



THE FINANCIAL
SERVICES
ROUNDTABLE

August 21, 2013

Elizabeth M. Murphy
Secretary of the Commission
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Comment Letter on the Proposed Rules and Interpretive Guidance Addressing Cross-Border Security-Based Swap Activities, the Re-Proposal of Regulation SBSR and Certain Rules and Forms Relating to the Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants (RIN 3235-AL25)

Dear Ms. Murphy:

The Securities Industry and Financial Markets Association (“**SIFMA**”), the Futures Industry Association (“**FIA**”) and The Financial Services Roundtable (“**The Roundtable**”) (together, the “**Associations**”)¹ appreciate the opportunity to provide the Securities and Exchange Commission (the “**Commission**”) with comments regarding the Proposed Rules and Interpretive Guidance on Cross-Border Security-Based Swap Activities and related issues (the “**Cross-Border Proposal**”).²

We appreciate the Commission’s efforts to provide clarity as to the cross-border reach of the new Title VII security-based swap (“**SBS**”) regulation. While we are

¹ Further information about the Associations is available in Annex C.

² Cross-Border Security-Based Swap Activities; Re-Proposal of Regulation SBSR and Certain Rules and Forms Relating to the Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants; Proposed Rule, 78 Fed. Reg. 30,968 (proposed May 23, 2013).

supportive of many elements of the Commission's Cross-Border Proposal, we have two significant concerns that we wish to highlight: the lack of harmonization with the Commodity Futures Trading Commission's ("CFTC's") cross-border approach and the Commission's proposed "conducted within the United States" test. We describe these concerns in greater detail below. We also provide detailed suggestions and specific responses to the many of the Commission's questions in Annex A of this letter, as well as a summary chart in Annex B of this letter.

Harmonization with the CFTC.³ While the Commission and the CFTC have similar mandates under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "**Dodd-Frank Act**") with respect to SBS and swaps, respectively, the two agencies have proceeded with rulemaking at significantly different paces. While the Commission's SBS rules, including its cross-border rules, are still in proposed form, the CFTC has already completed the majority of its swap rules, including its cross-border guidance, and currently requires compliance with many of those rules. Although Congress statutorily required the two agencies to coordinate their rulemaking approaches, the CFTC has completed its rules in advance of the Commission.⁴

We appreciate the Commission's thoughtful and deliberative approach to the SBS regulations, and we continue to strongly disagree with certain policy choices made by the CFTC. However, due to this mismatch in rulemaking and implementation schedules between the agencies, market participants are faced with the practical reality of needing to implement the CFTC's swap rules before the Commission's rules are final. Our members have invested, and continue to invest, an enormous amount of time, money and effort in preparing for compliance with the CFTC's rules. While the Commission and the CFTC should have coordinated rulemaking and implementation timeframes and the content of their rules to allow market participants to build technological, operational, legal and compliance systems that could be used for both sets of requirements, they did not. As such, market participants must develop systems to meet the CFTC's requirements and could be required, in many cases, to develop an entirely new infrastructure to comply with the Commission's SBS rules. Similarly, while the Commission and the CFTC should have coordinated rulemaking timeframes and content to allow market participants to educate customers on swap and SBS rules at the same time, they did not. Thus, market participants have been required to reach out repeatedly to customers to describe the complex and rapidly changing CFTC approach, and would face an extremely difficult task in trying to explain yet another complex set of differing

³ We also urge the Commission to coordinate with the U.S. prudential regulators and foreign regulators to achieve consistent international derivatives regulation as much as possible. However, given the critical importance of coordination with the CFTC's approach, due to the fact that the majority of the CFTC's rules are in effect, we focus here on the need for harmonization with the CFTC's rules.

⁴ See Section 712 of the Dodd-Frank Act.

rules to customers. These costs, relative to the benefit they provide, are magnified by the fact that the aggregate notional size of the Commission-regulated SBS market is only approximately 5% of the total swap market.

As a result, given the unfortunate situation in which the market finds itself, we believe that it is essential for the Commission to harmonize its rules with those of the CFTC to the extent possible. Given all of the investment to date required for compliance with CFTC rules, we believe that no cost-benefit analysis would justify applying a different set of rules to 5% of the market when rules governing 95% of the market have already largely been implemented.

However, we continue to believe that many of the policy choices made by the CFTC, in its cross-border guidance and elsewhere, will harm, rather than protect, the swaps markets and the liquidity on which end users and other customers rely. As a result, we strongly encourage the Commission to coordinate closely and frequently with the CFTC in an attempt to have the CFTC bring its rules closer in line with the Commission's approach to regulation that better protects the swaps and SBS markets.

Conduct Test. The primary aspect of the Commission's Cross-Border Proposal that we believe must be changed is the consideration of whether an SBS is "conducted within the United States." We have three primary issues with this conduct test.

First, a conduct-based approach to SBS regulation is impractical. It is quite difficult to determine, on a counterparty-by-counterparty basis, whether a specific market participant is a "U.S. person" and to apply SBS rules accordingly. However, it is virtually impossible to be able to determine on a *trade-by-trade* basis whether each specific contact with a counterparty or potential counterparty has some nexus to the United States that could make the SBS transaction "conducted within the United States." In addition, the Commission's requirements that would apply to SBS transactions between Non-U.S. Persons that are "conducted within the United States," may conflict with foreign regulatory requirements. This renders the definition of "conducted within the United States" even more challenging to implement. The cost of implementing such an approach would be so high as to make it impossible to justify on cost-benefit grounds.

Second, the Commission's conduct-based approach differs significantly from the entity-based approach adopted by the CFTC. As stated above, we continue to have very significant concerns with the CFTC's approach to swaps regulation and its cross-border application. However, given the timing of the Commission's and CFTC's rulemaking, we have been forced to come into compliance with the CFTC approach before the Commission's rules have been finalized. Adopting an entirely different approach, such as a conduct-based approach, will require building separate systems for a small percentage of the combined swaps and SBS market instead of using the systems already

built for compliance with the CFTC’s cross-border approach. It is clear to us that this cannot be justified on a cost-benefit basis.

Finally, we believe the conduct test is inconsistent with the Commission’s SBS authority under the Securities Exchange Act of 1934 (the “**Exchange Act**”). It ignores the fact that Exchange Act Section 30(c) is a restriction on the Commission’s cross-border jurisdiction that is to be read in light of the Dodd-Frank Act’s broader purpose, rather than in isolation. Title VII of the Dodd-Frank Act was adopted, in significant part, to decrease risk in the U.S. SBS markets through risk-based regulation. Thus, if an SBS transaction does not import risk into the United States, it should not be subject to Title VII or the Commission’s rules thereunder. Read in this light, Section 30(c) of the Exchange Act, which states that Title VII should not apply “to any person insofar as such person transacts a business in security-based swaps without the jurisdiction of the United States,” should be read as a limitation on those circumstances where the Commission can exert jurisdiction, not an invitation to the Commission to adopt a conduct-based approach to SBS in the absence of such a risk-based nexus.

As a result, instead of a conduct approach, we believe that the Commission should take the same general approach as the CFTC, classifying market participants into “U.S. person” and other categories and applying SBS rules based solely on that categorization. We emphasize, however, that the Commission must be mindful not to create competitive imbalances between U.S. and non-U.S. market participants and to take into account comparable foreign regulation.

* * *

We thank the Commission for its consideration of our request. Please feel free to contact the Associations should you wish to discuss this letter.

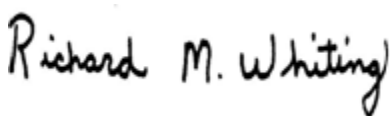
Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ken Bentsen". The signature is fluid and cursive, with a long horizontal stroke at the end.

Kenneth E. Bentsen, Jr.
President
SIFMA

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Walt Lukken
President & Chief Executive Officer
Futures Industry Association

A handwritten signature in black ink, appearing to read "Richard M. Whiting". The signature is cursive and written within a rectangular box.

Richard M. Whiting
Executive Director and General Counsel
The Financial Services Roundtable

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Recommendations in Response to Issues Presented in the Cross-Border Proposal

I. Application of Title VII Requirements

A. Conduct-Based Approach

Recommendation: The Commission’s conduct-based approach is impractical, cannot be justified by cost-benefit analysis and extends beyond the Commission’s SBS authority and mandate under the Exchange Act.⁵ It is not harmonized with the CFTC’s approach, which is already being implemented by market participants. As a result, it should be abandoned, and the Commission should follow an entity-based approach similar to that of the CFTC.

In addition to looking to the status of counterparties to SBS (an “**entity-based approach**”), the Cross-Border Proposal looks to whether a “transaction [is] conducted within the United States” in applying SBS requirements (a “**conduct-based approach**”). For example, a Non-U.S. Person is required to count toward its SBS *de minimis* threshold SBS dealing activity with U.S. Persons (the entity-based portion of the test) and SBS dealing activity with Non-U.S. Persons that is “conducted within the United States” (the conduct-based portion of the test).⁶ As another example, an SBS transaction entered into by a foreign branch of a U.S. bank (a “**Foreign Branch**”)⁷ would be subject to the SBS external business conduct requirements if either the counterparty is a U.S. person (the entity-based portion of the test) or the counterparty is a Non-U.S. Person and the transaction is “conducted within the United States”⁸ (the conduct-based portion of the test). Also, SBS transactions to which a non-U.S. fund is a counterparty likely would be subject to SBS requirements as a function of being “conducted within the United States” based solely on an asset manager’s activities in the United States. In addition, Non-U.S. Persons

⁵ This section is responsive to Question 39 at 31,001 of the Cross-Border Proposal.

⁶ Cross-Border Proposal, Proposed Rule § 240.3a71-3(b).

⁷ Cross-Border Proposal, Proposed Rule § 240.3a71-3(a)(1) defines a “foreign branch” as “any branch of a U.S. bank if:

- (i) The branch is located outside the United States;
- (ii) The branch operates for valid business reasons; and
- (iii) The branch is engaged in the business of banking and is subject to substantive banking regulation in the jurisdiction where located.”

⁸ Cross-Border Proposal, Proposed Rule § 240.3a71-3(c) read with Proposed Rule § 240.3a71-3(a)(6)(i).

would be required to register as security-based swap dealers (“**SBSDs**”) if they engage in dealing activity with Non-U.S. Persons solely because some aspect of the transaction is “conducted within the United States.” As stated above, we believe that this additional layer of conduct-based regulatory capture, beyond the entity-based portion adopted by the CFTC, is impractical, cannot be justified by cost-benefit analysis and exceeds the Commission’s SBS authority under the Exchange Act. Here, we provide additional detail regarding each of these views.

The Commission’s conduct-based approach is impractical.

The Commission defines a “transaction conducted within the United States” as any SBS transaction “solicited, negotiated, executed, or booked within the United States,” regardless of the location, domicile or residence status of either counterparty to the transaction. Since two transactions between the same counterparties may be “solicited, negotiated, executed or booked” in different ways, the conduct analysis must be done on a trade-by-trade basis. Such a trade-by-trade analysis is not feasible and does not comport with the modern model of international financial institutions. Even if such trade-by-trade tracking were possible, demanding that a particular SBS between two Non-U.S. Persons be completely isolated from the United States in order to avoid duplicative regulation would severely hamper the fast-moving SBS markets and the market participants worldwide that use them to hedge risks.

As one concrete example, the definition of “conducted within the United States” could include SBS transactions that occur within the United States merely as a function of the time of day at which those transactions were executed. For example, consider an SBS transaction between a Foreign Branch of an SBSB in London and a Non-U.S. Person counterparty in Japan that has been significantly negotiated between the British and Japanese counterparties. Consider further that the Japanese counterparty is ready to execute the transaction and needs to do so with some urgency at a time that is 9 a.m. in Tokyo, 1 a.m. in London and 8 p.m. in New York. Given the time difference, the Japanese counterparty would likely call a contact in the New York office of the U.S. SBSB, rather than the London contact in the U.S. SBSB’s Foreign Branch after business hours, and execute the transaction with New York. Under the proposed definition, this transaction could be considered “within the United States,” notwithstanding its tenuous nexus to the United States. There is no justification for forcing the Japanese counterparty to defer the final step of execution in order to avoid this result.

In addition, since the SBS markets are international, the solicitation, negotiation, execution and booking of SBS transactions will, in many cases, occur in multiple jurisdictions, which could cause confusion as to whether the SBS is “conducted within the United States.” As noted above, to comply with this requirement, market participants would have to develop complex systems to continually assess whether each and every

transaction is “conducted within the United States.” Given the multi-pronged analysis that is required, however, each market participant’s system could potentially reach different determinations with respect to the same transaction.

The Commission’s conduct-based approach is unnecessary and cannot be justified by cost-benefit analysis, either in isolation or when viewed in light of the CFTC’s approach already in effect.

It is well established that, in adopting regulations under the Exchange Act, the Commission must assess the relevant costs and the benefits and adopt regulations that minimize the cost of regulations to the extent possible. Given two ways to implement a regulation with significantly differing costs to market participants, the Commission must choose the option with lower cost unless the difference in benefits justifies the additional cost.⁹ In conducting a rigorous cost-benefit analysis, the Commission must examine the cost of its proposed regulation not only in isolation, but in conjunction with the other regulatory and business realities alongside which the regulation will be implemented.

We believe that the Commission’s hybrid conduct- and entity-based approach cannot, on its face, satisfy a cost-benefit analysis. Given the enormous difficulty and cost of engaging in a trade-by-trade analysis to determine the applicability of requirements, the benefit of the Commission’s approach would need to be large in order to justify the cost. We do not believe this is the case. The fact that an SBS is conducted within the United States between two counterparties that are not U.S. Persons does not import the risk of the SBS transaction into the United States, and therefore does not address the Dodd-Frank Act’s key concern with SBS market risk mitigation. As a result, the additional benefit of capturing entities through the imposition of a conduct-based approach layered on top of an entity-based approach is minimal and falls far short of the costs it imposes.

The Commission’s approach fails the cost-benefit analysis by an even wider margin when analyzed in light of the regulatory and business realities alongside which it will be implemented. As the Commission is aware, market participants are currently in the process of building sophisticated and costly systems to comply with burdensome requirements under the CFTC Cross-Border Guidance. Many of these swap dealers, or their affiliates, expect to register with the Commission as security-based swap dealers. To expect market participants to subsequently create additional systems to determine—on a trade-by-trade basis—whether a swap is “conducted within the United States” under a separate Commission cross-border regime would be economically, technologically and operationally impracticable for these market participants. The fact that the SEC’s

⁹ Exec. Order 12,866, 58 Fed. Reg. 51735 (Oct. 4, 1993) at § 1(b)(b) (requiring agencies to choose the most cost-effective of competing regulatory alternatives).

Proposal will be implemented in the context of an industry already building towards the CFTC's approach increases the relative cost of the SEC's hybrid entity-based and conduct-based approach over the CFTC's entity-based approach. This cannot be justified by any small additional benefits it provides.

The Commission's conduct-based approach extends beyond the Commission's SBS authority under the Exchange Act.

Section 30(c) of the Exchange Act, upon which the Commission's cross-border SBS authority is predicated, states that the Commission's SBS rules added by the Dodd-Frank Act will not apply:

to any person insofar as such person transacts a business in security-based swaps without the jurisdiction of the United States, unless such person transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of any provision of this chapter that was added by the [Dodd-Frank Act].¹⁰

This language is similar to the language in Section 30(b) of the Exchange Act, which has long governed the cross-border application of securities laws. Section 30(b) states that the Commission's rules shall not apply:

to any person insofar as he transacts a business in securities without the jurisdiction of the United States, unless he transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of [the Exchange Act].¹¹

Given the similarity of the language in Sections 30(b) and 30(c), we understand the Commission's initial instinct to propose an interpretation of the cross-border application of SBS requirements that mimics that of securities law more generally, including looking to where the transaction is conducted. However, it is a recognized canon of statutory interpretation that the general presumption that a term appearing in several places in a statutory text must generally be read the same way each time it appears is not rigid and "readily yields when there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were

¹⁰ Exchange Act § 30(c), 15 U.S.C. § 78dd(c) (2012).

¹¹ Exchange Act § 30(b), 15 U.S.C. § 78dd(b) (2012).

employed in different parts of the act with different intent.”¹² We believe that the differences between the SBS market and other securities markets justify such a different reading of admittedly similar statutory language. Specifically, SBS transactions, different from most securities transactions, are ongoing contracts that require payments from one side to another over the life of the contract and, as a result, impose credit risk on the counterparties and the financial system more generally. As a result, in regulating SBS transactions, the Commission should be concerned with mitigating risks posed to the U.S. financial system and on the protection of U.S. consumers, which is not implicated where two Non-U.S. Persons simply conduct an SBS in the United States.

