(h)(4)(C) and (5)(A). BaFin is not seeking substituted compliance with respect to these Exchange Act requirements.

iii. Additional conditions applicable to Exchange Act rule 18a-7

Under the proposed Order, substituted compliance with respect to Exchange Act rule 18a-7 is subject to the condition that the SBS Entity file with the Commission financial and operational information in the manner and format specified by the Commission by order or rule.¹⁰⁰ Rule 18a-7 requires SBS Entities, on a quarterly basis, to file an unaudited financial and operational report known as FOCUS Report Part IIC. The Commission will use the FOCUS Report Part IIC to both monitor the financial and operational condition of individual SBS Entities and to perform comparisons across SBS Entities. The FOCUS Report Part IIC is a standardized form that elicits specific information through numbered line items. This facilitates

¹⁰⁰ For example, the Commission could specify the manner and format of the filing of the financial and operational information in a final substituted compliance order.

cross-firm analysis and comprehensive monitoring of all SBS Entities registered with the Commission. Further, the Commission has designated the Financial Industry Regulatory Authority, Inc. (“FINRA”) to receive the FOCUS reports from SBS Entities.¹⁰¹ Broker-dealers registered with the Commission currently file their FOCUS reports with FINRA through the eFOCUS system it administers. FINRA’s eFOCUS system will enable broker-dealers, security-based swap dealers, and major security-based swap participants to file FOCUS reports on the same platform using the same preexisting templates, software, and procedures.

The Commission preliminarily believes that it would be appropriate to condition substituted compliance with respect to rule 18a-7 on the SBS Entity filing financial and operational information in a manner and format that facilitates cross-firm analysis and comprehensive monitoring of all SBS Entities registered with the Commission. For example, the Commission could by order or rule require SBS Entities to file the financial and operational information with FINRA using the FOCUS Report Part IIC but permit the information input into the form to be the same information the SBS Entity reports to BaFin or other European supervisors.¹⁰² Further, the Commission could specify that as a condition to the substituted compliance, an SBS Entity may present the information reported in the FOCUS Report Part IIC in accordance with generally accepted accounting principles (“GAAP”) that the SBS Entity uses

¹⁰¹ See Order Designating Financial Industry Regulatory Authority, Inc., to Receive Form X-17A-5 (FOCUS Report) from Certain Security-Based Swap Dealers and Major Security-Based Swap Participants, Exchange Release No. 34-88866 (May 14, 2020).

¹⁰² The Commission anticipates that it would be appropriate to tailor the line items required to be reported pursuant to this condition and is requesting comment on which, if any, line items in FOCUS Report Part IIC the SBS Entity does not otherwise report or record pursuant to applicable laws or regulations. Further, the Commission is requesting comment on whether it would be appropriate as a condition to substituted compliance for SBS Entities to file a FOCUS Report Part IIC with a limited number of the required line items filled out for two years. During this time, the Commission could further evaluate the scope of information SBS Entities should file.

to prepare general purpose financial statements in its home jurisdiction instead of U.S. GAAP if other GAAP, such as International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board (IASB), is used by the SBS Entity in preparing general purpose financial statements.

iv. Additional conditions applicable to Exchange Act rule 18a-8

Under the proposed Order, substituted compliance in connection with the notification requirements of Exchange Act rule 18a-8 is subject to the condition that the prudentially regulated SBS Entity: (1) simultaneously transmits to the principal office of the Commission or to an email address provided on the Commission's website a copy of any notice required to be sent by the German notification laws; and (2) includes with the transmission the contact information of an individual who can provide further information about the matter that is the subject of the notice. The purpose of this condition is to alert the Commission to financial or operational problems that could adversely affect the firm – the objective of Exchange Act rule 18a-8.

In addition, under the proposed Order, substituted compliance in connection with the notification requirements of Exchange Act rule 18a-8 is subject to the condition that the prudentially regulated SBS Entity comply with the notification requirement of Exchange Act rule 18a-8(g) if the firm is not exempt from Exchange Act rule 18a-4. This rule requires notification if the firm fails to make in its special reserve account for the exclusive benefit of security-based swap customers a deposit, as required by Exchange Act rule 18a-4(c). As discussed above, substituted compliance is not available for Exchange Act rule 18a-4.

3. Examination and production of records

Every SBS Entity registered with the Commission, whether complying directly with Exchange Act requirements or relying on substituted compliance as a means of complying with

the Exchange Act, is required to satisfy the inspection and production requirements imposed on such entities under the Exchange Act.¹⁰³ Covered entities may make, keep, and preserve records, subject to the conditions described above, in a manner prescribed by applicable European and German requirements. The Commission notes that as an element of its substituted compliance application, BaFin has provided the Commission with adequate assurances that no law or policy would impede the ability of any entity that is directly supervised by the authority and that may register with the Commission “to provide prompt access to the Commission to such entity's books and records or to submit to onsite inspection or examination by the Commission.”

Consistent with those assurances and the requirements that apply to all registered SBS Entities under the Exchange Act, prudentially regulated SBS Entities will need to keep books and records open to inspection by any representative of the Commission and to furnish promptly to a representative of the Commission legible, true, complete, and current copies of those records of the firm that these entities are required to preserve under Exchange Act rule 18a-6 (which would include records for which a positive substituted compliance determination is being made with respect to Exchange Act rule 18a-6 under this order), or any other records of the firm that are subject to examination or required to be made or maintained pursuant to Exchange Act section 15F that are requested by a representative of the Commission.

VIII. Additional Considerations regarding Supervisory and Enforcement Effectiveness in Germany

A. General considerations

As noted above, Exchange Act rule 3a71-6 provides that the Commission’s assessment of the comparability of the requirements of the foreign financial regulatory system take into account

¹⁰³ See Exchange Act section 15F(f); Exchange Act rule 18a-6(g).