Further, Congress explicitly requires the Commission and the CFTC to consult and coordinate with each other to the extent possible.¹³ In addition, Congress required that the Commission and the CFTC jointly adopt the foundational Title VII rules, such as those defining “security-based swap” and “security-based swap dealer.” In doing so, Congress expressed its intent that any rules governing the regulatory scope of the entities and any products subject to Title VII requirements should be defined by these two regulators together. Rules clarifying the cross-border impact of Title VII are effectively part of the “security-based swap” and “security-based swap dealer” definitional rules in that, like those rules, the clarification of the cross-border impact of Title VII defines which entities and transactions are subject to Title VII and which are not. Section 30(c) therefore must be read in light of this congressional intent that it be harmonized with the CFTC’s cross-border mandate pursuant to section 2(i) of the Commodity Exchange Act.

We believe that regulating SBS transactions that present no direct risk to the U.S. financial system or U.S. consumers would exceed the intended limits of the drafters of Dodd-Frank and, as a result, Section 30(c). Within the context of the SBS market, the mechanics of an SBS transaction—where no risk is transferred to a counterparty in the

¹²*Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932). See also *Robinson v. Shell Oil Co.*, 519 U.S. 337, 342-43 (1997) (term “employees” means current employees only in some sections of Title VII of Civil Rights Act, but in other sections includes former employees); *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001) (different statutory contexts of worker eligibility for Social Security benefits and “administrability” of tax rules justify different interpretations); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 594-595 (2004) (word “age” means “old age” when included in the term “age discrimination” in the Age Discrimination in Employment Act even though it is used in its primary sense elsewhere in the act). For disagreement about the appropriateness of applying this limitation, contrast the Court’s opinion in *Gustafson v. Alloyd Co.*, 513 U.S. 561 at 573 (1995), with the dissenting opinion of Justice Thomas in the same case, *id.* at 590 (interpreting a definition that, by its terms, was applicable “unless the context otherwise requires”).

¹³ See Section 712 of the Dodd-Frank Act.

United States—do not constitute a “necessary and substantial act” within the United States.¹⁴ Thus, we urge the Commission to reconsider its conduct-based approach.

The Commission should replace its conduct-based approach with an entity-based approach.

We strongly believe that the Commission can only solve these fundamental issues by abandoning its hybrid conduct-based and entity-based approach and replacing it with a single, streamlined entity-based approach. As stated above, the CFTC’s Cross-Border Guidance applies swap requirements based on the “U.S. person” and other status of the counterparties. While difficult to implement in its own right, this approach has the benefit of consistent treatment of multiple swap transactions between two counterparties absent changes to the counterparties’ status. As a result, rather than receive a representation or make an independent analysis on a swap-by-swap basis, market participants can rely on representations as to status that do not need to change until the counterparty’s status does. In addition, though we continue to have significant concerns with other aspects of the CFTC’s approach, harmonization with the CFTC’s general entity-based approach would significantly decrease costs to market participants by allowing the leveraging of work done in the CFTC context when preparing for the SBS cross-border regime. We emphasize, however, that whatever approach is taken by the Commission should be applied in a manner that does not create competitive imbalances between U.S. and non-U.S. market participants and takes into account comparable foreign regulation.

B. Definition of “U.S. Person”

<p>Recommendation: We generally support the Commission’s proposed definition of “U.S. person,” which is clear, objective and ascertainable.¹⁵</p>

The Commission’s proposed definition of “U.S. person”¹⁶ (“**U.S. Person**”) provides a clear, objective and ascertainable framework for market participants to determine their U.S. Person status. Specifically, the definition includes:

- any natural person resident in the United States;
- any partnership, corporation, trust, or other legal person organized or incorporated under the laws of the United States or having its principal place of business in the United States; and

¹⁴ *Kook v. Crang*, 182 F. Supp. 388, 390-91 (S.D.N.Y. 1960).

¹⁵ This section is responsive to Questions 26, 28, 31, 34, 35 and 36 at 30,999 of the Cross-Border Proposal.

¹⁶ Cross-Border Proposal, Proposed Rule § 240.3a71-3(a)(7).

- any account (whether discretionary or non-discretionary) of a U.S. person.

In general, subject to the suggestions below, we believe that the three-prong test provides clarity for market participants, which will minimize practical impediments while appropriately implementing the statutory requirements of Section 30(c) of the Exchange Act. The Commission’s clear and workable U.S. Person definition also preserves its legitimate interest in protecting the U.S. financial system from undue systemic risk while decreasing regulatory complexity and uncertainty. Thus, we also support the Commission’s proposal to not incorporate additional, complex prongs into the definition of “U.S. person.”¹⁷

Recommendation: The Commission should conform its test to determine an entity’s “principal place of business” with that of the CFTC and allow reliance on representations received from counterparties in the CFTC swap context.¹⁸

The Commission should provide further clarity regarding the meaning of “principal place of business.” To that end, the Commission should coordinate with the CFTC on providing a consistent set of standards for determining an entity’s principal place of business.

The Cross-Border Proposal suggests that a legal entity with a “significant portion of [its] commercial and legal relationships” within the United States, or which conducts its “business operations” and retains a “home office, in the United States” would be considered to maintain its principal place of business within the United States for the purposes of the U.S.-Person inquiry.¹⁹ Without greater clarity, regulated entities could face significant difficulty in determining their U.S.-Person status and regulatory obligations with confidence. This could be particularly problematic for SBSs where a counterparty refuses to make a representation regarding its U.S.-Person status, which would require the SBS itself to make a judgment as to its counterparty’s “principal place of business.” In such a situation, SBSs could (and likely would, at least in the short term) result in the same counterparty being assigned a different status for different transactions. Similarly, if the Commission’s standards to be applied in determining an entity’s principal place of business differ from those of the CFTC, an entity could be deemed to have different principal places of business for swaps and security-based swaps purposes. This would be an untenable outcome for the marketplace. Although we have reservations about the CFTC’s approach and a bright-line objective set of standards would have been preferable, the CFTC has already completed its cross-border guidance

¹⁷ This is responsive to Questions 26, 28, 31, 34, 35 and 36 at 30,999 of the Cross-Border Proposal.

¹⁸ This section is responsive to Questions 19, 20 and 21 at 30,998 of the Cross-Border Proposal.

¹⁹ See Cross-Border Proposal, 78 Fed. Reg. at 30,996.

and the practical difficulties in adopting a different set of standards would outweigh the benefits of a better test. Consequently, we believe that the Commission should harmonize its principal place of business guidance with the CFTC's standards. As one example, we would urge the Commission to clarify that the location of an asset manager or fiduciary of a legal entity is not the sole factor to determine that entity's principal place of business. Any other result would cause substantial competitive harm to U.S.-based asset managers relative to their Non-U.S. Person counterparts.

Furthermore, the Commission should allow market participants to rely on their counterparties' representations with respect to their principal place of business under the CFTC's U.S. person definition. By the time that the Commission's final cross-border rule becomes effective, market participants already will have built systems to track their counterparties' representations as to their principal place of business under the CFTC's Cross-Border Guidance. Requiring market participants to make and receive additional sets of representations is unduly burdensome, and the cost will significantly exceed the benefit.

Recommendation: We support the Commission's proposed approach for determining the U.S.-Person status of an account, which looks to whether any owner of the account is itself a U.S. Person.²⁰

Under the Cross-Border Proposal, accounts (whether discretionary or not) of U.S. Persons would fall within the definition of U.S. Person.²¹ For this purpose, the Commission proposes to look to whether an account, wherever located, is owned by U.S. Persons.²² We understand that the Commission does not intend to capture collective investment vehicles under this prong. Instead, we understand the purpose of this prong to be that a legal entity that is otherwise a U.S. Person will be treated as a U.S. Person even if SBS trades, with it as direct counterparty, are done through an account.

We support the Commission's proposed approach, but ask the Commission to clarify in the preamble to the final rule our understanding as described above. This approach would not require market participants to violate the legal entity structure by

²⁰ This section is responsive to Question 30 at 30,999 of the Cross-Border Proposal.

²¹ Cross-Border Proposal, Proposed Rule § 240.3a71-3(a)(7)(i)(C).

²² See Cross-Border Proposal, 78 Fed. Reg. at 30,997 ("In our view, the purposes of Title VII require that its provisions apply to the person that actually bears the risks arising from the [SBS] transaction. For this reason, we preliminarily believe that the status of accounts, wherever located, should turn on whether any owner of the account is itself a U.S. person, and not on the status of the fiduciary or other person managing the account, the discretionary or non-discretionary nature of the account, or the status of the entity at which the account is held or maintained. Thus, any account of a U.S. person would be a U.S. person for purposes of Title VII.").

looking to the direct or indirect ownership of, for example, a fund that itself trades through an account. We believe that such an approach is clear and workable and provides a bright line that the U.S.-Person status of trading through an account should be viewed as the U.S.-Person status of the direct individual or legal entity for which the account is trading.

We further agree with the Commission that the U.S.-Person status of a fiduciary or other person managing the account, the discretionary or non-discretionary nature of the account, or the status of the entity at which the account is held should not be relevant for the U.S.-Person analysis, as it does not capture those persons that bear the actual risks arising from the SBS transaction.²³ Instead, focusing on those factors could subject accounts that pose no direct risk to the U.S. financial system to the Commission's oversight, and extend the Commission's SBS regulatory authority beyond the intended limits of Section 30(c). We, therefore, support the Commission's proposed, workable approach, which looks only to the status of the legal entity that owns an account in determining the U.S.-Person status of that account.

Recommendation: The Commission should include a threshold of required ownership of an account so that an account with only *de minimis* U.S.-Person ownership is excluded.²⁴

The Commission's proposal defines "U.S. person" to include "any account (whether discretionary or non-discretionary) of a U.S. person."²⁵ While we generally support this approach, we believe that the Commission should clarify that *de minimis* ownership of an account by U.S. Persons would not cause such an account to be considered "of a U.S. person."

We believe that the Commission should establish more bright-line ownership principles to help regulated entities determine who is covered. Specifically, it should define the ownership requirement of U.S.-Person accounts objectively, establishing a numerical threshold, so as to definitively exclude accounts that are owned by U.S. Persons only to a *de minimis* extent. *De minimis* ownership would not appear to raise the jurisdictional nexus required under Section 30(c) of the Exchange Act.

²³ See *id.* at 30,997-98. This approach also would be consistent with the U.S. Person treatment of "managed accounts" in the MSBSP definition. See *id.* at 30,998 n. 298.

²⁴ This section is responsive to Question 27 at 30,999 of the Cross-Border Proposal.

²⁵ Cross-Border Proposal, Proposed Rule § 240.3a71-3(a)(7)(i)(C).

Recommendation: The exclusion from the U.S.-Person definition for international organizations should be extended to cover all Foreign Public Sector Financial Institutions (“FPSFIs”) and their affiliates.²⁶

The Cross-Border Proposal provides a list of international organizations excluded from the definition of U.S. Person. This includes “the International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, and their agencies and pension plans, and any other similar international organizations, their agencies and pension plans.”²⁷

We support the Commission’s proposal to exclude these organizations, which promotes principles of comity, cooperation and the harmonization of international SBS regulation.²⁸ We would, however, urge the Commission to explicitly extend the scope of this exclusion to include other FPSFIs²⁹ as defined by the Commission, that could potentially be U.S. Persons—specifically, other international financial institutions and multilateral development banks and their affiliates.

Recommendation: We support the Commission’s approach of not looking to whether an entity is guaranteed by a U.S. Person for purposes of determining an entity’s U.S.-Person status.³⁰

The Commission does not propose to, but seeks comment regarding, whether an entity that is incorporated or organized under foreign law but whose SBS transactions are guaranteed by a U.S. Person should fall within the definition of a U.S. Person.³¹ We believe that the Commission should not look to whether an entity’s SBS transactions are guaranteed by a U.S. Person for purposes of determining that entity’s U.S.-Person status.

Although the Commission has a legitimate interest in regulating SBS dealing activities that are within the jurisdiction of the United States, the connection between a foreign entity and its U.S. Person guarantor creates too tenuous a nexus to confer U.S.-Person status on the basis of this relationship alone. Performance of an SBS may be

²⁶ This section is responsive to Question 14 at 30,995 and Question 32 at 30,999 of the Cross-Border Proposal.

²⁷ Cross-Border Proposal, Proposed Rule § 240.3a71-3(a)(7)(ii).

²⁸ See Cross-Border Proposal, 78 Fed. Reg. at 30,998.

²⁹ See *id.* at 30,995.

³⁰ This section is responsive to Questions 21 and 24 at 30,998 and Question 29 at 30,999 of the Cross-Border Proposal.

³¹ Cross-Border Proposal, 78 Fed. Reg. at 30,998.

guaranteed for a number of reasons that should not necessarily implicate U.S. jurisdiction. For example, guarantees are used to satisfy both U.S. and foreign regulatory requirements, manage capital treatment across an entity and avoid negative credit rating consequences. In these situations, although a U.S. Person may guarantee a Non-U.S. Person's performance, there may be no importation of risk to the United States through the guarantee and, therefore, no nexus for purposes of Section 30(c) of the Exchange Act. To the extent that the Commission is concerned about the importation of risk into the United States, we believe that this concern is appropriately addressed, without the need to assert jurisdiction under Section 30(c) of the Exchange Act, where the guarantor is subject to prudential oversight, such as where the guarantor is a prudentially regulated entity or a registered SBS. To the extent that the Commission believes that guarantees are being used to evade registration requirements, the Commission should use its anti-evasion authority under the Exchange Act.

Finally, as the Commission notes, any risk posed to the U.S. financial system by Non-U.S. Persons engaged in dealing activity with Non-U.S. Persons outside the U.S. whose performance is guaranteed by a U.S. Person "can best be addressed through the [MSBSP] definition and requirements applicable to [MSBSPs]."³² For these reasons, we agree that guarantees of Non-U.S. Persons would not give rise to the requisite jurisdictional nexus necessary to classify the guaranteed party as a U.S. Person.

Recommendation: We support the Commission's decision not to consider whether an entity has a U.S. parent in determining that entity's U.S. Person status.³³

The Commission's proposed definition of U.S. Person does not look to an SBS market participant's corporate parenthood for purposes of determining its U.S. Person-status. We believe that this proposed approach appropriately respects the legal independence of distinct corporate entities, and avoids improperly presuming coordination of SBS transactions between affiliates with the same parent.

If the U.S.-Person status of an entity turned entirely on the corporate parenthood of the SBS entity, it would effectively disregard the legal independence of affiliates, and equate shared corporate parenthood with an implied coordinated SBS dealing strategy and approach. It also would effectively operate as a mandate that any subsidiary of a U.S. parent would be automatically classified as a U.S. Person solely on the basis of that relationship, and not due to any underlying connection of the subsidiary's SBS

³² *Id.* at 31,006.

³³ This section is responsive to Question 25 at 30,998 and Question 26 at 30,999 of the Cross-Border Proposal.

transactions with United States commerce or the risk posed by the subsidiary's SBS transactions to the United States.

We believe that conferring U.S.-Person status solely on the corporate parenthood of the foreign entity would inappropriately extend the scope of the Commission's SBS regulatory authority. We, therefore, urge the Commission to retain its current approach, which would not look to the U.S. Person status of an SBS market participant's parent, in its final cross-border rule.

II. Registration and Aggregation

A. SBSD Registration and Aggregation

Recommendation: A person should not be required to aggregate the SBS dealing transactions of its affiliates to determine the applicability of Title VII to that entity's SBS dealing activities.³⁴

The SBSD *de minimis* threshold calculation, as described in the Final Entity Definition Rules, requires that a person aggregate the notional value of its SBS dealing transactions with those entered into by affiliates.³⁵ Proposed Rule § 240.3a-71(b) clarifies that both U.S. and Non-U.S. persons will be required to aggregate the SBS dealing positions of their affiliates³⁶ to the extent that the affiliates would need to count the position toward their own *de minimis* threshold. Specifically, a person is required to aggregate all SBS dealing positions of U.S. Person affiliates (including Foreign Branches), as well as SBS transactions of Non-U.S. Person affiliates that are conducted within the United States or for which the counterparty is a U.S. Person other than a Foreign Branch.³⁷

We believe that the aggregation requirement effectively disregards the legal independence of entities, instead equating their shared corporate parenthood with an implied coordinated SBS dealing strategy and approach. While, for example, a Non-U.S. bank and its Non-U.S. affiliate broker-dealer may be under common control, the two entities may be operating completely independently of each other. Perhaps for this

³⁴ This section is responsive to Question 64 at 31,005 of the Cross-Border Proposal.

³⁵ Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant," 77 Fed. Reg. 30,596, 30,631 (May 23, 2012) (to be codified at 17 C.F.R. pts. 1 and 240) ("**Final Entity Definition Rules**").

³⁶ Cross-Border Proposal, Proposed Rule § 240.3a71-3(b)(2)(i).

³⁷ Cross-Border Proposal, Proposed Rule § 240.3a71-3(b)(2)(ii).

reason, there is no similar aggregation requirement for many other comparable registration requirements, such as broker-dealer registration.

We understand that the aggregation requirement is meant to prevent evasion of the SBSD registration rules. In the Final Entity Definition Rules, the Commission states that “[t]he final rules use a control standard in connection with the *de minimis* notional thresholds as a means reasonably designed to prevent evasion of the limitations of that exception.”³⁸ While we recognize the importance of anti-evasion provisions, we believe that the Commission’s existing anti-evasion capacities are sufficient to guard against such abuses, without requiring common-control aggregation.

Finally, we note that the aggregation requirement first appeared in the Final Entity Definition Rules, without having been included in the proposed entity definition rules. As a result, market participants have not been provided an opportunity to comment on the concept of aggregation. Had market participants been given this opportunity, SIFMA would have strenuously objected to the requirement for the reasons discussed above.

Recommendation: To the extent that aggregation is required, entities should not be required to aggregate SBS positions with registered SBSD affiliates, regardless of whether the entity and its SBSD affiliate are “operationally independent.”³⁹

As noted above, the SBSD *de minimis* threshold calculation presented in the Final Entity Definition Rules requires that a person aggregate the notional value of its SBS dealing transactions with those entered into by affiliates.⁴⁰ The Cross-Border Proposal further explains that, in determining whether an SBS market participant’s SBS dealing transactions exceed the *de minimis* threshold, the SBS market participant must include the aggregate notional value of any SBS dealing transactions of U.S. Person affiliates,⁴¹ as well as SBS transactions by Non-U.S. Person affiliates that are conducted within the United States or for which the counterparty is a U.S. Person (with the exception of Foreign Branches).⁴² The Commission proposes to exclude, however, SBS transactions

³⁸ Final Entity Definition Rules at 30,631, n.437.

³⁹ This section is responsive to Question 62 at 31,005 of the Cross-Border Proposal.

⁴⁰ Final Entity Definition Rules at 30,744 (“*De minimis exception*. [T]he swap positions connected with those [swap] dealing activities into which the person—or any other entity controlling, controlled by or under common control with the person—enters over the course of the immediately preceding 12 months.”).

⁴¹ Cross-Border Proposal, Proposed Rule § 240.3a71-3(b)(2)(i).

⁴² Cross-Border Proposal, Proposed Rule § 240.3a71-3(b)(2)(ii).

of affiliates under common control that are *both* “operationally independent” and registered as SBSDs.⁴³

We believe that, regardless of operational independence, SBS market participants should not be required to aggregate their SBS positions with any affiliate that is a registered SBSd. When all entities under common control are required to aggregate their SBS activities, the determination that any single entity in the group of affiliates is required to register effectively operates as a mandate that *all* affiliates that engage in any SBS dealing activity must register. This would have the effect of requiring a number of smaller, internationally based SBS market participants to register, even if they operate completely independently of their larger affiliate entities, solely by virtue of the affiliation. Additionally, these smaller affiliates could be compelled to register even where there is no substantial functional or strategic coordination of their SBS dealing activities. This result is unnecessarily burdensome for these smaller SBS market participants and appears beyond the extraterritorial scope of Title VII.

The Commission expressly acknowledges these concerns in proposing its exception from aggregation.⁴⁴ Indeed, without the exclusion, the Commission notes that “all persons affiliated with a registered [SBSd] that engaged in *any* level of [SBS] dealing activity . . . would necessarily be required to register with the Commission as [SBSds]”⁴⁵ The Commission recognizes that this result would be inconsistent with the statutory purpose of the *de minimis* exception because it would prevent all affiliates of a registered SBSd—even those engaged in a minimal amount of SBS dealing activity—from taking advantage of the exception.⁴⁶

The exception from aggregations for SBS with registered SBSd affiliates only applies, however, if the entity and the SBSd affiliate are “operationally independent.” The Cross-Border Proposal would consider the SBS dealing activities of two affiliates to be operationally independent if the affiliated persons maintain separate sales and trading functions, operations (including separate back offices), and risk management with respect to any SBS dealing activity conducted by either affiliate.⁴⁷ If any of these functions are jointly administered or managed at a central location within the affiliates’ corporate

⁴³ Cross-Border Proposal, Proposed Rule § 240.3a71-4.

⁴⁴ See Cross-Border Proposal, 78 Fed. Reg. at 31,005.

⁴⁵ *Id.* (emphasis added).

⁴⁶ *Id.*

⁴⁷ Cross-Border Proposal, 78 Fed. Reg. at 31,005.

group, then the unregistered affiliate would not be able to take advantage of the exclusion from its aggregation calculations.⁴⁸

We believe that this concept of “operationally independent” is overly broad and unnecessary to achieve the statutory goals of protecting U.S. customers. It would have the effect of tying registration requirements to firms’ internal risk management strategies or limit efficient leverage of back office functions. This result seems intrusive into the internal affairs of the affected affiliates, without providing any regulatory benefit. Further, this approach is inconsistent with the approach adopted by the CFTC in its Cross-Border Guidance, which would not require an entity to aggregate its swap dealing activities with those of its U.S. and non-U.S. affiliates that are registered swap dealers regardless of whether those registered swap dealer affiliates also are operationally independent.⁴⁹

As a result, we would urge the Commission to remove the concept of “operational independence” from the aggregation exclusion. To the extent that the Commission is concerned about evasion of its registration requirements, we believe that such concerns are better addressed through anti-evasion rules than a broad prohibition that could, effectively, reverse the helpful exclusion provided by the Commission.

Recommendation: Non-U.S. Persons should not be required to count transactions with Foreign Branches toward their *de minimis* thresholds, even if there is some involvement of U.S. personnel in “soliciting, negotiating, executing, or booking” the transaction on behalf of the Foreign Branch.⁵⁰

The Cross-Border Proposal provides that Non-U.S. Person counterparties do not need to count transactions with Foreign Branches toward their *de minimis* thresholds if they are conducted outside of the United States.⁵¹ The Commission proposes to exclude these transactions in recognition of the fact that “imposing registration requirements on non-U.S. persons solely by virtue of their transactions with Foreign Branches of U.S. banks could limit the access of U.S. banks to non-U.S. counterparties . . . because non-U.S. persons may not be willing to enter into transactions with them in order to avoid being required to register as [an SBSD].”⁵² While we support the Commission’s proposed approach, we would urge the Commission to extend this exclusion to cover all

⁴⁸ *Id.*

⁴⁹ CFTC Cross-Border Guidance, 78 Fed. Reg. at 45,326.

⁵⁰ This section is responsive to Question 55 at 31,003 of the Cross-Border Proposal.

⁵¹ Cross-Border Proposal, Proposed Rule § 240.3a71-3(b)(ii).

⁵² Cross-Border Proposal, 78 Fed. Reg. at 31,003.

SBS transactions between Non-U.S. Persons and Foreign Branches, even if only incidental activity is conducted within the United States.

As discussed above, the definition of “transaction conducted within the United States” could include incidental activities that occur within the United States. This is of particular concern in the case of Foreign Branches where certain back-office functions may be centralized in the United States for efficiency reasons. The occurrence of these back-office functions from within the United States would prevent Non-U.S. Persons from excluding transactions with Foreign Branches that otherwise occur outside of the United States. For these and the reasons discussed more fully above, we would urge the Commission to abandon its conduct-based approach, which would ensure that such incidental activities would not cause Non-U.S. Persons to count these transactions toward the *de minimis* exception.⁵³ This approach also would give effect to the Commission’s goal of minimizing disparate treatment for Foreign Branches, while ensuring the appropriate application of Title VII requirements.⁵⁴

Recommendation: We support the Commission’s proposed approach not to require a person to register as an SBSB by virtue of risk transfers achieved through inter-affiliate SBS.⁵⁵

The Commission notes that the CFTC has proposed an interpretation that would subject an entity that operates a “central booking system,” where swaps are booked into a single legal entity, to swap dealer registration as if it had entered into such swaps directly, irrespective of whether such entity is a U.S. person or whether the booking entity is a counterparty to the swap or enters into the swap indirectly through a back-to-back swap or other arrangement with its affiliate or subsidiary. The Commission requests comment on whether it should adopt a similar approach.⁵⁶

For the reasons we expressed to the CFTC in response to its proposed approach, we would urge the Commission not to adopt a “central booking system” registration approach. Requiring a central booking entity, or any other affiliate, to register as an SBSB based solely on its inter-affiliate SBS transactions would have the effect of tying registration requirements to firms’ internal risk management practices. This result seems intrusive into the internal affairs of the affected firms, without providing any additional benefit to the counterparties, whose rights and remedies extend only to the client-facing

⁵³ See A-1 above.

⁵⁴ *Id.*

⁵⁵ This section is responsive to Question 73 at 31,007 of the Cross-Border Proposal.

⁵⁶ Cross-Border Proposal, 78 Fed. Reg. at 31,007.

SBSD. In addition, this treatment would discourage the use of central booking entities achieved through inter-affiliate SBS transactions for risk management purposes, and would instead incentivize fragmentation of positions across affiliated legal entities. This would significantly hamper the ability to manage risk across a multinational enterprise, resulting in increased systemic risk, increased costs to counterparties and, potentially, the relocation of capital, risk expertise and jobs overseas. Thus, we agree with the Commission's proposed approach, which would require a person to register as an SBSB if that person is a direct booking entity for SBS transactions with third-party counterparties. We further believe that this proposed approach is bolstered by the fact that the CFTC did not include a concept of a "central booking system" in its Cross-Border Guidance.

Recommendation: We agree with the Commission's proposed approach not to require a Non-U.S. Person to aggregate its SBS dealing positions with those of Non-U.S. Person affiliates that receive guarantees from U.S. Persons toward its *de minimis* threshold.⁵⁷

The Commission has proposed not to require a foreign entity to count SBS transactions with Non-U.S. Persons that receive guarantees from U.S. Persons toward the *de minimis* threshold.⁵⁸ As a result, such guaranteed SBS would not be included in the aggregation requirements. This proposed approach differs from the CFTC Cross-Border Guidance, which would require a non-U.S. person to include in its own *de minimis* calculation, and therefore, in its aggregated calculations, positions of a non-U.S. person that is an affiliate of a U.S. person and is guaranteed by a U.S. person (a "**guaranteed affiliate**") except where the guaranteed affiliate is registered as a swap dealer, is not a swap dealer but engages in *de minimis* swap dealing activity and is affiliated with a swap dealer, or is guaranteed by a non-financial entity.⁵⁹ As previously stated, we believe that requiring a Non-U.S. Person to register as an SBSB solely as a result of being affiliated with a Non-U.S. Person that is guaranteed by a U.S. Person rests on too tenuous a nexus to justify registration on the basis of this relationship alone, and believe that logic extends to registration by virtue of guarantees.

⁵⁷ This section is responsive to Question 70 at 31,007 of the Cross-Border Proposal.

⁵⁸ *Id.* at 31,006.

⁵⁹ CFTC Cross-Border Guidance, 78 Fed. Reg. at 45,326.

Recommendation: SBS activity undertaken in respect of a legacy portfolio in run-off should not be included in an entity’s aggregation calculation and should not itself trigger a registration requirement.

Many SIFMA members are in the process of consolidating U.S.-facing SBS dealing activities worldwide into one entity or a few entities that they will register as SBSDs, to comply more efficiently and effectively with Title VII. However, it may not be possible or economically efficient for all entities that wish to terminate or restructure their SBS dealing activities (“**Transitioning Entities**”) to novate, or to otherwise transfer or terminate their entire legacy SBS portfolios, particularly since parties cannot compel such terminations or novations. However, it is possible, and more likely, that such portfolios will be left in run-off and risk-reduced or terminated as the occasion arises. As a result, Transitioning Entities will likely occasionally need to enter into new SBS transactions, or amend existing ones, in respect of such portfolios.

We believe that such SBS-related activity is not part of the active SBS dealing activity that the Commission seeks to regulate through SBSD registration and regulation. However, counting such activity as part of aggregation calculations and registration requirements could have the effect of requiring Transitioning Entities that are actively seeking to end their SBS activities to register as SBSDs during their wind-down period—the burdensome result that Transitioning Entities are seeking to avoid by terminating their SBS activities. Therefore, we believe that transactions undertaken in respect of a legacy portfolio run-off should be excluded from aggregation and registration requirements and should not themselves trigger a registration requirement.

Recommendation: The Commission should consider a system for limited designations.⁶⁰

Under Section 3(a)(71)(B) of the Exchange Act, the Commission is permitted to designate an entity as an SBSD for “a single type or single class or category of [SBS] or activities,” while providing that the entity will not be considered an SBSD for “other types, classes or categories” of SBS transactions.⁶¹ In the Cross-Border Proposal, the Commission has indicated that it would be challenging for an applicant to satisfy the requirements in order to be granted such limited designations, and that it is not providing specific guidance on how to achieve such limited designations at this time.⁶² We urge the Commission to consider the use of its limited designation authority in response to meritorious SBSD requests in the future.

⁶⁰ This section is responsive to Question 116 at 31,029 of the Cross-Border Proposal.

⁶¹ 15 U.S.C. § 78c(a)(71)(B) (2012).

⁶² Cross-Border Proposal, 78 Fed. Reg. at 31,029.

Limited designations may be warranted where individual circumstances permit the Commission to find that the regulatory purpose of registration will be fulfilled if only certain activities by a registered SBSB are deemed part of the registered entity. The merits of these situations are best evaluated on an individual basis, as any determination would be specific to a given business model. We would urge the Commission to issue guidance on when and how SBSBs may apply for limited designations in order to provide registered entities with the necessary guidance to seek appropriate relief.

B. Major Security-Based Swap Participant (“MSBSP”) Registration and Aggregation

Recommendation: A Non-U.S. Person should not be required to include transactions with Foreign Branches when calculating its outward SBS exposure for the purpose of the MSBSP definition.⁶³

As noted above, the Commission is proposing to exclude SBS transactions between a Non-U.S. Person and a Foreign Branch from the Non-U.S. Person’s SBSB *de minimis* threshold. However, the Commission is proposing to require a Non-U.S. Person to include the same SBS transactions with Foreign Branches when calculating the Non-U.S. Person’s “outward exposure” in SBS positions for the purposes of the MSBSP definition.⁶⁴

The resulting disparate treatment of Foreign Branches and Foreign SBSBs may have significant adverse competitive effects. Non-U.S. Persons that may otherwise be considered MSBSPs will have a strong incentive to limit or even stop trading with U.S. banks via Foreign Branches. Perhaps more importantly, even those Non-U.S. Persons whose outward exposure does not approach the MSBSP threshold may avoid transacting in SBS with Foreign Branches in order to avoid the need to monitor and calculate their “outward exposure” under the complex MSBSP definition.

Furthermore, this approach differs from the approach adopted by the CFTC in its Cross-Border Guidance. Under the CFTC’s Cross-Border Guidance, a non-U.S. person that is not a guaranteed affiliate of a U.S. person and is a financial entity may exclude from its MSP threshold its exposure under swaps with foreign branches of U.S. swap dealers, provided that the swap is either cleared, or the documentation of the swap requires the foreign branch to collect daily variation margin on its swaps with such non-U.S. person.⁶⁵ The CFTC Cross-Border Guidance also would permit a non-U.S. person

⁶³ This section is responsive to Question 119 at 31,036 of the Cross-Border Proposal.

⁶⁴ Cross-Border Proposal, Proposed Rule § 240.3a67-10(c)(2).