“the effectiveness of the supervisory program administered, and the enforcement authority exercised” by the foreign financial regulatory authority. This prerequisite accounts for the understanding that substituted compliance determinations should reflect the reality of the foreign regulatory framework, in that rules that appear high-quality on paper nonetheless should not form the basis for substituted compliance if – in practice – market participants are permitted to fall short of their regulatory obligations. This prerequisite, however, also recognizes that differences among the supervisory and enforcement regimes should not be assumed to reflect flaws in one regime or another.¹⁰⁴

In connection with these considerations, BaFin’s application includes information regarding the German supervisory and enforcement framework applicable to derivatives markets and market participants. This includes information regarding the supervisory and enforcement authority afforded to BaFin to promote compliance with applicable requirements, applicable supervisory and enforcement tools and capabilities, consequences of non-compliance, and the application of BaFin’s supervisory and enforcement practices in the cross-border context.

In preliminarily concluding that the relevant supervisory and enforcement considerations are consistent with substituted compliance, the Commission particularly has considered the following factors:

B. Supervisory framework in Germany

Supervision of credit institutions located in Germany is conducted by both BaFin and the European Central Bank (“ECB”). BaFin supervises credit institutions for compliance with the WpHG (the German Securities Trading Act), MiFID, and EMIR. The ECB, through joint supervisory teams (“JSTs”) comprising ECB staff, BaFin staff, and staff from other countries in

¹⁰⁴ See generally Business Conduct Adopting Release, 81 FR at 30079.

the EU where the institution has a subsidiary or branch, supervises credit institutions that are classified as significant institutions for compliance with the CRD and CRR.¹⁰⁵ Both BaFin and the ECB are able to request records needed for supervision from credit institutions through the supervisory process. In addition, both BaFin and the ECB set annual priorities and conduct thematic reviews that are used to deepen supervision in specific regulatory areas. The results of these thematic reviews are made public and are used to provide transparency to the industry.

1. BaFin supervisory considerations

BaFin's supervision over credit institutions is conducted by multiple supervisors who are in frequent contact with the firms. The supervisors review various reports submitted to BaFin to ensure they are complete, accurate and timely, including the independent auditor reports that are required by statute in Germany.¹⁰⁶ Supervisors review each report against other information they have about the firm to look for inconsistencies. Depending on the issue, BaFin's supervisors follow up with the firm in a variety of ways to ensure that the auditor's findings have been remedied, including document and data requests, meetings with compliance staff, formal meetings with senior management, onsite inspections, requiring a special audit, or accompanying the auditors on the annual audit or a special audit. BaFin requires special audits when it suspects a violation of a regulatory provision. During a special audit, BaFin will provide the independent auditor with comprehensive and detailed information on the scope of the audit and the issues and

¹⁰⁵ All credit institutions supervised under the ECB's single supervision mechanism are classified as significant institutions or less significant institutions. Additional information on how credit institutions are classified is available at: https://www.bankingsupervision.europa.eu/press/publications/newsletter/2018/html/ssm.nl181114_3.en.html.

¹⁰⁶ Although the credit institution can choose its auditor, the auditor must be approved by BaFin. BaFin also has the authority to require a firm to change its auditor, to direct the areas that the auditor must review, or to take over the audit.

questions that need to be addressed. BaFin staff is in close contact with the auditor and discusses preliminary findings and the progress of the audit. The auditor issues a final report to BaFin on the audit, which serves as a basis for further regulatory measures.

BaFin's specialized divisions engage in daily supervision of the markets. Should they detect misconduct, they have the authority to initiate administrative procedures in order to halt it. The specialized divisions also may refer the misconduct to the Division for Administrative Offence Proceedings for enforcement, or, in the case of a criminal offense, must refer the case to the state prosecutor for criminal consideration.

2. ECB and JST supervisory considerations

Supervision of credit institutions' compliance with the CRD and CRR is conducted through the ECB's single supervisory mechanism and executed by JSTs. The head of the JST is from the ECB and generally is not from the country where the significant institution is located. As part of its day-to-day supervision, the JST analyzes the supervisory reporting, financial statements, and internal documentation of supervised entities. The JSTs hold regular and ad hoc meetings with the supervised entities at various levels of staff seniority. They conduct ongoing risk analyses of approved risk models, and analyze and assess the recovery plans of supervised entities. The various supervisory activities typically result in supervisory measures addressed to the supervised institution. Supervisory activities and decisions result in a number of routine steps such as the monitoring of compliance by the JST and, if necessary, enforcement measures and sanctions. In addition to ongoing supervision, the JST may conduct in-depth reviews on certain topics by organizing a dedicated onsite mission (*e.g.*, an inspection or an internal model investigation). The onsite inspections are carried out by an independent inspection team, which works in close cooperation with the respective JST.

C. Enforcement authority in Germany

The Securities Trading Act empowers BaFin Securities Supervision to compel in an investigation, via formal request, information from any person, including responses to questions, documents, or other data. In addition, its Division for Administrative Offence Proceedings has the authority to compel unsworn testimony from witnesses and subjects of an investigation, but under German law, the subject of the investigation is not required to answer questions about the accusation.

When a matter has been referred for enforcement proceedings, BaFin Securities Supervision is authorized to impose a range of sanctions. The main sanctioning tool is imposition of financial penalties. Other sanctions include publishing warnings on BaFin's website, prohibiting certain trading, requiring cessations of the misconduct, and prohibiting an individual from exercising professional activity. Because BaFin's general focus is to ensure compliance with the applicable regulatory framework, investigations do not always result in a sanction process.

Misconduct detected by the JSTs is addressed primarily by the ECB. The ECB has the power to enforce violations and to impose fines on supervised entities for breaches of directly applicable European Union law. The ECB can also ask national competent authorities (such as BaFin) to open proceedings that may lead to the imposition of certain pecuniary and non-pecuniary penalties.

IX. Request for Comment

Commenters are invited to address all aspects of the application, the Commission's preliminary views and the proposed Order.

A. General aspects of the comparability assessments and proposed Order

The Commission requests comment regarding the preliminary views and proposed Order in connection with each of the general “regulatory outcome” categories addressed above.