⁶⁵ CFTC Cross-Border Guidance, 78 Fed. Reg. at 45, 326-27.

that is not a guaranteed affiliate and is not a financial entity to exclude from its MSP threshold its exposure under swaps with a foreign branch of a U.S. swap dealer. The CFTC notes that this latter “exclusion reflects the [CFTC]’s recognition of the more modest risk to the U.S. financial markets from swaps activities with non-financial entities organized outside the United States.”⁶⁶

For these reasons, we believe that the Commission should allow Non-U.S. Persons to exclude their transactions with Foreign Branches from MSBSP threshold calculations. In the alternative, if the Commission determines to require Non-U.S. Persons to include SBS transactions with Foreign Branches for purposes of determining MSBSP status, a Non-U.S. Person that is a financial entity should not have to count toward its MSBSP threshold its exposure under swaps with Foreign Branches, provided that the swap is either cleared, or the documentation of the swap requires the Foreign Branch to collect daily variation margin.

Recommendation: For the purpose of the MSBSP calculation, to avoid double counting, guaranteed SBS positions that are attributed to the guaranteed entity should not be counted toward the guarantor’s own MSBSP calculations as well.⁶⁷

Under the Commission’s proposed approach, a U.S. Person must include in its MSBSP calculations (i) all SBS transactions to which it is a counterparty and (ii) all SBS transactions entered into by a Non-U.S. Person that the U.S. Person guarantees (with exceptions described below).⁶⁸ A Non-U.S. Person must include in its MSBSP calculation (i) all SBS transactions to which it is a counterparty, (ii) all SBS transactions entered into by a U.S. Person that it guarantees (with exceptions described below), and (iii) all SBS transactions of a Non-U.S. Person that it guarantees where the counterparty is a U.S. Person (with exceptions described below).⁶⁹ In all of the cases in which a guaranteed entity’s SBS positions are counted by the guarantor, they are also included in the MSBSP calculation of the guaranteed entity.⁷⁰

As a result of the Commission’s approach, many SBS transactions that are counted toward a guarantor’s MSBSP calculations also will be counted toward the

⁶⁶ See *id.* at 45, 324-25.

⁶⁷ This section is responsive to Question 122 at 31,036 of the Cross-Border Proposal.

⁶⁸ See Cross-Border Proposal, 78 Fed. Reg. at 31,032 (“[A]ll [SBS] entered into by a non-U.S. person and guaranteed by a U.S. person [must] be attributed to such U.S. person guarantor for purposes of determining such U.S. person guarantor’s [MSBSP] status, regardless of whether the underlying transaction was entered into with a U.S. person counterparty or non-U.S. person counterparty.”).

⁶⁹ See *id.* at 31,033.

⁷⁰ See *id.* notes 632 and 634, respectively.

guaranteed entity's MSBSP thresholds. The Commission notes that SBS positions are attributed to the guarantor in order to "reflect the risk that a guarantor might pose to, and the systemic impact of such risk may impose on, the U.S. financial system as a result of guarantees it provides."⁷¹ We believe that the Commission's concerns regarding systemic risk are adequately addressed by requiring only one entity—the guaranteed entity that is the direct counterparty to the SBS—to count that SBS position for purposes of determining its MSBSP status. Further, we believe that counting these SBS positions twice—toward the guarantor's SBS positions and the guaranteed entity's SBS positions—extends beyond the intended limits of Section 30(c) of the Exchange Act. As a result, we do not believe that SBS positions should be attributed to a guarantor for purposes of determining whether it is an MSBSP where the SBS position must be attributed to the direct counterparty to the transaction.

The only instances where the SBS positions of a direct counterparty should be attributed to the guarantor are where the direct counterparty is not otherwise required to count those SBS positions toward its own MSBSP calculations. Specifically, a guaranteed Non-U.S. Person, whether guaranteed by a U.S. Person or a Non-U.S. Person, would not be required to include in its MSBSP calculations SBS positions with other Non-U.S. Persons for purposes of determining its MSBSP status.⁷² In these circumstances, those SBS positions should be attributed to the guarantor (unless the guaranteed entity is subject to capital regulation by the Commission or CFTC or is subject to capital standards adopted in its home jurisdiction that are consistent in all respects with the Basel Capital Accord of the Basel Committee on Banking Supervision (the "**Basel Accord**"). In all other instances, we believe that only the guaranteed entity should be required to attribute to itself its SBS positions for purposes of the MSBSP calculations.

Recommendation: We agree with the Commission that a guaranteed Non-U.S. Person's SBS positions should not be attributed to a parent or guarantor if the guaranteed Non-U.S. Person is subject to capital regulation by the Commission or the CFTC or is subject to capital standards adopted by its home country consistent with the Basel Accord.⁷³

Both the Commission and the CFTC have confirmed in the Final Entity Definition Rules that it is not necessary to attribute a person's swap or SBS positions to a parent or guarantor if the direct counterparty that the guarantor guarantees is subject to capital regulation by the Commission or the CFTC or if the person is a U.S. entity regulated as a

⁷¹ See *id.* at 31,032.

⁷² See *id.* notes 629 and 634, respectively.

⁷³ This section is responsive to Question 123 at 31,036 of the Cross-Border Proposal.

bank in the United States.⁷⁴ The Commission proposes to apply this approach equally to a Non-U.S. Person whose SBS positions are guaranteed by another person. In particular, the Commission proposes that it would not be necessary to attribute a Non-U.S. Person's SBS positions to a parent or other guarantor if the Non-U.S. Person is subject to capital regulation by the Commission or CFTC or is subject to capital standards adopted in its home jurisdiction that are consistent in all respects with the Basel Accord.⁷⁵

The Commission seeks comment on this proposed approach.⁷⁶ As the Commission notes, these regulated Non-U.S. Persons “would be subject to risk-based capital requirements that take into account the unique risks (including the credit risk, market risk, and other risks) arising from [SBS] transactions, in such a way as to make it unnecessary to separately address, via [MSBSP] regulation, the risks associated with guarantees of those [SBS] positions.” We agree with this reasoning and with the Commission's proposed approach not to require attribution of SBS positions of a Non-U.S. Person to a parent or guarantor in these circumstances.

III. SBS and MSBSP Requirements

A. Classification of SBS Requirements

Recommendation: Uncleared swap margin should be categorized as a Transaction-Level Requirement rather than an Entity-Level Requirement.⁷⁷

The Commission proposes to categorize uncleared swap margin rules as an Entity-Level Requirement because “the cumulative effect of collecting margin from counterparties is to protect an entity from the default of its counterparties.”⁷⁸ We believe that the Commission should adopt the CFTC's approach and, instead, classify margin as a Transaction-Level Requirement. As the Commission notes, “margin is calculated based on individual transactions.”⁷⁹ In particular, the application and enforcement of margin requirements applies on a transaction-by-transaction basis and the calculation of margin depends on the circumstances of a particular SBS, including the status of the counterparty. For these reasons, margin requirements are more appropriately considered Transaction-

⁷⁴ See Final Entity Definition Rules, 77 Fed. Reg. at 30,689.

⁷⁵ Cross-Border Proposal, 78 Fed. Reg. at 31,033.

⁷⁶ *Id.* at 31,036.

⁷⁷ This section is responsive to Question 104 at 31,025 of the Cross-Border Proposal.

⁷⁸ Cross-Border Proposal, 78 Fed. Reg. at 31,011.

⁷⁹ *Id.*

Level, and their application should differ depending on the type of counterparty in question.

Recommendation: Daily trading records, swap trading relationship documentation, confirmations, processing, netting and valuation requirements should be classified as Transaction-Level Requirements, rather than Entity-Level Requirements.⁸⁰

The Commission proposes to classify daily trading records, swap trading relationship documentation, confirmations, processing, netting and valuation requirements as Entity-Level Requirements.⁸¹ This is in contrast to the CFTC’s approach, which classifies these requirements as transaction-level requirements.⁸² As with uncleared swap margin, these requirements apply on a transaction-by-transaction basis rather than applying to an SBS’s SBS activities more generally. Since both the application and, presumably, the enforcement of these requirements will be addressed at the transaction level, we believe that these requirements are more appropriately categorized as Transaction-Level Requirements.

Recommendation: We support the Commission’s proposal to allow SBS Title VII requirements to be allocated between an SBS and its agent.⁸³

The Cross-Border Proposal allows for an SBS to allocate Title VII duties to its agent, provided that the SBS ultimately remains responsible for compliance with the applicable requirements. We support this provision and believe that it reflects the realities of the SBS market, in which agents often play a significant role. Furthermore, we appreciate that this allocation is permitted but optional, which we believe provides the flexibility necessary for the broad range of business relationships that exist in the SBS markets.

B. Transaction-Level Requirements

Recommendation: The Commission’s external business conduct requirements should be applied to U.S. Person counterparties only.⁸⁴

The Commission proposes to apply the external business conduct requirements to the “U.S. Business” of an SBS. For U.S. SBSs, “U.S. Business” is defined to include

⁸⁰ This section is responsive to Question 81 at 31,023 of the Cross-Border Proposal.

⁸¹ Cross-Border Proposal, 78 Fed. Reg. at 31,013.

⁸² CFTC Cross-Border Guidance, 78 Fed. Reg. at 45,333.

⁸³ This section is responsive to Question 108 at 31,027 of the Cross-Border Proposal.

⁸⁴ This section is responsive to Questions 83 and 85 at 31,023 of the Cross-Border Proposal.

all SBS transactions, except those conducted through a Foreign Branch with a Non-U.S. Person or another Foreign Branch.⁸⁵ For a Foreign SBSD, “U.S. Business” would include all SBS transactions with a U.S. Person counterparty (other than a Foreign Branch), as well as all SBS transactions that are conducted within the United States.⁸⁶ The external business conduct requirements would not apply to the “Foreign Business” of an SBSD, which is defined to include SBS transactions conducted outside of the United States with a Non-U.S. Person counterparty or a Foreign Branch by either a Non-U.S. Person or a Foreign Branch.⁸⁷

The Commission bases the exclusive application of external business conduct requirements to “U.S. Business” on the fact that the external business conduct rules are intended to further the consumer protection goals of the Dodd-Frank Act, which is generally concerned with the protection of U.S. consumers.⁸⁸ The Commission appears to agree with the CFTC’s logic that “the external business conduct standards. . . are those requirements that may not be necessary to apply to swaps between non-U.S. persons taking place outside the United States [because] [w]ith respect to these swaps, foreign regulators may have a relatively stronger supervisory interest in regulating sales practices concerns than the [CFTC].”⁸⁹ In giving effect to principles of international comity, the Commission proposes to exempt SBSDs from transactions related to their Foreign Business. We support this proposal and believe that it is appropriate given the goals of the external business conduct requirements.

We believe, however, that the customer protection logic employed by the Commission further suggests that the U.S. Person status of the counterparty that the rules are meant to protect—not the U.S. Person status of the SBSD or the location of the trade—should determine whether the external business conduct requirements apply. To incorporate this concept, the Commission should define “U.S. Business” as SBS transactions with U.S. Person counterparties (other than Foreign Branches), regardless of the status of the SBSD in question or where the SBS is transacted. Principles of international comity would support an approach that recognizes the legitimate interest of foreign regulators in protecting consumers within their jurisdiction. As the Commission states in support of the proposed Foreign Branch exclusion, it is appropriate to provide “effective protections for counterparties who are U.S. persons while recognizing the role

⁸⁵ Cross-Border Proposal, Proposed Rule § 240.3a71-3(a)(6).

⁸⁶ Cross-Border Proposal, Proposed Rule § 240.3a71-3(c).

⁸⁷ Cross-Border Proposal, Proposed Rule § 240.3a71-3(a)(2).

⁸⁸ Cross-Border Proposal, 78 Fed. Reg. at 31,018.

⁸⁹ CFTC Cross-Border Guidance, 78 Fed. Reg. at 45,336.

of foreign regulators in non-U.S. markets.”⁹⁰ This would more appropriately accord with the Commission’s stated rationale for the external business conduct rules: U.S. customer protection. In addition, such treatment would minimize competitive inequalities between U.S. SBSDs and Foreign SBSDs.

A counterparty would have no expectation of U.S. protections solely because of incidental execution or negotiation of an SBS transaction in the United States. For these reasons, we believe that the current definition of “U.S. Business” relies on too tenuous a jurisdictional nexus to justify the application of external business conduct requirements to all transactions conducted within the United States, regardless of the U.S. Person status of the counterparties.

<p>Recommendation: Collateral segregation requirements, and related disclosure requirements, should only apply to transactions with U.S. counterparties.⁹¹</p>
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Like the Commission’s proposed external business conduct standards, the Commission notes that the segregation requirement “intends to protect U.S. Person counterparties and minimize the impact of a failed [SBS] on the U.S. financial system generally and the U.S. [SBS] market in particular”⁹² and “minimize[] the disruption to and impact on the U.S. [SBS] financial system overall caused by [the] insolvency and liquidation of a[n] [SBS].”⁹³ Collateral segregation requirements are classified as Transaction-Level Requirements.

Under the Cross-Border Proposal, Foreign SBSDs that are also registered broker-dealers would be subject to collateral segregation requirements for all of their SBS transactions (whether cleared or uncleared) with respect to all counterparties, whether U.S. Persons or Non-U.S. Persons. Additionally, Foreign SBSDs that are not banks with a branch or agency in the United States are subject to the segregation requirements with respect to cleared SBS with all counterparties if they accept collateral from at least one U.S. Person. The Cross-Border Proposal also would require registered U.S. SBSDs to observe collateral segregation requirements for transactions with all counterparties, including Non-U.S. counterparties.⁹⁴

⁹⁰ Cross-Border Proposal, 78 Fed. Reg. at 31,018.

⁹¹ This section is responsive to Question 94 at 31,023 of the Cross-Border Proposal.

⁹² Cross-Border Proposal, 78 Fed. Reg. at 31,019.

⁹³ *Id.* at 31,010.

⁹⁴ Cross-Border Proposal, Proposed Rule § 240.18a-4.

The Commission's valid interest in the protection of U.S. counterparties is much less implicated when the counterparty is a Non-U.S. Person. While the Commission may be concerned about the failure of any SBSB and the collateral effects of such failure on the U.S. financial system, the risk to the U.S. system is substantially decreased where Foreign SBSBs maintain separate accounts to segregate the collateral collected from all transactions with U.S. Person counterparties. Under the Cross-Border Proposal, Foreign SBSBs that are foreign banks with a branch or agency in the U.S. are required to maintain a special account designated for the exclusive benefit of U.S. Person SBS customers.⁹⁵ This approach would ensure that U.S. customers are adequately protected without extending the reach of the requirements to Non-U.S. counterparties that the rules are not designed to protect. We believe that the Commission should extend the requirement to designate a special account to all SBSBs—U.S. and Non-U.S.—rather than require Foreign SBSBs to comply with the segregation requirements for transactions with Non-U.S. counterparties.

Recommendation: Foreign Branches that are not part of registered broker-dealers, like their Foreign SBSB counterparts, should not be subject to segregation requirements when transacting with Non-U.S. Persons.⁹⁶

As stated above, the primary motivation for imposing segregation requirements is the protection of U.S. SBS market participants. As a result, the Commission proposes to classify segregation as a Transaction-Level Requirement and to except from the collateral segregation requirements all Foreign SBSBs that are not registered broker-dealers for their non-cleared transactions with Non-U.S. Persons, as well as Foreign SBSBs that are foreign banks with a branch or agency in the United States for their cleared transactions with Non-U.S. Persons.⁹⁷ Foreign Branches, however, are subject to the segregation requirements for all SBS, regardless of counterparty and regardless of whether the Foreign Branch is part of a registered broker-dealer.

As discussed above in the context of the external business conduct requirements, applying those requirements to a transaction conducted through a Foreign Branch with Non-U.S. Persons “would produce little or no benefit to U.S. market participants.”⁹⁸ This is because the Commission's legitimate interest in ensuring consumer protection is not implicated when the counterparty is a Non-U.S. Person. We believe that a similar

⁹⁵ Cross-Border Proposal, Proposed Rule § 240.18a-4(e)(2)(iii).

⁹⁶ This section is responsive to Question 94 at 31,023 and Question 100 at 31,024 of the Cross-Border Proposal.

⁹⁷ Cross-Border Proposal, Proposed Rules §§ 240.18a-4(e)(1)(ii) and 240.18a-4(e)(2)(iii).

⁹⁸ Cross-Border Proposal, 78 Fed. Reg. at 31,018.

approach should be applied to Foreign Branches in their transactions with Non-U.S. Persons with respect to collateral segregation requirements. Relief for Foreign Branches from segregation requirements would mitigate the competitive effects that Foreign Branches may suffer relative to Foreign SBSDs, many of which are presently exempted from such requirements in their transactions with Non-U.S. Persons.

As a result, we believe that Foreign Branches should be treated the same for purposes of the collateral segregation requirements as Foreign SBSDs. Specifically, since Foreign Branches are banking institutions, they should be treated the same as foreign banks with a branch or agency in the United States. This would require Foreign Branches that are not broker-dealers to segregate only collateral received from U.S. Persons.

Recommendation: We support the Commission’s decision not to apply Transaction-Level Requirements differently depending on whether a Non-U.S. Person counterparty is a “non-U.S. affiliate conduit” or is guaranteed by a U.S. Person.⁹⁹

The CFTC Cross-Border Guidance would generally not apply transaction-level requirements (as defined in the CFTC Cross-Border Guidance) to swaps between a non-U.S. swap dealer and a non-U.S. person (as defined in the CFTC Cross-Border Guidance). However, the CFTC Cross-Border Guidance would apply transaction-level requirements to swaps between a non-U.S. swap dealer and a non-U.S. counterparty that is either a guaranteed affiliate or an “affiliate conduit.”¹⁰⁰ While the CFTC does not provide a definition of an “affiliate conduit,” it has indicated that it would look to certain factors in considering whether a non-U.S. person is an affiliate conduit, including whether:

- the non-U.S. person is a majority-owned affiliate of a U.S. person;
- the non-U.S. person is controlling, controlled by or under common control with the U.S. person;
- the financial results of the non-U.S. person are included in the consolidated financial statements of the U.S. person; and
- the non-U.S. person, in the regular course of business, engages in swaps with non-U.S. third-party(ies) for the purpose of hedging or mitigating risks faced by, or to take positions on behalf of, its U.S. affiliate(s), and enters into

⁹⁹ This section is responsive to Question 98 at 31,024 of the Cross-Border Proposal.

¹⁰⁰ CFTC Cross-Border Guidance, 78 Fed. Reg. at 45, 352-53. Substituted compliance would be available for swaps between a non-U.S. swap dealer and such counterparties.

offsetting swaps or other arrangements with its U.S. affiliate(s) in order to transfer the risks and benefits of such swaps with third-party(ies) to its U.S. affiliates.

An “affiliate conduit” would not include affiliates of swap dealers under the CFTC Cross-Border Guidance.¹⁰¹

We support the Commission’s proposed approach, which would not apply SBS regulatory requirements differently to Non-U.S. Person counterparties that are either guaranteed affiliates or affiliate conduits. We believe that either relationship presents too tenuous a nexus to the United States to warrant the application of Transaction-Level Requirements to transactions between Non-U.S. counterparties; Section 30(c) of the Exchange Act constrains the Commission’s ability to regulate extraterritorial conduct, requiring that the Commission first determine that such regulation is “necessary or appropriate to prevent the evasion” of Title VII requirements. This represents the legislatively intended limit to the Commission’s extraterritorial jurisdiction with respect to SBS regulation, and we believe that many, if not most, affiliate conduits would not satisfy this requirement. Furthermore, we believe that the burdens on Foreign SBSDs when dealing with affiliate conduits are too significant to justify any regulatory benefit.

C. Treatment of Inter-Affiliate SBS Transactions

Recommendation: The Commission should propose a comprehensive inter-affiliate SBS rule before finalizing substantive SBS requirements.¹⁰²

The Cross-Border Proposal does not provide for or reject the possibility of inter-affiliate exemptions from the Commission’s substantive SBS requirements, but instead seeks comment on all issues regarding cross-border inter-affiliate SBS. In so doing, the Commission appears to defer consideration of inter-affiliate exemptions to the adoption of the underlying substantive rules.¹⁰³ Given the central importance of inter-affiliate SBS and the implications that the Commission’s treatment of inter-affiliate SBS could have on entities’ structuring decisions, we believe that it is critical that the Commission at least propose a comprehensive inter-affiliate rule before finalizing the substantive underlying rules governing the SBS markets.

¹⁰¹ CFTC Cross-Border Guidance, 78 Fed. Reg. at 45,359.

¹⁰² This section is responsive to Question 73 at 31,007 and Questions 227 and 229 at 31,072 of the Cross-Border Proposal.

¹⁰³ Cross-Border Proposal, 78 Fed. Reg. at 31,070–71. The Commission anticipates that an inter-affiliate exemption will be addressed in the adopting release for public dissemination.

As stated more fully in our comment letter regarding Proposed Regulation SBSR,¹⁰⁴ global financial institutions use inter-affiliate SBS to accommodate their clients' demand to deal with specific local counterparties while achieving their internal risk management goals. The use of inter-affiliate SBS not only allows risk to be more efficiently managed, but it also has a net positive effect on an institution's assets and liquidity, as well as on its efficiency in deploying capital.

Inter-affiliate SBS generally do not raise the legislative concerns that Title VII regulation is intended to address because they do not create additional counterparty exposure outside of the corporate group and do not increase interconnectedness between third parties. Inter-affiliate trades, in fact, reduce systemic risk by making it possible to increase the use of netting with clients and, by bringing together a diversified portfolio in one entity (i.e., the risk-managing entity), to better manage and reduce risk.

Applying the full panoply of regulations under Title VII to inter-affiliate SBS as if they were third-party SBS will not reduce risk to the financial system, increase transparency or improve the market integrity of the financial system.¹⁰⁵ On the contrary, such regulations could balkanize risks within a corporate enterprise, by forcing individual entities with limited portfolios and limited ability to access risk management to manage their own individual risks. Imposing unnecessary requirements on inter-affiliate SBS will impede efficient, centralized risk management and thus increase, rather than decrease, the level of risk within the enterprise and the broader financial system. To the extent that the Commission is concerned that inter-affiliate trades could be used, in limited or hypothetical circumstances, to evade SBS regulation, we believe that such evasion concerns are better addressed through the use of the Commission's substantial anti-evasion tools.

Inter-affiliate SBS are important because they (1) provide end-users with entity choice, risk and cost reduction and operational efficiency and (2) allow global financial institutions to manage risk effectively. As a result, the treatment of inter-affiliate SBS will play a critical role in how financial institutions structure their internal decision-making processes. Given their use for valid and important customer accommodation and risk management purposes across a corporate group, we would urge the Commission to

¹⁰⁴ See letter submitted by ABA Securities Association, American Council of Life Insurers, Financial Services Roundtable, Futures Industry Association, Institute of International Bankers, International Swaps and Derivatives Association, Securities Industry and Financial Markets Association to the Commission on the subject of the Treatment of Inter-Affiliate Transactions under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Sept. 8, 2011) (available at <http://www.sec.gov/comments/s7-16-10/s71610-181.pdf>).

¹⁰⁵ See Final Entity Definition Rules, 77 Fed. Reg. at 30,596 (stating that the goals of Title VII were "to reduce risk, increase transparency, and promote market integrity within the financial system").

propose a separate inter-affiliate SBS rule that would reflect our proposed nuanced approach. We believe that a separate proposed rule, like the Cross-Border Proposal, is necessary to ensure that market participants are accorded sufficient opportunity to comment on the interplay between the Commission’s proposed rules and inter-affiliate trades. We believe that our recommended approach is consistent with the legal authority provided in Dodd-Frank, as well as with regulators’ current approach toward affiliate transactions, and would achieve the statute’s objectives and facilitate an efficient, effectively regulated and competitive SBS market.

D. Substituted Compliance for SBS Entity-Level and Transaction-Level Requirements

Recommendation: We support the Commission’s proposed approach to substituted compliance that focuses on an outcomes-based comparability determination.¹⁰⁶

The Commission proposes a framework that would allow a Foreign SBS to satisfy the Entity-Level Requirements and Transaction-Level Requirements of section 15F of the Exchange Act, and the rules and regulations thereunder, by complying with foreign law that the Commission has deemed comparable with the relevant SBS regulations.¹⁰⁷ The Commission proposes to make such comparability determinations using an outcomes-based approach. Under such an approach, substituted compliance determinations “would focus on the similarities in regulatory objectives, rather than requiring that the foreign jurisdiction’s rules be identical.”¹⁰⁸

We support the Commission’s proposed approach. We believe that such an approach is consistent with the goal of international comity and is preferable to a rule-by-rule comparison.

Recommendation: The Commission should delay the effectiveness of Entity-Level Requirements until it has had sufficient opportunity to make initial substituted compliance determinations or to provide exemptive relief where potentially comparable foreign requirements are proposed but not yet final.¹⁰⁹

The deference to local regulation available under the Commission’s proposed approach to substituted compliance may be significantly delayed for Foreign SBSs that

¹⁰⁶ This section is responsive to Questions 269 and 270 at 31,087 of the Cross-Border Proposal.

¹⁰⁷ Cross-Border Proposal, 78 Fed. Reg. at 31,088.

¹⁰⁸ *Id.*

¹⁰⁹ This section is responsive to Question 268 at 31,087, Question 276 at 31,091 and Question 295 at 31,092 of the Cross-Border Proposal.

intend to apply for substituted compliance but that may operate in jurisdictions where final rules will still be in the process of being adopted, or not have come into effect, when the Commission's Entity-Level Requirements become effective. Similarly, the Commission may not have had the opportunity to make a comparability determination by the relevant time. In those circumstances, the Foreign SBSDs may be subject to U.S. regulations for the period of time until the finalization of home-jurisdiction regulations, plus the length of time it takes for the Commission to make an accompanying comparability determination.

To address this issue, we believe that Foreign SBSDs should be provided relief from compliance with Entity-Level Requirements until the Commission has had the opportunity to provide substituted compliance determinations. We believe that this is preferable to requiring Foreign SBSDs to have to build the technological, operational and compliance systems required to comply with U.S. law for a short, interim period. This should be the case so long as that period of time is anticipated to be reasonably brief and the Commission anticipates a possibility that the finalized regulations will be sufficiently comparable.

Further, we believe that the Commission should provide for an interim process in which Foreign SBSDs may present, as part of their substituted compliance applications, the enacted legislation or regulation regarding SBS regulation, along with the anticipated effectiveness dates and scope of home-jurisdiction regulations not yet finalized. Based on these presentations, the Commission could exercise discretionary authority to extend exemptive relief for a reasonable period of time. This extension would allow for smoother transitions, both for regulated entities and the markets in which they operate. It would also provide for better harmonization among U.S. and foreign SBS regulations.

In particular, we propose that the Commission allow a Foreign SBS, group of Foreign SBSs or a foreign regulator to, at any time, apply to the Commission for a six-month extension, during which the Foreign SBSs would remain exempt from Title VII SBS requirements in anticipation of the finalization of home-jurisdiction SBS regulations and the requisite comparability analyses. Upon receipt of this application, the Commission would be required to respond within 30 days to notify the applicant of the Commission's determinations. This process would allow the Commission to make reasonable allowances for the transition time required by (1) Foreign SBSs that may be subject to a range of SBS regulations internationally, (2) Non-U.S. jurisdictions that are beginning to create SBS regulatory regimes, and (3) the Commission itself, which must evaluate those regimes for comparability as they come into existence. We recognize that granting an exemption will not be appropriate in those instances where no legislation exists and finalization of home-country regulations is too remote.

Recommendation: Foreign Branches and Foreign SBSDs should be eligible for a Foreign Ancillary Activity Exemption for “transaction-based requirements” where foreign regulations are not yet comparable.¹¹⁰

Should the Commission decline our request to reclassify margin, daily trading records, swap trading relationship documentation, confirmations, processing, netting and valuation requirements (collectively, the “**transaction-based requirements**”), we would urge the Commission to provide for a “**Foreign Ancillary Activity Exemption**” for Foreign Branches and Foreign SBSDs.¹¹¹ Under the Foreign Ancillary Activity Exemption, Foreign Branches and Foreign SBSDs would be eligible to comply with local law for transaction-based requirements for a limited portion of their SBS activity in markets without comparable swap regulatory regimes. This approach is similar to the CFTC’s 5% exemption, subject to our requested clarifications to that exemption in our comment letter regarding the CFTC exemptive order and CFTC Cross-Border Guidance.¹¹² Such a Foreign Ancillary Activity Exemption would recognize that an SBSD’s dealing activities in markets with no comparable SBS regulatory regimes, including through branches or agencies, may not be significant in size but may be, nevertheless, an integral element of their global business.

Specifically, the use of the Foreign Ancillary Activity Exemption in a specific jurisdiction by a specific SBSD should be available as long as the aggregate notional value of swaps in the jurisdictions for which the Foreign Ancillary Activity Exemption is used does not exceed 15% of the SBSD’s total swap activities. We believe this 15% threshold limits the amount of business an SBSD may conduct in a noncomparable jurisdiction, while allowing SBSDs to engage in critical business in such jurisdictions to better serve local customers or comply with local laws.

¹¹⁰ This section is responsive to Questions 99 at 31,024 and 296 at 31,092 of the Cross-Border Proposal.

¹¹¹ See recommendation on A-35.

¹¹² See letter submitted by SIFMA to the Commodity Futures Trading Commission on the subject of the Exemptive Order Regarding Compliance with Certain Swap Regulations (RIN 3038-AE85) and Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations (RIN 3038-AD85) (August 12, 2013) (available at <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59313&SearchText=>).

Recommendation: Foreign Branches should be permitted to use substituted compliance with respect to daily trading records, swap trading relationship documentation, confirmations, processing, netting and valuation requirements.¹¹³

As stated above, if the Commission does not reclassify daily trading records, swap trading relationship documentation, confirmations, processing, netting and valuation requirements from Entity-Level to Transaction-Level Requirements, we believe that their transaction-specific application dictates that they be treated differently from other Entity-Level Requirements such as capital. Specifically, we believe that substituted compliance should be extended to Foreign Branches with respect to these requirements.

The Cross-Border Proposal contemplates the ability of Foreign SBSs to rely on a substituted compliance determination made by the Commission with respect to reporting, trade execution and Entity-Level Requirements, including daily trading records, swap trading relationship documentation, confirmations, processing, netting and valuation requirements.¹¹⁴ Substituted compliance is also available to Foreign Branches for regulatory reporting, public dissemination and trade execution. The Cross-Border Proposal does not, however, extend substituted compliance to Foreign Branches for the transaction-based requirements, which are Entity-Level Requirements adopted pursuant to § 15F of the Exchange Act.

To increase the equality of treatment of Foreign Branches and Foreign SBSs, Foreign Branches should be able to rely on substituted compliance determinations for Entity-Level Requirements. The proposed disparate treatment of Foreign Branches and Foreign SBSs puts Foreign Branches at a competitive disadvantage, even though Foreign Branches are, in most cases, subject to extensive supervision and oversight in their host country, and substituted compliance would only be permitted where such comprehensive regulation exists. Consequently, to mitigate the competitive inequalities that result from disparate treatment of entities operating outside the United States, we believe that the final cross-border rule should allow Foreign Branches to benefit from the availability of substituted compliance for daily trading records, swap trading relationship documentation, confirmations, processing, netting and valuation requirements.

¹¹³ This section is responsive to Questions 274 at 31,090 and 296 at 31,092 of the Cross-Border Proposal.

¹¹⁴ Cross-Border Proposal, Proposed Rules §§ 240.3a71-5, 240.3Ch-2(a)(1) and 242.908(c)(1)(i).

Recommendation: MSBSPs should be permitted to rely on substituted compliance to the extent that they are subject to the rules for which the substituted compliance determination has been made.¹¹⁵

While substituted compliance would be available for Foreign SBSDs under the Cross-Border Proposal, the same relief would not be available to Foreign MSBSPs. The Commission's decision to distinguish between the two groups of foreign registered SBS entities is premised on uncertainty regarding the oversight of Foreign MSBSPs in their home jurisdiction.¹¹⁶ We recognize that it would be inappropriate to allow unregulated Foreign MSBSPs to rely on a substituted compliance determination; however, a blanket denial of substituted compliance relief for Foreign MSBSPs is an overly broad solution for addressing this concern.

Instead, the Commission should allow those Foreign MSBSPs that are subject to comparable foreign regulatory requirements to apply for a substituted compliance determination from the relevant Entity-Level Requirements and Transaction-Level Requirements. Without this allowance, MSBSPs subject to comparable regulation in their home jurisdiction would be forced to comply with duplicative or potentially conflicting regulatory regimes. In addition, to the extent that a comparability determination has been made for a set of rules in a foreign jurisdiction that applies to Foreign SBSDs, and Foreign MSBSPs are subject to the same requirements, we see no reason why the Foreign MSBSP should not be allowed to use such a determination and comply with the local law that the Commission has already deemed comparable.