Commenters particularly are invited to address, among other issues:

- Whether the relevant German and EU provisions generally are sufficient to produce regulatory outcomes that are comparable to the outcomes associated with requirements under the Exchange Act;
- Whether the conditions and limitations of the proposed Order would adequately address potential gaps in the relevant regulatory outcomes;
- Whether additional or fewer conditions or limitations would be appropriate for enhancing regulatory efficiency while promoting regulatory outcomes that are comparable to those arising under the Exchange Act;
- Whether the proposed conditions and limitations sufficiently guard against comparability gaps arising from the cross-border application of German or EU requirements (including when SBS Entities conduct security-based swap business through branches located in the United States or in third countries);
- Whether the proposed conditions and limitations sufficiently guard against comparability gaps arising from the cross-border application of German or EU requirements, including when SBS Entities conduct security-based swap business through branches located in other EU jurisdictions, and when SBS Entities conduct that business through branches located in the United States or in third countries; and
- Any implementation or other practical issues that may arise due to the proposed conditions and limitations.

Commenters also are invited to address the references to EU directives (e.g., MiFID and CRD) that are incorporated into the conditions to the proposed Order. EU directives by themselves do not apply to market participants, but instead require implementation by member states (see notes 25 and 27, supra). As drafted, the conditions to the proposed Order not only would require Covered Entities to comply with EU regulations (which directly are applicable to market participants) and with German laws implementing EU directives, but also incorporate references to relevant EU directives. Commenters are invited to address the implication of those references to EU directives, including whether their inclusion may raise questions regarding the availability of substituted compliance.

B. Risk control requirements

The Commission further requests comment regarding the proposed conditions in connection with the risk control requirements.

Trading relationship documentation and MiFID “eligible counterparty” exclusion – Commenters in part are requested to address the potential impact of the condition that would disapply application of the MiFID “eligible counterparty” exclusion in connection with substituted compliance for the trading relationship documentation requirements. What potential disruption may arise as a result of that condition? Is that condition necessary given the related EU requirements that are not subject to the MiFID “eligible counterparty” exclusion – i.e., EMIR Margin RTS article 2 (regarding procedures providing for or specifying the terms of agreements), EMIR article 11(1)(a) (regarding bilateral confirmations), and MiFID article 25(6) and MiFID Org Reg article 59 (regarding required reports on services)? Are there more targeted conditions that would effectively promote the relevant regulatory outcomes?

Trading relationship documentation disclosure provisions – In addition, commenters are requested to address whether the proposal appropriately excludes the provisions of paragraph

(b)(5) of rule 15Fi-5 from the scope of substituted compliance in connection with trading relationship documentation, on the basis that the German and EU documentation requirements would not be expected to subsume those disclosures. Also, should the proposal be modified to further exclude the clearing disclosure provisions of paragraph (b)(6) of rule 15Fi-5 from the scope of substituted compliance, for similar reasons?¹⁰⁷

Risk management systems – Commenters further are requested to address the set of German and EU requirements that Covered Entities must satisfy as conditions to substituted compliance in connection with risk management system requirements (as well as in connection with the internal supervision and compliance requirements addressed below), including whether any additions to or subtractions from those conditions are warranted. In this respect the Commission notes that although the proposed conditions in connection with those requirements generally incorporate CRD requirements related to internal governance (CRD article 74), treatment of risk (CRD article 76), additional risk-related practices (CRD articles 79-87), governance arrangements (CRD article 88), management body responsibilities (CRD article 91) and remuneration (CRD articles 92-95),¹⁰⁸ the proposed conditions do not incorporate certain CRD requirements related to management body activities and recruitment.¹⁰⁹ While the Commission is mindful that the holistic approach toward substituted compliance generally necessitates a focus on the U.S. and foreign regulatory regimes as a whole, those foreign

¹⁰⁷ Paragraph (b)(6) to rule 15Fi-5 requires that trading relationship documentation include a notice containing information regarding certain consequences of a security-based swap being accepted by a clearing agency.

¹⁰⁸ See paragraphs (b)(1) and (c)(3) to the proposed Order.

¹⁰⁹ The proposed conditions in connection with the risk control requirements and internal supervision and compliance requirements particularly do not incorporate CRD articles 88(2), 91(3)-(6) and 91(10) and KWG sections 25c(2), 25d(3) and 25d(11), which address nomination committees, outside directorships, and management body qualities and diversity.

requirements related to management body activities and recruitment appear significantly different from the U.S. internal supervision and compliance requirements at issue. The Commission accordingly believes that, on balance, the conditions to substituted compliance should not subsume those particular CRD requirements. The Commission invites comment regarding whether this aspect of the proposal strikes the correct balance.

Delivery of trade acknowledgements – Commenters are invited to address whether substituted compliance in connection with trade acknowledgment and verification requirements should be conditioned on Covered Entities having to use electronic means to provide relevant information to clients pursuant to applicable EU requirements. In this regard, the Commission notes that Exchange Act rule 15Fi-2(c) requires that trade acknowledgments be provided via “electronic means,” while MiFID Org Reg article 59 instead states that applicable disclosures must be in a “durable medium” but does not appear to explicitly mandate electronic disclosure.

Timing of dispute reporting – Commenters also are requested to address whether substituted compliance in connection with dispute reporting appropriately may be satisfied by disclosing information to the Commission based on the 15 business day standard of EMIR RTS art. 15(2), in lieu of the three to five business day standard prescribed by rule 15Fi-3(c).

Applicability of relevant requirements under EMIR – Substituted compliance for Exchange Act rules 15Fi-2 through 15Fi-4, related to trade acknowledgments and verifications, portfolio reconciliation and dispute reporting, and portfolio compression, in part are conditioned on EMIR article 11 requirements that are linked to the presence of an “OTC derivative contract not cleared by a CCP.”¹¹⁰ Those Exchange Act rules similarly do not apply to cleared security-

¹¹⁰ EMIR article 2(3) defines “OTC derivative contract” by reference to derivatives not executed on a “regulated market” within the meaning of article 4(1)(14) of MiFID I (Directive 2004/39/EC,

based swaps. Commenters are invited to address whether there are any differences between the scope of the EMIR requirements and the scope of those Exchange Act rules that may lead to uncertainty or otherwise complicate the implementation of substituted compliance in connection with those requirements.