Recommendation: The Commission should clarify that segregation requirements may be subject to a substituted compliance determination.¹¹⁷

Under the Cross-Border Proposal, the Commission would have authority to make substituted compliance determinations with respect to those SBS requirements adopted under § 15F of the Exchange Act. All but one of the Entity-Level and Transaction-Level Requirements—collateral segregation—will be adopted under § 15F of the Exchange Act. Because of this technicality, Foreign SBSDs would not be able to rely on substituted compliance determinations for the segregation requirements. Since the same logic for permitting substituted compliance for other Entity-Level and Transaction-Level Requirements applies to collateral segregation, we request that the Commission clarify that substituted compliance would be available for this requirement.

¹¹⁵ This section is responsive to Question 126 at 31,037 of the Cross-Border Proposal.

¹¹⁶ Cross-Border Proposal, 78 Fed. Reg. at 31,036.

¹¹⁷ This section is responsive to Questions 283 and 284 at 31,091 of the Cross-Border Proposal.

Recommendation: We agree with the Commission that the class of U.S. counterparties with which a Foreign SBSB transacts should not prevent the entity from relying on substituted compliance.¹¹⁸

The Cross-Border Proposal would not limit the availability of substituted compliance to Foreign SBSBs based on the counterparties with which they transact. We support the Commission's proposed approach, which gives full effect to the principles of international comity exemplified in the Commission's substituted compliance policy.

However, the Commission has specifically requested comment on whether substituted compliance for Foreign SBSBs should be limited to those entities that transact with certain classes of U.S. counterparties, such as Qualified Institutional Buyers ("QIBs") under Rule 144A of the Securities Act of 1933. We do not believe that it should, and therefore support the Commission's proposed approach, which would not apply such a restriction. If Foreign SBSBs are forced to comply with duplicative and potentially conflicting regulatory regimes at the Entity-Level because of their transactions with non-QIBs in the U.S., they may be incentivized to restrict dealing activities within the U.S. to QIBs only. This could reduce liquidity in U.S. markets and could decrease competitiveness of the markets from the perspective of non-QIB counterparties. These effects may lead to rising spreads for non-QIBs, thereby reducing their ability to participate in otherwise desirable SBS transactions. For these reasons, we do not believe that the Commission should impose this restriction or a similar restriction on a Foreign SBSB's ability to rely on substituted compliance.

Recommendation: We agree with the Commission that substituted compliance for Foreign SBSBs should not be limited to Foreign SBSBs that engage in predominantly foreign business.¹¹⁹

The Commission requests comment on whether it should consider restricting reliance on substituted compliance determinations to Foreign SBSBs that are predominantly engaged in foreign business.¹²⁰ We support the Commission's proposed approach, which would not apply such a threshold requirement as it could have an adverse market impact within the United States and competitively disadvantage certain Foreign SBSBs. Providing regulatory incentives for Foreign SBSBs to decrease their dealing activities within the U.S. relative to their total activities could artificially constrain liquidity and competition within the U.S. SBS market. In addition, this approach necessarily would require Foreign SBSBs to determine whether they are in fact

¹¹⁸ This section is responsive to Question 283 at 31,091 of the Cross-Border Proposal.

¹¹⁹ This section is responsive to Question 292 at 31,091–92 of the Cross-Border Proposal.

¹²⁰ *Id.*

predominantly engaged in foreign business, which could result in significant operational and logistical difficulties to accurately track their business.

Recommendation: Foreign regulators should be permitted to make substituted compliance requests.¹²¹

Under the Commission’s proposed approach to substituted compliance for SBSD-specific requirements,¹²² only Foreign SBSDs that are directly supervised by the foreign regulatory system at issue may apply for a substituted compliance determination. We urge the Commission to extend this approach to allow foreign regulators the opportunity to apply for substituted compliance determinations. Foreign regulators are often best placed to describe their rules and provide information for the purposes of a comparability analysis. Such an approach would also allow for a more efficient use of resources. In particular, where a foreign regulator obtains a substituted compliance determination, that determination presumably would apply to all Foreign SBSDs subject to that regime. This approach would allow Foreign SBSDs to avoid the costs associated with collecting the relevant information necessary for a substituted compliance determination regarding a foreign regulatory authority’s rules and regulations and coordinating with various other Foreign SBSDs before making an application to the Commission. Additionally, giving foreign regulators standing in the process may facilitate international coordination and lead to further cooperation and collaboration.

Recommendation: The Commission’s decision to modify or withdraw a substituted compliance determination should be subject to a phase-in period, in addition to the notice and comment procedures already contemplated.¹²³

Each of the proposed rules addressing substituted compliance stipulates that the Commission may, “on its own initiative,” modify or withdraw a substituted compliance determination, “after appropriate notice and opportunity for comment.”¹²⁴ We recognize that as regulatory regimes change the Commission must have the authority to reevaluate substituted compliance determinations in order to ensure that reliance continues to generate outcomes comparable to those of the Commission’s rules. However, market participants are likely to design systems and processes to comply with an approved substituted regulatory regime after the Commission has made such a determination.

¹²¹ This section is responsive to Question 284 at 31,091 of the Cross-Border Proposal.

¹²² Cross-Border Proposal, Proposed Rule § 240.3a71-5(c).

¹²³ This section is responsive to Question 281 at 31,909, Question 307 at 31,097 and Question 321 at 31,100 of the Cross-Border Proposal.

¹²⁴ Cross-Border Proposal, Proposed Rules §§ 240.3a71-5(a)(4), 240.3Ch-2(b)(4) and 242.908(c)(2)(v).

Withdrawal or modification of such a determination could cause significant operational difficulties for market participants, that may have to realign their internal infrastructure to be in compliance with the Commission’s requirements.

We appreciate that the Commission has indicated that it will provide notice and an opportunity for comment for any such withdrawal. In addition, any final decision by the Commission should include a phase-in period, in order to provide market participants adequate opportunity to make necessary adjustments to internal systems and processes. Such a process would balance the Commission’s interests in ensuring comparable regulation under substituted compliance with market participants’ need for reliance and predictability.

Recommendation: The Commission should coordinate with prudential regulators to provide substituted compliance for margin and capital requirements for entities subject to the prudential regulators’ jurisdiction.¹²⁵

Under the Cross-Border Proposal, capital and margin requirements are classified as Entity-Level Requirements that would apply to all SBSDs—both U.S. and Foreign. The Commission proposes to permit nonbank Foreign SBSDs to apply for substituted compliance from these “interrelated requirements.”¹²⁶ Due to the fact that Dodd-Frank grants the prudential regulators, not the Commission, the authority to adopt uncleared SBS margin requirements for bank SBSDs, however, the Commission notes that it “does not have the authority to make substituted compliance determinations in those areas for dealers that are banks.”¹²⁷ We understand this view, but encourage the Commission to closely coordinate with the prudential regulators to make sure that the cross-border application of uncleared swap margin rules is identical. Differing cross-border application of margin and capital rules could, thus, lead to competitive inequalities between otherwise similarly situated SBSDs.

Recommendation: The Commission should provide further guidance on how it will evaluate requests for substituted compliance determinations.¹²⁸

We believe that the Commission should provide further clarity regarding the assessment process for substituted compliance determinations and identify with particularity the factors that would be most relevant to the determination. The

¹²⁵ This section is responsive to Question 101 at 31,025 of the Cross-Border Proposal.

¹²⁶ Cross-Border Proposal, 78 Fed. Reg. at 31,088.

¹²⁷ *Id.* at 31,090.

¹²⁸ This section is responsive to Question 272 at 31,088 of the Cross-Border Proposal.

Commission notes that it will “tak[e] into account such factors as the Commission determines are appropriate, such as the scope and objectives of the relevant foreign regulatory requirements, as well as the effectiveness of the supervisory compliance program administered, and the enforcement authority exercised.”¹²⁹ This broad language does not clearly establish the specific materials most critical to a determination, nor does it state the exact method and metrics by which the Commission will compare regulatory outcomes between the United States and the foreign jurisdiction. For example, it is unclear from the current proposal whether empirical evidence or regulatory resources will inform the Commission’s determination of whether or not a regulatory regime achieves similar outcomes.

While the current Cross-Border Proposal provides guidance on the relevant substituted compliance considerations with respect to reporting and public dissemination requirements,¹³⁰ no similar guidance is provided for the other categories of regulation. Thus, it is unclear precisely what materials will be most helpful, pertinent and persuasive to the Commission when assessing the comparability of a foreign regulatory regime. We therefore urge the Commission to provide a more granular and detailed framework regarding the considerations relevant to evaluating substituted compliance requests.

Finally, the Commission should ensure that the timing of its substituted compliance determinations are coordinated with the rulemaking and implementation schedules of the key G-20 jurisdictions that are currently working in good faith to develop and implement derivatives reform.

IV. Reporting, Clearing and Trade Execution Requirements; Substituted Compliance

A. Reporting, Clearing and Trade Execution

Recommendation: The application of regulatory reporting, public dissemination, trade execution and clearing requirements should follow the same rules as the external business conduct requirements.¹³¹

Under the Cross-Border Proposal, regulatory reporting, public dissemination, mandatory trade execution and clearing requirements are not categorized as either Transaction-Level Requirements or Entity-Level Requirements. Instead, these requirements are considered “transactional requirements” that apply to persons regardless

¹²⁹ Cross-Border Proposal, 78 Fed. Reg. at 31,094.

¹³⁰ See *Id.* at 31,095.

¹³¹ This section is responsive to Question 220 at 31,068–69 of the Cross-Border Proposal.

of their registration status.¹³² The rules regarding the application of these “transactional requirements” are complex and differ depending on whether the regulatory reporting, public dissemination or execution/clearing requirements are at issue.

Under the Proposal, therefore, a registered SBSB would be required to separately determine, with respect to each SBS that it enters into, whether the transaction is subject to (i) Entity-Level Requirements, (ii) external business conduct requirements, (iii) segregation requirements, (iv) regulatory reporting, (v) public dissemination and (vi) mandatory clearing and trade execution requirements. In addition, in each of these cases, the SBSB may need to determine whether substituted compliance is available. The result is an unnecessarily complex and confusing process for determining whether a cross-border SBS transaction must meet the Commission’s Title VII regulatory requirements. In particular, under the current proposal, market participants would be required to build out extremely detailed and expensive systems simply in order to accurately determine the various permutations that could arise under this cross-border regulatory matrix.

We believe that, since the regulatory reporting, public dissemination, mandatory trade execution and clearing requirements apply on an SBS-by-SBS basis, they resemble Transaction-Level Requirements more closely than Entity-Level Requirements, as evidenced by the Commission’s calling them “transactional requirements.” We think it would be simpler and more rational, therefore, to apply these Transaction-Level Requirements to both SBSBs and non-SBSBs/MSBSPs in the same way as Transaction-Level Requirements apply to SBSBs. Specifically, we believe that the transactional requirements should be applied in the same way as the external business conduct rules, since the application of the segregation rules include a number of distinctions (e.g., whether the SBSB is a broker-dealer) that is not relevant in this context.

B. Regulatory Reporting and Public Dissemination

Recommendation: If public dissemination is not subject to the same treatment as external business conduct, it should nonetheless not apply to transactions between two Non-U.S. Persons, a Non-U.S. Person and a Foreign Branch or two Foreign Branches.¹³³

As noted above, the requirement to publicly disseminate SBS data in real-time is not an SBSB-specific requirement that is categorized as either a Transaction-Level or Entity-Level Requirement. We believe, as stated above, that public dissemination should be treated the same as external business conduct. However, if the Commission determines not to apply such treatment, we believe that, at the least, public dissemination

¹³² Cross-Border Proposal, 78 Fed. Reg. at 30,973.

¹³³ This section is responsive to Question 220 at 31,068–69 of the Cross-Border Proposal.

should not apply to transactions between two Non-U.S. Persons, a Non-U.S. Person and a Foreign Branch and or Foreign Branches.

Re-proposed Regulation SBSR would require public dissemination of information about an SBS, for example, between a Foreign Branch and a Foreign SBS, as well as, for example, an SBS between a Foreign Branch and a Non-U.S. Person guaranteed by a U.S. Person, even if conducted outside of the United States.¹³⁴ Public dissemination is a requirement specifically intended to improve “the transparency, fairness and efficiency of the U.S. [SBS] market” by enhancing price discovery in the U.S. SBS markets.¹³⁵ As a result, it does not appear to further the stated purposes of public dissemination to apply the requirements to transactions where there is no U.S. Person counterparty and the transaction is not conducted in the United States. Indeed, it is possible that including such SBS transactions would provide “noise” to the public data-stream, impeding rather than promoting useful transparency.

The Commission’s proposed approach also is inconsistent with its proposal to exempt two Foreign SBSs from the real-time reporting requirements for SBS conducted outside of the United States.¹³⁶ We believe that the Commission’s reasons for exempting SBS between two Foreign SBSs outside the U.S. apply equally to an SBS between a Foreign SBS and either a Non-U.S. Person guaranteed by a U.S. Person or a Foreign Branch that also occurs outside the United States, since such a transaction is less likely to affect the U.S. SBS market. For these reasons, we believe that the Commission’s supervisory interests are too remote to justify applying real-time reporting requirements to swaps transacted between Foreign SBSs (or Foreign Branches) and other Non-U.S. Persons.

As a result, if the Commission does not choose to treat public dissemination in the same way as the external business conduct rules, we believe that, at the least, public dissemination should not apply to transactions between two Non-U.S. Persons, a Non-U.S. Person and a Foreign Branch or Foreign Branches.

¹³⁴ Cross-Border Proposal, Proposed Rule § 242.908(a)(2)(iv).

¹³⁵ Cross-Border Proposal, 78 Fed. Reg. at 31,062.

¹³⁶ *Id.* at 31,063.

Recommendation: A guarantee of an SBS transaction by a U.S. Person should not be considered in determining whether a transaction is subject to regulatory reporting or public dissemination requirements.¹³⁷

Under the Cross-Border Proposal, swap guarantees are important in determining whether the regulatory reporting and public dissemination requirements apply to a specific SBS. For example, regulatory reporting requirements would apply to any SBS transaction between Non-U.S. Persons if one or both of the Non-U.S. Persons are guaranteed by a U.S. Person, wherever executed.¹³⁸ Further, public dissemination requirements would apply to transactions between two Non-U.S. Persons that are each guaranteed by U.S. Persons, as well as to transactions between a Foreign SBSD or Foreign Branch and a Non-U.S. Person that is guaranteed by a U.S. Person, wherever executed.¹³⁹

The connection between a Non-U.S. Person and its U.S. Person guarantor creates too tenuous a nexus to justify regulatory reporting and public dissemination requirements on the basis of this relationship alone. As the Commission notes, “the risk posed to the U.S. markets by non-U.S. persons engaged in dealing activity with non-U.S. persons outside the United States whose performance under [an SBS] is guaranteed by a U.S. person can best be addressed through the [MSBSP] definition and requirements applicable to [MSBSPs].”¹⁴⁰ To require a Non-U.S. Person that is guaranteed by a U.S. Person to comply with regulatory reporting and public dissemination requirements, particularly for transactions conducted outside the United States, would impose overly burdensome reporting requirements on that Non-U.S. Person with no corresponding regulatory benefit. For these reasons, we believe that the Commission should only look to whether direct U.S. Persons are counterparties to SBS transactions to determine whether regulatory reporting and public dissemination requirements apply.

¹³⁷ This section is responsive to Questions 201, 204, 205 and 206 at 31,064 of the Cross-Border Proposal.

¹³⁸ Cross-Border Proposal, Proposed Rule § 242.908(a)(1)(ii).

¹³⁹ Cross-Border Proposal, Proposed Rule §§ 242.908(a)(2)(ii) and (iv).

¹⁴⁰ Cross-Border Proposal, 78 Fed. Reg. at 31,006.

Recommendation: An SBS transaction should not be subject to regulatory reporting or public dissemination requirements solely by virtue of being conducted within the United States or cleared at a clearing agency with its principal place of business in the United States.¹⁴¹

Under the Cross-Border Proposal, the regulatory reporting and public dissemination requirements would apply to any transaction that is conducted within the United States, even if both counterparties are Non-U.S. Persons and do not have U.S. Person guarantors or affiliates.¹⁴² As we have described above, we believe that the Commission should abandon its conduct-based approach.¹⁴³ In addition, since such SBS counterparties are likely to be subject to the reporting requirements of their home jurisdictions, the result is likely to be duplicative reporting requirements. The Commission could avoid the confusion that could arise from multiple transaction reports in different jurisdictions at different times by deferring to a foreign reporting regime where both parties are Non-U.S. Persons.