C. Internal supervision, chief compliance officer and additional Exchange Act section 15F(j) requirements

The Commission also requests comment regarding the proposed conditions in connection with the internal supervision, chief compliance officer and additional Exchange Act section 15F(j) requirements.

“As if” compliance condition – Commenters particularly are invited to address the proposed condition that SBS Entities apply relevant German and EU supervisory and compliance provisions “as if” those provisions also promoted the SBS Entities’ compliance with applicable requirements under the Exchange Act (i.e., requirements that are not satisfied via substituted compliance) and the other conditions to the Order. To what extent would this condition lead to implementation issues, including but not limited to issues regarding how SBS Entities – in practice – would leverage existing supervisory and compliance frameworks to comply with this condition? Would alternative approaches, more targeted conditions or further guidance promote regulatory outcomes that are comparable to outcomes under the Exchange Act, while reducing implementation issues?

Annual reports pursuant to EU rules – Commenters also are invited to address the proposed condition that SBS Entities provide to the Commission, at least annually, certified English-language versions of the annual compliance reports required under MiFID Org Reg

the predecessor to the current version of MiFID) or on a third country market considered as equivalent to a regulated market in accordance with article 19(6) of MiFID I.

article 22(2)(c) that also address compliance with other conditions to the Order. Are those compliance reports sufficient to provide the Commission with compliance-related information that is comparable to the information required by Exchange Act section 15F(k)(3) and Exchange Act rule 15Fk-1(c)? If not, how may the condition appropriately be modified? Could the proposed condition impose implementation issues? Would alternative approaches or more targeted conditions promote regulatory outcomes that are comparable to those under the Exchange Act while reducing implementation issues? Should the condition also require SBS Entities to provide the Commission with ad hoc compliance reports required pursuant to MiFID Org Reg article 22(3)(c)?

D. Counterparty protection requirements

The Commission also requests comment regarding the proposed conditions in connection with counterparty protection requirements. Commenters particularly are invited to address the Commission's preliminary view that German and EU requirements are not comparable to clearing rights disclosure requirements under the Exchange Act. Do any German or EU requirements compare in scope and objective to the clearing rights disclosure requirements under the Exchange Act?

Commenters also are invited to address the Commission's preliminary view that German and EU portfolio reconciliation requirements are comparable to Exchange Act daily mark disclosure requirements only for transactions required to be reconciled each business day. Should the Commission instead allow substituted compliance for daily mark disclosure requirements for any uncleared OTC derivative contract that is subject to German and EU portfolio reconciliation requirements, even if reconciliation is required on less than a daily basis? Should the Commission allow substituted compliance for daily mark disclosure requirements for any OTC derivative contract for which margin is exchanged, even if German and EU portfolio

reconciliation requirements do not require that contract to be reconciled? Similarly, are the scope and objectives of German and EU trade reporting requirements comparable to the scope and objectives of Exchange Act daily mark disclosure requirements? Do the scope and/or objectives of those German and EU requirements differ in important ways from the scope and/or objectives of daily mark disclosure requirements under the Exchange Act?

Commenters also are invited to address the proposed condition that would require an SBS Entity's counterparty to be a per se "professional client" that is not a "special entity," for substituted compliance to be available for Exchange Act suitability requirements. Would that condition appropriately limit substituted compliance to recommendations that are subject to German and EU suitability requirements comparable to those under the Exchange Act? Would the absence of that condition permit SBS Entities to comply with materially narrower German and EU suitability requirements in lieu of broader Exchange Act suitability requirements? Would that condition cause any market disruption or be difficult to implement? Would alternative approaches or more targeted conditions effectively promote the counterparty protection objectives of the Exchange Act suitability requirement while reducing implementation issues?

Commenters also are invited to address whether the Commission should allow SBS Entities to use substituted compliance for Exchange Act material incentives or conflicts of interest disclosure requirements if the SBS Entity is subject to and complies with German and EU laws that require the SBS Entity to have organizational arrangements to prevent conflicts of interest from adversely affecting the interest of the SBS Entity's client and, when those arrangements are not sufficient to ensure with reasonable confidence that risks of damage to client interests will be prevented, to disclose a conflict of interest and the steps taken to mitigate

those risks. Would permitting substituted compliance in the latter scenario achieve comparable regulatory outcomes as the relevant Exchange Act disclosure requirements? Should the Commission limit substituted compliance for Exchange Act material incentives or conflicts of interest disclosure requirements only to conflicts of interest for which German and EU laws require disclosure because the organizational arrangements are not sufficient as described above? Would limiting substituted compliance in this way cause any market disruption or be difficult to implement? Would alternative approaches effectively promote the counterparty protection objectives of the Exchange Act disclosure requirements while reducing implementation issues?

E. Recordkeeping, reporting, and notification

The Commission also requests comment regarding the proposed conditions with respect to the recordkeeping, reporting, and notification requirements. Commenters particularly are invited to address the proposed condition with respect to Exchange Act rule 18a-5 that the prudentially regulated SBS Entity: (a) preserve all of the data elements necessary to create the records required by Exchange Act rules 18a-5(b)(1), (2), (3), and (7); and (b) upon request furnish promptly to representatives of the Commission the records required by those rules. Do the relevant German and EU laws require prudentially regulated SBS Entities to retain the data elements necessary to create the records required by these rules? If not, please identify which data elements are not preserved pursuant to the relevant German and EU laws. Further, how burdensome would it be for a prudentially regulated SBS Entity to format the data elements into the records required by these rules (e.g., a blotter, ledger, or securities record, as applicable) if the firm was requested to do so? In what formats do prudentially regulated SBS Entities in Germany produce this information to BaFin or other European authorities? How do those formats differ from the formats required by Exchange Act rules 18a-5(b)(1), (2), (3), and (7)?

Commenters also are invited to address the proposal that a positive substituted compliance determination with respect to Exchange Act rule 18a-7 would be conditioned on the SBS Entity filing financial and operational information with the Commission in the manner and format specified by the Commission by order or rule. Because the Commission does not have responsibility to administer capital and margin requirements for prudentially regulated SBS Entities, the FOCUS Report Part IIC elicits much less information than the FOCUS Report Part II or the financial reports SBS Entities file with BaFin and/or other European authorities. Should the Commission require SBS Entities to file the financial and operational information using the FOCUS Report Part IIC? Are there line items on the FOCUS Report Part IIC that elicit information that is not included in the reports SBS Entities file with BaFin and/or other European authorities? If so, do SBS Entities record that information in their required books and records? Please identify any information that is elicited in the FOCUS Report Part IIC that is not: (1) included in the financial reports filed by SBS Entities with BaFin and/or other European authorities; or (2) recorded in the books and records required of SBS Entities. Would the answer to these questions change if references to FFIEC Form 031 were not included in the FOCUS Report Part IIC? If so, how? As a preliminary matter, as a condition of substituted compliance should SBS Entities file a limited amount of financial and operational information on the FOCUS Report Part IIC for a period of two years to further evaluate the burden of requiring all applicable line items to be filled out? If so, which line items should be required? To the extent that SBS Entities otherwise report or record information that is responsive to the FOCUS Report Part IIC, how could the information on these reports be integrated into a database of filings the Commission or its designee will maintain for filers of the FOCUS Report Parts II and IIC (e.g.,

the eFOCUS system) to achieve the objective of being able to perform cross-form analysis of information entered into the uniquely numbered line items on the forms?

In addition, commenters are invited to address the Commission's preliminary view that a substituted compliance determination with respect to the recordkeeping, reporting, and notification requirements applicable to nonbank SBS Entities be made in connection with an application for substituted compliance with respect to the capital and margin requirements applicable to nonbank SBS Entities. For example, are there recordkeeping, reporting, and notification requirements applicable to nonbank SBS Entities that the Commission should consider for substituted compliance in the context of this application? If so, please identify the requirements and explain why the Commission should consider them.

Further, if the Commission makes a positive substituted compliance determination with respect to the underlying requirements and the related record making and record preservation requirements applicable to prudentially regulated SBS Entities, should the Commission also make a positive substituted compliance determination with respect to parallel record making and record preservation requirements for SBS Entities that do not have a prudential regulator? In particular, in this circumstance, should the Commission make a positive substituted compliance determination with respect to the following record making and record preservation requirements applicable to SBS Entities that do not have a prudential regulator: Exchange Act rule 18a-5(a)(18) (regarding making portfolio reconciliation records), Exchange Act rule 18a-6(d)(4)-(5) (regarding portfolio reconciliation retention), Exchange Act rule 18a-5(a)(16)-(17) with respect to requirements of Exchange Act rules 15Fh-3 and 15Fk-1 to which the proposed order extends (regarding making records evidencing compliance with business conduct standards), Exchange Act rule 18a-6(b)(1)(xii) with respect to requirements of Exchange Act rules 15Fh-3 and 15Fk-1

to which the proposed order extends (regarding business conduct record retention), and Exchange Act rule 18a-5(a)(15) (regarding making non-verified security-based swap records)? If so, explain why.

Finally, if the Commission makes a positive substituted compliance determination with respect to other record making and record preservation requirements applicable to prudentially regulated SBS Entities where there is a parallel requirement applicable to SBS Entities without a prudential regulator, should the Commission make a substituted compliance determination with respect to the parallel requirements? If so, identify the parallel requirements and explain why the Commission should make a positive substituted compliance determination.

F. Supervisory and enforcement issues

The Commission further requests comment regarding how to weigh considerations regarding supervisory and enforcement effectiveness in Germany as part of the comparability assessments. Commenters particularly are invited to address relevant issues regarding the effectiveness of German supervision and enforcement over firms that may register with the Commission as SBS Entities, including but not limited to issues regarding:

- BaFin and ECB supervisory and enforcement authority, supervisory inspection practices and the use of alternative supervisory tools, and enforcement tools and practices;
- BaFin and ECB supervisory and enforcement effectiveness with respect to derivatives such as security-based swaps;
- BaFin and ECB supervision and enforcement in the cross-border context (e.g., any differences between the oversight of firms' businesses within Germany and the oversight of activities and branches outside of Germany, including within the United States); and

- BaFin supervision and enforcement effectiveness with respect to investment firms as compared to BaFin and ECB supervision and enforcement effectiveness with respect to credit institutions.

By the Commission.

Vanessa A. Countryman,
Secretary.

ATTACHMENT A**SECURITIES AND EXCHANGE COMMISSION**

(Release No. 34-)

[DATE]

Order providing for Conditional Substituted Compliance to Certain German Security-Based Swap Dealers and Major Security-Based Swap Participants

IT IS HEREBY ORDERED, pursuant to rule 3a71-6 under the Exchange Act, that a Covered Entity (as defined in paragraph (f)(1) of this Order) may satisfy the requirements under the Exchange Act that are addressed in paragraphs (b) through (e) of this Order so long as the Covered Entity is subject to and complies with relevant requirements of the Federal Republic of Germany and the European Union and with the conditions to this Order.

(a) General conditions.

This Order is subject to the following general conditions, in addition to the conditions specified in paragraphs (b) through (e):

(1) Activities as “investment services or activities.” For each condition in paragraphs (b) through (e) of this Order that requires the application of, and the Covered Entity’s compliance with, provisions of MiFID, WpHG, and/or other EU and German requirements adopted pursuant to those provisions, the Covered Entity’s relevant security-based swap activities constitute “investment services” or “investment activities,” as defined in MiFID article 4(1)(2) and in WpHG section 2(8), and fall within the scope of the Covered Entity’s authorization from BaFin to provide investment services and/or perform investment activities in the Federal Republic of Germany.