Similarly, proposed Rule 908(a)(1)(iv) and 908(a)(2)(v) would require regulatory reporting and public dissemination of any transaction that is cleared through a clearing agency having its principal place of business in the United States, even where the transaction is conducted outside the United States by two Non-U.S. Persons with no additional nexus to the United States. Such an approach would subject Non-U.S. Persons to the Commission's regulatory reporting and public dissemination requirements, notwithstanding that these entities are likely subject to an existing regulatory regime in their home countries. Further, Regulation SBSR would require regulatory reporting and public dissemination of transaction, volume and pricing data within specific time periods after execution of the SBS, and **before** the transaction is submitted for clearing. Therefore, relating the public dissemination requirement to the location of clearing does not make sense in this context.

We believe that this proposed approach also may discourage market participants from clearing transactions in the United States. Because clearing is designed to reduce systemic risk, the Commission's regulations should not discourage its use. We thus believe that Non-U.S. Persons or persons that enter into a transaction outside of the United States should be allowed to elect to clear the SBS at a clearinghouse with its principal place of business in the United States without subjecting that SBS to regulatory requirements other than those that directly relate to clearing.

¹⁴¹ This section is responsive to Questions 199 and 200 at 31,064 of the Cross-Border Proposal.

¹⁴² Cross-Border Proposal, Proposed Rule § 242.908(a)(1)(i).

¹⁴³ See A-1 above.

Recommendation: Foreign Branches should be treated the same as Foreign SBSDs for purposes of public dissemination requirements.¹⁴⁴

The application of the public dissemination requirements in the Cross-Border Proposal depends, in part, on whether there is a U.S. Person involved in the SBS transaction. In some instances, a Foreign Branch is treated as a U.S. Person for this purpose, while, in other instances, it is not. For example, an SBS is subject to the public dissemination requirement under § 242.908(a)(2)(iii) if at least one direct counterparty to the transaction is a U.S. Person other than a Foreign Branch. An SBS also is subject to the public dissemination requirement under § 242.908(a)(2)(iv) if one side of the SBS includes a Foreign SBSD (as a direct counterparty or as a guarantor) and the other side includes a direct or indirect counterparty that is a U.S. person, including a Foreign Branch. In addition, it would appear that SBS between two Foreign Branches would be subject to public dissemination requirements.

We believe that Foreign Branches should be treated the same as Foreign SBSDs from the perspective of their counterparties for these requirements. We see no reason to treat Foreign Branches differently depending on the particular prong of the regulatory reporting or public dissemination rule in question. Treating Foreign Branches the same as Foreign SBSDs would minimize the disparate treatment of Foreign Branches as counterparties. It would also give effect to principles of international comity, given the prudential regulation of these entities by foreign regulators. Most importantly, we believe that SBS between two Foreign Branches should be treated the same as SBS between two Foreign SBSDs and not be subject to public dissemination requirements.

Recommendation: The Commission should provide an inter-affiliate exemption from public dissemination requirements.¹⁴⁵

The Commission notes that it “preliminarily believes that cross-border inter-affiliate [SBS] should not be excluded from the public dissemination requirements to the extent that inter-affiliate [SBS] are not excluded as a general matter.”¹⁴⁶ As stated more fully above, we believe that the Commission should propose a separate rule providing for inter-affiliate exemptions from certain of its Title VII requirements. To this end, we would urge the Commission to provide an inter-affiliate exemption from public dissemination requirements.

¹⁴⁴ This section is responsive to Question 208 at 31,064 of the Cross-Border Proposal.

¹⁴⁵ This section is responsive to Questions 227 and 229 at 31,072 of the Cross-Border Proposal.

¹⁴⁶ Cross-Border Proposal, 78 Fed. Reg. at 31,070.

As stated in our comment letter regarding Proposed Regulation SBSR,¹⁴⁷ a global financial institution needs to use inter-affiliate swaps to accommodate its clients' demand to deal with specific local counterparties, while achieving its internal risk management goals. The use of inter-affiliate SBS not only allows risks to reside where they are more efficiently managed, but it also has a net positive effect on an institution's assets and liquidity, as well as on its efficiency in deploying capital. For these reasons, we believe that there should be an inter-affiliate exemption from the public dissemination requirements.

Requiring real-time reporting of inter-affiliate SBS will not contribute to Dodd-Frank's transparency goals but rather would distort market information and thus have a detrimental market and commercial impact. Public reporting of inter-affiliate SBS will not accurately inform the Commission or market participants regarding the size or state of the U.S. SBS market. These trades are typically risk transfers with no market impact. Thus, inclusion of these SBS in SBS market data will distort the establishment of position limits, analysis of open interest, determinations of block trade thresholds and performance of other important regulatory analysis, functions and enforcement activities that require an accurate assessment of the SBS market. The market-facing SBS already will have been reported, and, therefore, to require that inter-affiliate SBS also be reported will duplicate information. Such double counting will distort information that is critical for price discovery and measuring liquidity, the depth of trading and exposure to SBS in the market.

In addition, affiliates often enter into these SBS on terms linked to an external trade being hedged. If markets have moved before the inter-affiliate trade is entered into on the SBSEF or reported as an off-exchange trade, market participants could also misconstrue the market's true direction and depth.

Simply put, there are no discernible benefits, and a serious risk of public confusion, if reporting requirements are extended to inter-affiliate trades. We therefore urge the Commission to provide for an inter-affiliate exclusion from the public dissemination requirements as part of a separately proposed rule regarding inter-affiliate exemptions.

¹⁴⁷ See letter submitted by ABA Securities Association, American Council of Life Insurers, Financial Services Roundtable, Futures Industry Association, Institute of International Bankers, International Swaps and Derivatives Association, Securities Industry and Financial Markets Association to the Commission on the subject of the Treatment of Inter-Affiliate Transactions under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Sept. 8, 2011) (available at <http://www.sec.gov/comments/s7-16-10/s71610-181.pdf>).

Recommendation: We agree with the Commission that public dissemination of SBS data should not be required solely by virtue of the SBS being cleared at a clearing agency that is registered with the Commission but that does not have its principal place of business in the United States.¹⁴⁸

The Commission seeks comment on whether it should require public dissemination of SBS that are cleared at a clearing agency that is registered with the Commission but that does not have its principal place of business in the United States. As stated above, the Commission’s regulations should not unnecessarily discourage central clearing at a well-capitalized, well-regulated clearinghouse. Requiring persons to report SBS under the Commission’s rules solely because they have made the choice to clear that SBS and, thereby, have decreased the systemic risk associated with that SBS seems contrary to the goals of the Dodd-Frank Act. In addition, such an approach is likely to discourage clearing agencies from voluntarily seeking to register with the Commission, which could lead to fewer clearinghouses having robust risk-mitigation systems.

C. Substituted Compliance for Regulatory Reporting and Public Dissemination

Recommendation: Substituted compliance should be considered separately for regulatory reporting and real-time public dissemination requirements.¹⁴⁹

Under the Cross-Border Proposal, the Commission would consider regulatory reporting and public dissemination together for purposes of substituted compliance.¹⁵⁰ As the Commission notes, however, there may be some instances in which its own proposed Regulation SBSR would require regulatory reporting but not public dissemination of a particular transaction.¹⁵¹ Yet the Commission has determined not to consider the requirements separately for purposes of substituted compliance due to “unnecessary operational complexity.”¹⁵²

We believe that this proposed approach would prevent market participants from applying for substituted compliance if they are located in a jurisdiction that requires comparable regulatory reporting or comparable public dissemination, but not both. In

¹⁴⁸ This section is responsive to Question 207 at 31,064 of the Cross-Border Proposal.

¹⁴⁹ This section is responsive to Question 226 at 31,037 and Questions 300–305 at 31,096 of the Cross-Border Proposal.

¹⁵⁰ Cross-Border Proposal, 78 Fed. Reg. at 31,096.

¹⁵¹ *Id.*

¹⁵² *Id.*

such a situation, it would appear that substituted compliance would not be available for either regulatory reporting or public dissemination, even though, for example, regulatory reporting is comparable. This would lead to an otherwise preventable situation in which market participants would be required to comply with the Commission's regulatory reporting requirements in addition to comparable regulatory reporting requirements of their home regulator. This would result in unnecessary and duplicative costs for those market participants that would be required to report data in multiple jurisdictions. This approach also could be compounded by any privacy, secrecy and blocking statutes which may prevent the reporting of data to U.S. trade repositories or the Commission.

As a result, we think that market participants should be able to request substituted compliance for regulatory reporting but not public dissemination, public dissemination but not regulatory reporting, or both.

Recommendation: The Commission should take into account the issue of foreign jurisdictions' privacy laws.¹⁵³

Under the Cross-Border Proposal, before granting a substituted compliance determination with respect to regulatory reporting and public dissemination, the Commission would require direct electronic access to the SBS data held by the trade repository or foreign regulatory authority to which the data is reported.¹⁵⁴ For the reasons given below, we would urge the Commission to take into account the issue of foreign jurisdictions' privacy laws before imposing a blanket requirement that it have direct electronic access to SBS data¹⁵⁵ held by a non-U.S. trade repository or foreign regulatory authority.

We believe that additional time is needed for the Commission and market participants to address concerns arising from client confidentiality requirements under the local law of certain non-U.S. jurisdictions, some of which may even apply to transactions with U.S. Persons. This is a complicated issue that requires consultation with local regulators. More than a dozen jurisdictions have been identified where local law prohibits the disclosure of client names to non-local regulators that do not currently have an information-sharing treaty or agreement in place with the local regulator, some of which cannot be satisfied by counterparty consent.¹⁵⁶ One solution could be to mask

¹⁵³ This section is responsive to Question 234 at 31,073 of the Cross-Border Proposal.

¹⁵⁴ Cross-Border Proposal, 78 Fed. Reg. at 31,094.

¹⁵⁵ We note that it is not clear whether the Commission would require access to all SBS data or only to SBS data with a U.S. nexus.

¹⁵⁶ See CFTC Letter No. 13-41, Time-Limited No-Action Relief Permitting Part 45 and Part 46 Reporting Counterparties to Mask Legal Entity Identifiers, Other Enumerated Identifiers and Other (...continued)

client identities, consistent with the approach taken in the OTC Derivatives Supervisors Group global trade repository.

As this delicate issue requires more time for the Commission to consider and to develop possible alternative solutions, we suggest that entities should be permitted to mask client information from regulatory reporting and any other similar requirements, provided that the failure to do so would violate foreign legal requirements. The Commission should work with foreign regulators to address these problems. To the extent that these problems are not solved before reporting is required for U.S. Persons, market participants may need to ask for additional relief from specific reporting requirements.

Recommendation: We agree with the Commission that Foreign Branches and entities guaranteed by U.S. Persons should be eligible for substituted compliance from regulatory reporting and public dissemination requirements to the same extent as Foreign SBSDs.¹⁵⁷

Under the Cross-Border Proposal, if at least one counterparty to an SBS transaction is a Non-U.S. Person, the SBS would be eligible for substituted compliance for the regulatory reporting and public dissemination requirements as long as no person within the United States is directly involved in executing, soliciting or negotiating the terms of the SBS on behalf of the Non-U.S. Person.¹⁵⁸ Such substituted compliance is available regardless of whether or not the Non-U.S. Person is an SBS or is guaranteed by a U.S. Person. Similarly, if at least one counterparty to an SBS is a Foreign Branch, the SBS would be eligible for substituted compliance for the regulatory reporting and public dissemination requirements as long as no person within the United States is directly involved in executing, soliciting or negotiating the terms of the SBS on behalf of the Foreign Branch.¹⁵⁹ The Commission notes that “[t]his approach is designed to promote access of foreign branches to the local markets in which those branches are located.”¹⁶⁰

(continued...)

Identifying Terms and Permitting Part 20 Reporting Entities to Mask Identifying Information, with respect to certain Enumerated Jurisdictions (June 28, 2013), available at <http://www.cftc.gov/ucm/groups/public/@lrllettergeneral/documents/letter/13-41.pdf>.

¹⁵⁷ This section is responsive to Questions 296 at 31,092, 300 at 31,096 and 302 at 31,097 of the Cross-Border Proposal.

¹⁵⁸ Cross-Border Proposal, Proposed Rule § 242.908(c).

¹⁵⁹ Cross-Border Proposal, 78 Fed. Reg. at 31,093.

¹⁶⁰ *Id.*

We believe that the Commission’s proposed approach to substituted compliance from these reporting requirements is appropriate and would serve to increase the equality of treatment of Foreign Branches and Foreign SBSDs.

D. Mandatory Clearing and Trade Execution Requirements

Recommendation: The mandatory clearing rules should not apply to SBS transactions solely by virtue of being “conducted within the United States.”¹⁶¹

The mandatory clearing requirement is designed to reduce risk to the counterparties to the SBS transaction and the financial system throughout the life of the SBS. As the Commission states, the clearing requirements are meant to apply to “persons that engage in [SBS] transactions within the United States and who may pose financial or operational risk to the U.S. financial system that may be mitigated by requiring transactions to be centrally cleared.”¹⁶²

The Commission has proposed to apply the clearing requirements to all transactions “conducted within the United States,”¹⁶³ unless neither party is a U.S. Person, a Non-U.S. Person guaranteed by a U.S. Person, or a Foreign SBS. ¹⁶⁴ For the reasons described more fully above, we believe that the Commission should abandon its conduct-based approach, which is impractical, cannot be justified by cost-benefit analysis and exceeds the Commission’s SBS authority under the Exchange Act.¹⁶⁵ Thus, we do not believe that the Commission should apply its clearing requirements to transactions “conducted within the United States,” and we would urge the Commission to confirm that the clearing requirement would not apply to any transaction between two Non-U.S. Persons.

As we have described above, the fact that a transaction is “conducted within the United States,” with nothing more, does not pose credit risk to the United States financial

¹⁶¹ This section is responsive to Questions 247 at 31,080 and 265 at 31,085 of the Cross-Border Proposal.

¹⁶² Cross-Border Proposal, 78 Fed. Reg. at 31,075.

¹⁶³ Under the Commission’s proposed definition, a transaction is “conducted in the United States” if “any of the activities that represent key stages in [an SBS] transaction, including solicitation, negotiation, execution, or booking” occur within the United States. *Id.* at 31,080. Not all of these activities, however, pose the kind of direct risk to the U.S. financial system that Title VII is designed to prevent. This definition includes, for example, the utilization of an agent within the United States, who may have relevant expertise or whose location may facilitate transactions otherwise difficult due to time-zone issues. *Id.* at 31,084.

¹⁶⁴ Cross-Border Proposal, Proposed Rule § 240.3Ch-1(b)(2).

¹⁶⁵ See A-1 above.

markets.¹⁶⁶ As a result, we believe that the proposed application of the clearing requirement is overly broad in its application to transactions between Non-U.S. Persons. In a transaction between two Non-U.S. Persons—whether or not they are registered—the risk that clearing is meant to alleviate lies outside of the United States with the Non-U.S. Person counterparties. In order to justify the application of mandatory clearing and trade execution requirements in this situation, we believe that something more than indirect default risk must be demonstrated.

Recommendation: Transactions conducted outside the United States between a Foreign Branch and a Non-U.S. Person guaranteed by a U.S. Person should not be subject to mandatory clearing and trade execution.¹⁶⁷

The Cross-Border Proposal provides exceptions from the mandatory clearing and trade execution requirements for transactions conducted outside of the United States between certain Non-U.S. Persons.¹⁶⁸ An SBS transaction between a Foreign Branch and a Non-U.S. Person that is guaranteed by a U.S. Person would be subject to these requirements, however, even if conducted outside of the United States. This effectively defines a U.S. Person to include a Non-U.S. Person that is guaranteed by a U.S. Person.

We believe that this proposed approach extends beyond the Commission’s jurisdictional reach, as the guarantor relationship presents too tenuous a nexus to the United States. Further, this approach may have competitive effects on Foreign Branches, as Non-U.S. Persons with U.S. guarantors may be deterred from transacting with Foreign Branches to avoid being subject to clearing and trade execution requirements.

Recommendation: Mandatory clearing and trade execution requirements should not apply to inter-affiliate transactions.