(2) Counterparties as “clients.” For each condition in paragraphs (b) through (e) of this Order that requires the application of, and the Covered Entity’s compliance with, provisions of MiFID, WpHG and/or other EU and German requirements adopted pursuant to those provisions,

the relevant counterparty (or potential counterparty) to the Covered Entity is a “client” (or potential “client”), as defined in MiFID article 4(1)(9) and in WpHG section 67(1).

(3) Security-based swaps as “financial instruments.” For each condition in paragraphs (b) through (e) of this Order that requires the application of, and the Covered Entity’s compliance with, provisions of MiFID, WpHG and/or other EU and German requirements adopted pursuant to those provisions, the relevant security-based swap is a “financial instrument,” as defined in MiFID article 4(1)(15) and in WpHG section 2(4).

(4) Covered Entity as “institution.” For each condition in paragraph (b) through (e) of this Order that requires the application of, and the Covered Entity’s compliance with, the provisions of the CRD, KWG, CRR and/or other EU and German requirements adopted pursuant to those provisions, the Covered Entity is an “institution,” as defined in CRD article 3(1)(3), in CRR article 4(1)(3) and in KWG section 1(1b).

(5) Memorandum of Understanding. The Commission and BaFin have a supervisory and enforcement memorandum of understanding and/or other arrangement addressing cooperation with respect to this Order at the time the Covered Entity complies with the relevant requirements under the Exchange Act via compliance with one or more provisions of this Order.

(6) Notice to Commission. A Covered Entity relying on this Order must provide notice of its intent to rely on this Order by notifying the Commission in writing. Such notice must be sent to an email address provided on the Commission's website. The notice must include the contact information of an individual who can provide further information about the matter that is the subject of the notice.

(7) European Union Cross-Border Matters. If, in relation to a particular service provided by a Covered Entity, responsibility for ensuring compliance with any provision of MiFID or any

other EU or German requirement adopted pursuant to MiFID listed in paragraphs (b) through (e) of this Order is allocated to an authority of the Member State of the European Union in whose territory a Covered Entity provides the service, BaFin must be the authority responsible for supervision and enforcement of that provision or requirement in relation to the particular service. If responsibility for ensuring compliance with any provision of MAR or any other EU requirement adopted pursuant to MAR listed in paragraphs (b) through (e) of this Order is allocated to one or more authorities of a Member State of the European Union, one of such authorities must be BaFin.

(b) Substituted compliance in connection with risk control requirements.

This Order extends to the following provisions related to risk control:

(1) Internal risk management. The requirements of Exchange Act section 15F(j)(2) and related aspects of Exchange Act rule 15Fh-3(h)(2)(iii)(I), provided that the Covered Entity is subject to and complies with the requirements of: MiFID articles 16(4) and 16(5); WpHG section 80; MiFID Org Reg articles 21-24; CRD articles 74, 76 and 79-87; KWG sections 25a, 25b, 25c (other than 25c(2)), 25d (other than 25d(3) and 25d(11)), 25(e) and 25(f); CRR articles 286-88 and 293; and EMIR Margin RTS article 2.

(2) Trade acknowledgement and verification. The requirements of Exchange Act rule 15Fi-2, provided that the Covered Entity is subject to and complies with the requirements of MiFID article 25(6), WpHG section 63(12), MiFID Org Reg articles 59-61, EMIR article 11(1)(a) and EMIR RTS article 12.

(3) Portfolio reconciliation and dispute reporting. The requirements of Exchange Act rule 15Fi-3, provided that:

(i) The Covered Entity is subject to and complies with the requirements of EMIR article 11(1)(b) and EMIR RTS article 13 and 15;

(ii) The Covered Entity provides the Commission with reports regarding disputes between counterparties on the same basis as it provides those reports to competent authorities pursuant to EMIR RTS article 15(2).

(4) Portfolio compression. The requirements of Exchange Act rule 15Fi-4, provided that the Covered Entity is subject to and complies with the requirements of EMIR RTS article 14.

(5) Trading relationship documentation. The requirements of Exchange Act rule 15Fi-5, other than paragraph (b)(5) to that rule, provided that:

(i) The Covered Entity is subject to and complies with the requirements of MiFID article 25(5), WpHG section 83(2), MiFID Org Reg articles 24, 56, 58, 73 and applicable parts of Annex I, and EMIR Margin RTS article 2; and

(ii) The Covered Entity does not treat the applicable counterparty as an “eligible counterparty” for purposes of MiFID article 30 and WpHG section 68.

(c) Substituted compliance in connection with internal supervision and compliance requirements and certain Exchange Act section 15F(j) requirements.

This Order extends to the following provisions related to internal supervision and compliance and Exchange Act section 15F(j) requirements:

(1) Internal supervision. The requirements of Exchange Act rule 15Fh-3(h) and Exchange Act sections 15F(j)(4)(A) and (j)(5), provided that:

(i) The Covered Entity is subject to and complies with the requirements identified in paragraph (c)(3);

(ii) The Covered Entity complies with paragraph (c)(4) to this Order; and

(iii) This paragraph (c) does not extend to the requirements of paragraph (h)(2)(iii)(I) to rule 15Fh-3 to the extent those requirements pertain to compliance with Exchange Act sections 15F(j)(2), (j)(3), (j)(4)(B) and (j)(6), or to the general and supporting provisions of paragraph (h) to rule 15Fh-3 in connection with those Exchange Act sections.

(2) Chief compliance officers. The requirements of Exchange Act section 15F(k) and Exchange Act rule 15Fk-1, provided that:

(i) The Covered Entity complies with the requirements identified in paragraph (c)(3) to this Order;

(ii) All reports required pursuant to MiFID Org Reg article 22(2)(c) must also:

(A) Be provided to the Commission at least annually, and in the English language;

(B) Include a certification that, under penalty of law, the report is accurate and complete;

and

(C) Address the firm's compliance with the other conditions to this Order.