The Cross-Border Proposal would not exempt from the mandatory clearing requirements SBS transactions between majority-owned affiliates. Clearing requirements are designed to mitigate the exposure of the U.S. financial system to entities that may pose financial or operational risk.¹⁶⁹ Where an SBS transaction is entered into between unrelated parties, the imposition of a clearing requirement will meaningfully change the credit default risk faced by SBS counterparties. The benefits of central clearing, however, are unlikely to be realized in connection with inter-affiliate SBS. In the course of

¹⁶⁶ See A-1 above.

¹⁶⁷ This section is responsive to Questions 245 at 31,080 and 260 at 31,081 of the Cross-Border Proposal.

¹⁶⁸ Cross-Border Proposal, Proposed Rules §§ 240.3Ca-3(b)(1) and 240.3Ch-1(b)(1).

¹⁶⁹ Cross-Border Proposal, 78 Fed. Reg. at 31,075.

clearing inter-affiliate SBS, the affiliates may be exposed to new sources of risk—that of the credit of the clearinghouse and its members. Additionally, compliance with trade execution requirements is unnecessary in the case of inter-affiliate transactions. The execution requirement would impose costs and inefficiencies not justified by offsetting risk-reducing benefits.

Applying mandatory clearing and trade execution requirements to inter-affiliate transactions would unnecessarily intrude into the internal affairs of the affected firms and may deter desirable risk-management activity. The CFTC recently issued a final rule to provide an exemption from the clearing requirement for inter-affiliate swaps provided certain conditions are met.¹⁷⁰ In the rule, the CFTC cites the benefits of inter-affiliate transactions, stating “inter-affiliate swaps offer certain risk-mitigating, hedging, and netting benefits.”¹⁷¹ The CFTC further acknowledges that concerns regarding the default of an affiliate are mitigated from the perspective of counterparties, as “the entities within an affiliated group are incentivized to fulfill their inter-affiliate swap obligations to each other, to support each other to prevent outward facing failures, and to resolve any disagreements about the terms of inter-affiliate swaps more quickly and amicably.”¹⁷²

We believe that this same reasoning supports an inter-affiliate exemption from clearing and trade execution for SBS swaps between majority-owned affiliates. For these reasons, we would urge the Commission to separately propose a comprehensive inter-affiliate exemption, which includes an exemption from the mandatory clearing and trade execution requirements.

¹⁷⁰ Clearing Exemption for Swaps Between Certain Affiliated Entities, 78 Fed. Reg. 21,750, 21,573 (Apr. 11, 2013). Under the rule, counterparties to a swap may elect an inter-affiliate exemption from the clearing requirement if: (1) the financial statements of both counterparties are reported on a consolidated basis and either one counterparty directly or indirectly holds a majority ownership interest in the other, or a third party directly or indirectly holds a majority ownership interest in both counterparties; (2) both counterparties comply with the conditions set forth in the proposed rule; and (3) one of the counterparties provides certain information on behalf of both affiliated counterparties to either a registered SDR, or the CFTC if a registered SDR does not accept the information.

¹⁷¹ *Id.*

¹⁷² *Id.*

E. Substituted Compliance for Mandatory Clearing Requirements

Recommendation: Substituted compliance for mandatory clearing requirements should be based on the clearing requirements of a regime rather than allowing a person subject to the Commission's clearing laws to clear SBS at a non-registered clearing agency.¹⁷³

The Commission's concept of substituted compliance for clearing differs substantially from its concept of substituted compliance for other areas. Specifically, under the Cross-Border Proposal, the Commission would not look at whether the clearing laws of a foreign jurisdiction are comparable to the Commission's laws and allow a foreign market participant to comply with those laws instead of the Commission's rules, but instead would allow a market participant subject to the Commission's clearing requirement to clear the SBS at a foreign clearing agency if that foreign clearing agency met certain requirements. As a result, if a person were subject to both the laws of a foreign jurisdiction and the United States, and the Commission would find the rules of the foreign jurisdiction to be comparable with respect to clearing, that person would be required to clear under Commission rules notwithstanding the possible availability of an exception under foreign law.

The Commission's proposed approach would simply increase the number of clearing agencies at which an SBS that is subject to the mandatory clearing requirement could be cleared. This approach differs from the Commission's proposed approach to substituted compliance for SBS-specific¹⁷⁴ and reporting requirements,¹⁷⁵ which would achieve the Commission's stated purpose in permitting a market participant to substitute compliance with comparable local law requirements. This proposed approach also is inconsistent with the CFTC's Cross-Border Guidance, which would allow certain entities that are subject to the CFTC's mandatory clearing requirements to substitute compliance with local law requirements.¹⁷⁶

We urge the Commission to permit substituted compliance determinations for mandatory clearing to be made with respect to a foreign financial regulatory system in addition to a foreign clearing agency. This approach is conceptually more aligned with the Commission's expressed view of substituted compliance: to substitute compliance with local law requirements. Recognizing that a foreign financial regulatory system's mandatory clearing regime is comparable also would accord more closely with principles of international comity. In particular, foreign regulators may choose to provide limited

¹⁷³ This section is responsive to Question 316 at 31,099 of the Cross-Border Proposal.

¹⁷⁴ Cross-Border Proposal, Proposed Rule § 240.3a71-5(a)(1).

¹⁷⁵ Cross-Border Proposal, Proposed Rule § 240.908(c).

¹⁷⁶ CFTC Cross-Border Guidance, 78 Fed. Reg. at 45,350-51; 45,353; 45,364.

exceptions or exemptions from mandatory clearing for entities or SBS transactions that do not pose systemic risk to the foreign regulatory regime. The Commission's proposed approach would fail to recognize any such exceptions or exemptions granted by the foreign financial regulatory system. We believe that SBS entities should be able to avail themselves of an exception or exemption from mandatory clearing that is part of a foreign financial regulatory regime that the Commission considers to be comparable.

F. Substituted Compliance for Trade Execution Requirements

Recommendation: Market participants should be permitted to request substituted compliance determinations for trade execution.¹⁷⁷

Under the Cross-Border Proposal, one or more SBS markets in a foreign jurisdiction may file an application with the Commission requesting a substituted compliance determination for trade execution requirements.¹⁷⁸ We believe that market participants should also be able to request such a determination if they engage in transactions that are subject to the rules of a foreign regulatory regime. The mandatory trade execution requirement applies to market participants, and thus their interest in compliance with multiple regulatory regimes may prompt a need for a substituted compliance determination. We also would urge the Commission to consider the interest of market participants in observing potentially conflicting or duplicative execution requirements as part of any such substituted compliance determination.

¹⁷⁷ This section is responsive to Question 329 at 31,101 of the Cross-Border Proposal.

¹⁷⁸ Cross-Border Proposal, Proposed Rule § 240.3Ch-2(c).

Table of Questions to Which Recommendations Respond

The question numbers are based on the order in which the questions are presented in the Cross-Border Proposal. The page numbers in the “Page in Letter” column are hyperlinks to the appropriate section of the letter.

Question in Proposal*	Statement	Page in Letter
Conduct-Based Approach		
Question 39	The Commission’s conduct-based approach is impractical, cannot be justified by cost-benefit analysis and extends beyond the Commission’s SBS authority and mandate under the Exchange Act. It is not harmonized with the CFTC’s approach, which is already being implemented by market participants. As a result, it should be abandoned, and the Commission should follow an entity-based approach similar to that of the CFTC.	A-1
Definition of “U.S. Person”		
Questions 26, 28, 31, 34, 35 and 36	We generally support the Commission’s proposed definition of “U.S. person,” which is clear, objective and ascertainable.	A-6
Questions 19, 20 and 21	The Commission should conform its test to determine an entity’s “principal place of business”	A-7
Question 30	We support the Commission’s proposed approach for determining the U.S.-Person status of an account, which looks to whether any owner of the account is itself a U.S. Person.	A-8
Question 27	The Commission should include a threshold of required ownership of an account so that an account with only <i>de minimis</i> U.S.-Person ownership is excluded.	A-9

* Refers to the Cross-Border Proposal unless otherwise noted.

Question in Proposal*	Statement	Page in Letter
Questions 14 and 32	The exclusion from the U.S.-Person definition for international organizations should be extended to cover all Foreign Public Sector Financial Institutions (“ FPSFIs ”) and their affiliates.	A-10
Questions 21, 24 and 29	We support the Commission’s approach of not looking to whether an entity is guaranteed by a U.S. Person for purposes of determining an entity’s U.S.-Person status.	A-10
Questions 25 and 26	We support the Commission’s decision not to consider whether an entity has a U.S. parent in determining that entity’s U.S. Person status.	A-11
SBSD Registration and Aggregation		
Question 64	A person should not be required to aggregate the SBS dealing transactions of its affiliates to determine the applicability of Title VII to that entity’s SBS dealing activities.	A-12
Question 62	To the extent that aggregation is required, entities should not be required to aggregate SBS positions with registered SBSD affiliates, regardless of whether the entity and its SBSD affiliate are “operationally independent.”	A-13
Question 55	Non-U.S. Persons should not be required to count transactions with Foreign Branches toward their <i>de minimis</i> thresholds, even <i>if there</i> is some involvement of U.S. personnel in “soliciting, negotiating, executing, or booking” the transaction on behalf of the Foreign Branch.	A-15
Question 73	We support the Commission’s proposed approach not to require a person to register as an SBSD by virtue of risk transfers achieved through inter-affiliate SBS.	A-16
Question 70	We agree with the Commission’s proposed approach not to require a Non-U.S. Person to aggregate its SBS dealing positions with those of Non-U.S. Person affiliates that receive guarantees from U.S. Persons toward its <i>de minimis</i> threshold.	A-17

Question in Proposal*	Statement	Page in Letter
N/A	SBS activity undertaken in respect of a legacy portfolio in run-off should not be included in an entity's aggregation calculation and should not itself trigger a registration requirement.	A-18
Question 116	The Commission should consider a system for limited designations.	A-18
Major Security-Based Swap Participant ("MSBSP") Registration and Aggregation		
Question 119	A Non-U.S. Person should not be required to include transactions with Foreign Branches when calculating its outward SBS exposure for the purpose of the MSBSP definition.	A-19
Question 122	For the purpose of the MSBSP calculation, to avoid double counting, guaranteed SBS positions that are attributed to the guaranteed entity should not be counted toward the guarantor's own MSBSP calculations as well.	A-20
Question 123	We agree with the Commission that a guaranteed Non-U.S. Person's SBS positions should not be attributed to a parent or guarantor if the guaranteed Non-U.S. Person is subject to capital regulation by the Commission or the CFTC or is subject to capital standards adopted by its home country consistent with the Basel Accord.	A-21
Classification of SBSD Requirements		
Question 104	Uncleared swap margin should be categorized as a Transaction-Level Requirement rather than an Entity-Level Requirement.	A-22
Question 81	Daily trading records, swap trading relationship documentation, confirmations, processing, netting and valuation requirements should be classified as Transaction-Level Requirements, rather than Entity-Level Requirements.	A-23
Question 108	We support the Commission's proposal to allow SBSD Title VII requirements to be allocated between an SBSD and its agent.	A-23

Question in Proposal*	Statement	Page in Letter
Transaction-Level Requirements		
Questions 83 and 85	The Commission’s external business conduct requirements should be applied to U.S. Person counterparties only.	A-23
Question 94	Collateral segregation requirements, and related disclosure requirements, should only apply to transactions with U.S. counterparties.	A-25
Questions 94 and 100	Foreign Branches that are not part of registered broker-dealers, like their Foreign SBSB counterparts, should not be subject to segregation requirements when transacting with Non-U.S. Persons	A-26
Question 98	We support the Commission’s decision not to apply Transaction-Level Requirements differently depending on whether a Non-U.S. Person counterparty is a “non-U.S. affiliate conduit” or is guaranteed by a U.S. Person.	A-27
Treatment of Inter-Affiliate SBS Transactions		
Questions 73, 227 and 229	The Commission should propose a comprehensive inter-affiliate SBS rule before finalizing substantive SBS requirements.	A-28
Substituted Compliance for SBSB Entity-Level and Transaction-Level Requirements		
Questions 269 and 270	We support the Commission’s proposed approach to substituted compliance that focuses on an outcomes-based comparability determination.	A-30
Questions 268, 276 and 295	The Commission should delay the effectiveness of Entity-Level Requirements until it has had sufficient opportunity to make initial substituted compliance determinations or to provide exemptive relief where potentially comparable foreign requirements are proposed but not yet final.	A-30

Question in Proposal*	Statement	Page in Letter
Questions 99 and 296	Foreign Branches and Foreign SBSDs should be eligible for a Foreign Ancillary Activity Exemption for “transaction-based requirements” where foreign regulations are not yet comparable.	A-32
Questions 274 and 296	Foreign Branches should be permitted to use substituted compliance with respect to daily trading records, swap trading relationship documentation, confirmations, processing, netting and valuation requirements.	A-33
Question 126	MSBSPs should be permitted to rely on substituted compliance to the extent that they are subject to the rules for which the substituted compliance determination has been made.	A-34
Questions 283 and 284	The Commission should clarify that segregation requirements may be subject to a substituted compliance determination.	A-34
Question 283	We agree with the Commission that the class of U.S. counterparties with which a Foreign SBSD transacts should not prevent the entity from relying on substituted compliance.	A-35
Question 292	We agree with the Commission that substituted compliance for Foreign SBSDs should not be limited to Foreign SBSDs that engage in predominantly foreign business.	A-35
Question 284	Foreign regulators should be permitted to make substituted compliance requests.	A-36
Questions 281, 307 and 321	The Commission’s decision to modify or withdraw a substituted compliance determination should be subject to a phase-in period, in addition to the notice and comment procedures already contemplated.	A-36
Question 101	The Commission should coordinate with prudential regulators to provide substituted compliance for margin and capital requirements for entities subject to the prudential regulators’ jurisdiction.	A-37

Question in Proposal*	Statement	Page in Letter
Question 272	The Commission should provide further guidance on how it will evaluate requests for substituted compliance determinations.	A-37
Regulatory Reporting and Public Dissemination		
Question 220	The application of regulatory reporting, public dissemination, trade execution and clearing requirements should follow the same rules as the external business conduct requirements.	A-38
Question 220	If public dissemination is not subject to the same treatment as external business conduct, it should nonetheless not apply to transactions between two Non-U.S. Persons, a Non-U.S. Person and a Foreign Branch or two Foreign Branches.	A-39
Questions 201, 204, 205 and 206	A guarantee of an SBS transaction by a U.S. Person should not be considered in determining whether a transaction is subject to regulatory reporting or public dissemination requirements.	A-41
Questions 199 and 200	An SBS transaction should not be subject to regulatory reporting or public dissemination requirements solely by virtue of being conducted within the United States or cleared at a clearing agency with its principal place of business in the United States.	A-42
Question 208	Foreign Branches should be treated the same as Foreign SBSDs for purposes of public dissemination requirements.	A-43
Questions 227, and 229	The Commission should provide an inter-affiliate exemption from public dissemination requirements.	A-43
Question 207	We agree with the Commission that public dissemination of SBS data should not be required solely by virtue of the SBS being cleared at a clearing agency that is registered with the Commission but that does not have its principal place of business in the United States.	A-45

Question in Proposal*	Statement	Page in Letter
Substituted Compliance for Regulatory Reporting and Public Dissemination		
Questions 226, 300–305	Substituted compliance should be considered separately for regulatory reporting and real-time public dissemination requirements.	A-45
Question 234	The Commission should take into account the issue of foreign jurisdictions’ privacy laws.	A-46
Question 300	We agree with the Commission that Foreign Branches and entities guaranteed by U.S. Persons should be eligible for substituted compliance from regulatory reporting and public dissemination requirements to the same extent as Foreign SBSDs.	A-47
Mandatory Clearing and Trade Execution Requirements		
Questions 247 and 265	The mandatory clearing rules should not apply to SBS transactions solely by virtue of being “conducted within the United States.”	A-48
Questions 245 and 260	Transactions conducted outside the United States between a Foreign Branch and a Non-U.S. Person guaranteed by a U.S. Person should not be subject to mandatory clearing and trade execution.	A-48
	Mandatory clearing and trade execution requirements should not apply to inter-affiliate transactions.	A-49
Substituted Compliance for Mandatory Clearing Requirements		
Question 316	Substituted compliance for mandatory clearing requirements should be based on the clearing requirements of a regime rather than allowing a person subject to the Commission’s clearing laws to clear SBS at a non-registered clearing agency.	A-51
Substituted Compliance for Trade Execution Requirements		
Question 329	Market participants should be permitted to request substituted compliance determinations for trade execution.	A-52

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