(3) Applicable supervisory and compliance requirements. Paragraphs (c)(1) and (c)(2) are conditioned on the Covered Entity being subject to and complying with the following requirements: MiFID articles 16 and 23; WpHG sections 63, 80, 83 and 84; MiFID Org Reg articles 21-37, 72-76 and Annex IV; CRD articles 74, 76, 79-87, 88(1), 91(1)-(2), 91(7)-(9) and 92-95; and KWG sections 25a, 25b, 25c (other than 25c(2)), 25d (other than 25d(3) and 25d(11)), 25e and 25f.

(4) Additional condition to paragraph (c)(1). Paragraph (c)(1) further is conditioned on the requirement that Covered Entities comply with the provisions specified in paragraph (c)(3) as if those provisions also require compliance with:

(i) Applicable requirements under the Exchange Act; and

(ii) The other conditions to this Order.

(d) Substituted compliance in connection with counterparty protection requirements.

This Order extends to the following provisions related to counterparty protection:

(1) Disclosure of information regarding material risks and characteristics. The requirements of Exchange Act rule 15Fh-3(b) relating to disclosure of material risks and characteristics of a security-based swap, provided that the Covered Entity is subject to and complies with the requirements of MiFID article 24(4), WpHG sections 63(7) and 64(1) and MiFID Org Reg articles 48-50, in each case in relation to that security-based swap.

(2) Disclosure of information regarding material incentives or conflicts of interest. The requirements of Exchange Act rule 15Fh-3(b) relating to disclosure of material incentives or conflicts of interest that a Covered Entity may have in connection with a security-based swap, provided that the Covered Entity, in relation to that security-based swap, is subject to and complies with the requirements of either:

(i) MiFID article 23(2)-(3); WpHG section 63(2); and MiFID Org Reg articles 33-35;

(ii) MiFID article 24(9); WpHG section 70; and MiFID Delegated Directive article 11(5);

or

(iii) Market Abuse Regulation article 20(1).

(3) “Know your counterparty.” The requirements of Exchange Act rule 15Fh-3(e), provided that the Covered Entity is subject to and complies with the requirements of MiFID article 16(2); WpHG section 80(1); MiFID Org Reg articles 21-22, 25-26 and applicable parts of Annex I; CRD articles 74(1) and 85(1); KWG section 25a; MLD articles 11 and 13; GwG sections 10-11; MLD articles 8(3) and 8(4)(a) as applied to internal policies, controls and procedures regarding recordkeeping of customer due diligence activities; and GwG section 6(1)-

(2) as applied to principles, procedures and controls regarding recordkeeping of customer diligence activities, in each case in relation to that security-based swap.

(4) Suitability. The requirements of Exchange Act rule 15Fh-3(f), provided that:

(i) The Covered Entity is subject to and complies with the requirements of MiFID articles 24(2)-(3) and 25(1)-(2); WpHG sections 63(5)-(6), 80(9)-(13) and 87(1)-(2); and MiFID Org Reg articles 21(1)(b) and (d), 54 and 55, in each case in relation to the recommendation that is provided by or on behalf of the Covered Entity; and

(ii) The counterparty to which the Covered Entity makes the recommendation is a “professional client” mentioned in MiFID Annex II section I and WpHG section 67(2) and is not a “special entity” as defined in Exchange Act section 15F(h)(2)(C) and Exchange Act rule 15Fh-2(d).

(5) Fair and balanced communications. The requirements of Exchange Act rule 15Fh-3(g), provided that the Covered Entity, in relation to the relevant communication, is subject to and complies with the requirements of:

(i) Either MiFID articles 24(1), (3) and WpHG sections 63(1), (6) or MiFID article 30(1) and WpHG section 68(1); and

(ii) MiFID articles 24(4)-(5); WpHG sections 63(7) and 64(1); MiFID Org Reg articles 46-48; Market Abuse Regulation articles 12(1)(c) and 15; and MAR Investment Recommendations Regulation article 5.

(6) Daily mark disclosure. The requirements of Exchange Act rule 15Fh-3(c), provided that the Covered Entity is required to reconcile, and does reconcile, the portfolio containing the relevant security-based swap on each business day pursuant to EMIR articles 11(1)(b) and 11(2) and EMIR RTS article 13.

(e) Substituted compliance in connection with recordkeeping, reporting, and notification requirements.

This Order extends to the following provisions related to Commission requirements to:

(1) Make and keep current certain records. The requirements to make and keep current records of Exchange Act rule 18a-5 applicable to prudentially regulated security-based swap dealers and major security-based swap participants; provided that:

(i) The Covered Entity is subject to and complies with the following requirements: CRR articles 103 and 103(b)(ii); EMIR articles 9(2), 11(1)(a), and 39(4); EMIR RTS 148/2013; MiFID articles 9(1), 16(3), 16(6)-16(9), 25(1), 25(5), and 25(6); MiFID Delegated Directive article 2; MiFID Org Reg. articles 16(7), 21(1)(a), 35, 59, 72, 73, 74, 75, 76, and applicable parts of Annex I; MiFID Org Reg. Annex IV; MiFIR article 25; MLD4 articles 11 and 13; EBA/ESMA Guidelines on Management Suitability guidelines 74, 75, and 172, and Annex III; CRD articles 88, 91(1), and 91(8); KWG sections 25c(1) and 25d(1)-(3); WpHG section 63, section 64, section 81 paragraph 1, section 83 paragraphs 1 through 8, and section 84; and GwG section 10, paragraph 1, points 1 through 3;

(ii)(A) The Covered Entity preserves all of the data elements necessary to create the records required by Exchange Act rules 18a-5(b)(1), (2), (3), and (7); and

(B) The Covered Entity upon request furnishes promptly to representatives of the Commission the records required by those rules;

(iii) The Covered Entity makes and keeps current the records required by Exchange Act rules 18a-5(b)(9) and (10) if the Covered Entity is not exempt from the requirements of Exchange Act rule 18a-4;

(iv) The Covered Entity makes and keeps current the records required by Exchange Act rule 18a-5(b)(12); and

(v) Except with respect to requirements of Exchange Act rules 15Fh-3 and 15Fk-1 to which this Order extends pursuant paragraphs (c)(2) and (d), the Covered Entity makes and keeps current the records required by Exchange Act rule 18a-5(b)(13).

(2) Preserve records. The record preservation requirements of Exchange Act rule 18a-6 applicable to prudentially regulated security-based swap dealers and major security-based swap participants; provided that:

(i) The Covered Entity is subject to and complies with the following requirements: CRD articles 88, 91(1), and 91(8); CRR articles 99, 104(1)(j), 294, 394, 415-428, and 430; CRR Reporting ITS Article 14 and Annexes I-V, VIII-XIII; EMIR articles 9(1) and 9(2); MiFID articles 9(1), 16(3), and 69(2); MiFID Org Reg. articles 21(1)(a), 21(2), 35, 58, 72(1), 72(3), 73, and 76; MiFIR articles 16(2), 16(5), 16(6), 16(7), 25(1), 25(5), 31(1) and 72; MLD4 articles 11 and 13; EBA/ESMA Guidelines on Management Suitability guidelines 74, 75, and 172, and Annex III; EBA Guidelines on Outsourcing section 13.3; KWG 25c(1) and 25d(1)-(3); WpHG sections 6, 7, 63, 64, and 80 and section 83 paragraphs 1, 2, 3, and 8; and GwG sections 10 and 11;

(ii) The Covered Entity preserves the records required by Exchange Act rule 18a-6(b)(2)(v) if the Covered Entity is not exempt from the requirements of Exchange Act rule 18a-4;

(iii) Except with respect to requirements of Exchange Act rules 15Fh-3 and 15Fk-1 to which this Order extends pursuant to paragraphs (c)(2) and (d), the Covered Entity preserves the records required by Exchange Act rule 18a-6(b)(2)(vii); and

(iv) The Covered Entity preserves the records required by Exchange Act rule 18a-6(b)(2)(vi) and (b)(2)(viii).

(3) File Financial and Operational Information. The reporting requirements of Exchange Act rule 18a-7 applicable to prudentially regulated security-based swap dealers and major security-based swap participants; provided that:

(i) The Covered Entity is subject to and complies with the following requirements: CRR articles 99, 104(1)(j), 394, 415-428, and 430; CRR Reporting ITS chapter 2 and Annexes I-V and VII-XIII; and Commission Delegated Regulation (EU) 2017/1443, as amended from time to time; and

(ii) The Covered Entity files financial and operational information with the Commission or its designee in the manner and format required by Commission rule or order.

(4) Provide Notification. The notification requirements of Exchange Act rule 18a-8 applicable to prudentially regulated security-based swap dealers and major security-based swap participants; provided that:

(i) The Covered Entity is subject to and complies with the following requirements: CRD article 71; MiFID article 73; KWG section 24 paragraph 1; and FinDAG section 4d; and

(ii) The Covered Entity:

(A) Simultaneously transmits to the principal office of the Commission or to an email address provided on the Commission's website a copy of any notice required to be sent by the German and EU laws referenced in paragraph (e)(3)(i) of this order; and

(B) Includes with the transmission the contact information of an individual who can provide further information about the matter that is the subject of the notice;

(iii) The Covered Entity complies with notification requirements of Exchange Act rule 18a-8(g) if the Covered Entity is not exempt from Exchange Act rule 18a-4.

(4) Examination and Production of Records. Notwithstanding the forgoing provisions of paragraph (e) of this Order, prudentially regulated security-based swap dealers and major security-based swap participants remains subject to the requirement of Exchange Act section 15F(f) to keep books and records open to inspection by any representative of the Commission and the requirement of Exchange Act rule 18a-6(g) to furnish promptly to a representative of the Commission legible, true, complete, and current copies of those records of the Covered Entity that are required to be preserved under Exchange Act rule 18a-6, or any other records of the Covered Entity that are subject to examination or required to be made or maintained pursuant to Exchange Act section 15F that are requested by a representative of the Commission.

(f) Definitions.

(1) “Covered Entity” means an entity that:

(i) Is a security-based swap dealer or major security-based swap participant registered with the Commission;

(ii) Is not a “U.S. person,” as that term is defined in rule 3a71-3(a)(4) under the Exchange Act; and

(iii) Is an investment firm or credit institution authorized by BaFin to provide investment services or perform investment activities in the Federal Republic of Germany.

(2) “MiFID” means the “Markets in Financial Instruments Directive,” Directive 2014/65/EU, as amended from time to time.

(3) “WpHG” means Germany’s “Wertpapierhandelsgesetz”, as amended from time to time.

(4) “MiFID Org Reg” means Commission Delegated Regulation (EU) 2017/565, as amended from time to time.

- (5) “MiFID Delegated Directive” means Commission Delegated Directive (EU) 2017/593, as amended from time to time.
- (6) “MLD” means Directive (EU) 2015/849, as amended from time to time.
- (7) “GwG” means Germany’s “Geldwäschegesetz,” as amended from time to time.
- (8) “MiFIR” means Regulation (EU) 600/2014, as amended from time to time.
- (9) “EMIR” means the “European Market Infrastructure Regulation,” Regulation (EU) No 648/2012, as amended from time to time.
- (10) “EMIR RTS” means Commission Delegated Regulation (EU) No 149/2013, as amended from time to time.
- (11) “CRR Reporting ITS” means Commission Implementing Regulation (EU) 680/2014, as amended from time to time.
- (12) “CRD” means Directive 2013/36/EU, as amended from time to time.
- (13) “KWG” means Germany’s “Kreditwesengesetz,” as amended from time to time.
- (14) “CRR” means Regulation (EU) No 575/2013, as amended from time to time.
- (15) “Market Abuse Regulation” means Regulation (EU) 596/2014, as amended from time to time.
- (16) “MAR Investment Recommendations Regulation” means Commission Delegated Regulation (EU) 2016/958, as amended from time to time.
- (17) “FinDAG” means Germany’s “Finanzdienstleistungsaufsichtsgesetz,” as amended from time to time.
- (18) “BaFin” means the Bundesanstalt für Finanzdienstleistungsaufsicht.