July 23, 2019

Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Proposed Rule Amendments and Guidance Addressing Cross-Border Application of Certain Security-Based Swap Requirements (File No. S7-07-19)

Dear Secretary Countryman:

The Institute of International Bankers ("**IIB**")[1] and the Securities Industry and Financial Markets Association ("**SIFMA**")[2] (together, the "**Associations**") welcome the opportunity to comment on the above-captioned proposal (the "**Proposal**")[3] regarding the cross-border application of certain security-based swap ("**SBS**") requirements adopted by the Securities and Exchange Commission (the "**Commission**" or "**SEC**"), specifically those relating to: (1) transactions connected with a non-U.S. person's dealing activity that are arranged, negotiated, or executed by personnel located in a U.S. branch or office of the non-U.S. person or its agent ("**ANE transactions**"); (2) certifications and legal opinions from non-resident ("**non-U.S.**") SBS dealers ("**SBSDs**") relating to Commission

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[1] IIB is the only national association devoted exclusively to representing and advancing the interests of the international banking community in the U.S. Its membership is comprised of internationally headquartered banking and financial institutions from over 35 countries around the world doing business in the U.S. The IIB's mission is to help resolve the many special legislative, regulatory, tax, and compliance issues confronting internationally headquartered institutions that engage in banking, securities, and other financial activities in the U.S. Through its advocacy efforts the IIB seeks results that are consistent with the U.S. policy of national treatment and appropriately limit the extraterritorial application of U.S. laws to the global operations of its member institutions. Further information is available at www.iib.org.

[2] SIFMA is the leading trade association for broker-dealers, investment banks, and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly 1 million employees, we advocate on legislation, regulation, and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association ("**GFMA**"). For more information, visit http://www.sifma.org.

[3] SEC Release No. 34-85823 (May 10, 2019), 84 Fed. Reg. 24,206 (May 24, 2019).

access to books and records and conduct of onsite inspections and examinations; and (3) background checks for associated persons ("**APs**") of SBSDs.

We appreciate and support the Commission's efforts to address the significant challenges that these SBS requirements would pose to efficient operation of the global SBS markets and effective implementation of Title VII of the Dodd-Frank Act. Even as modified by the Proposal, however, these requirements seem likely to result in significant and undue operational burdens, risk management and execution challenges, and unwarranted competitive distortions in the global SBS markets, for dealers as well as their investor and corporate counterparties. To address these issues, we continue to recommend that the Commission harmonize its rules with the parallel Title VII rules adopted by the Commodity Futures Trading Commission ("**CFTC**") by eliminating several aspects of these requirements, as described in greater detail below. Consistency would benefit the entire marketplace and promote fair, orderly, and efficient markets.

If the Commission does not harmonize its rules in this manner, then it should adopt additional modifications and clarifications to the Proposal in order to mitigate appropriately the burdens and challenges associated with the cross-border application of its SBS requirements. We also discuss these additional modifications and clarifications in greater detail below.

Although we appreciate the Commission providing an 18-month implementation period when it finalized its rules concerning capital, margin, and segregation requirements for SBSDs and major SBS participants, we continue to recommend that the Commission adopt an overall 18-month implementation period between when (1) it has made all applicable substituted compliance determinations covering the same range of rules and foreign jurisdictions currently covered by the CFTC's corollary determinations and related no-action relief and (2) SBSD registration, business conduct, and reporting rules take effect. In addition, if the Commission does not further harmonize its rules with the CFTC's, then additional time will be needed to implement those aspects of the Commission's rules that diverge from the CFTC's, which we also discuss below.

This letter proceeds as follows. First, we summarize our recommendations. Next, we discuss our recommendations in greater detail, starting with the treatment of ANE transactions, next addressing recordkeeping and reporting requirements for both U.S. and non-U.S. SBSDs, then turning to certification and legal opinion requirements for non-U.S. SBSDs, then covering background check requirements for APs of both U.S. and non-U.S. SBSDs, and finally discussing our recommendations for the compliance dates of the Commission's Title VII rules.

SUMMARY OF RECOMMENDATIONS

- ***ANE Transactions.***
    - ***Harmonization with the CFTC.*** To avoid a loss of U.S. jobs and prevent market fragmentation, the Commission should harmonize with the CFTC by repealing its rules for ANE transactions.

- ***Additional Guidance and Relief.*** If the Commission does not harmonize with the CFTC, then it should provide additional guidance and relief for ANE transactions as follows:

    - ***Market Color Guidance.*** The Commission should adopt the Proposal's market color guidance;

    - ***SBSD De Minimis Counting Exception.*** The Commission should adopt its proposed conditional exception from the *de minimis* calculation for ANE transactions involving a U.S. broker-dealer or SBSD affiliate, but with modifications to the proposed conditions designed to eliminate certain undue burdens on non-U.S. counterparties (*e.g.*, in connection with suitability and portfolio reconciliation rules), as these conditions would otherwise significantly reduce the viability of relying on the exception;

    - ***External Business Conduct Standards.*** To avoid the imposition of additional documentation burdens on non-U.S. counterparties that would deter their interactions with U.S. personnel, the Commission should harmonize the external business conduct ("**EBC**") requirements that apply to a registered non-U.S. SBSD's ANE transactions with those that apply under the proposed SBSD *de minimis* counting exception, as modified by our comments; and

    - ***Reporting.*** To alleviate non-U.S. counterparties' concerns regarding overlapping or additional reporting requirements and the significant operational burdens associated with tracking ANE activity for trade reporting purposes, the Commission should not subject ANE transactions to Regulation SBSR where one or both of the parties are organized or located in a jurisdiction that applies trade reporting rules to SBS.

- ***Certifications and Legal Opinions for Non-U.S. SBSDs.***

    - ***Harmonization with the CFTC.*** To avoid severe disruptions that would occur from the withdrawal of non-U.S. SBSDs from the U.S. market, the Commission should harmonize with the CFTC by (1) removing the requirement for a non-U.S. SBSD to provide a legal opinion regarding Commission access to books and records and conduct of onsite inspections and examinations and (2) adopting exclusions from the related certification requirement for foreign blocking, privacy, and secrecy rules notified to the Commission in writing.

    - ***Additional Guidance and Relief.*** If the Commission does not harmonize its non-U.S. SBSD certification and legal opinion requirements with the CFTC as described above, then it should adopt the Proposal's guidance regarding those requirements with the following modifications:

- ***Covered Jurisdictions.*** The Commission should narrow the jurisdictions whose laws are covered by the requirements to those where an SBSD maintains its "covered books and records" for production, inspection, and examination by the Commission. If an SBSD maintains copies of the same covered books and records in multiple jurisdictions, then the SBSD should only be required to cover one such jurisdiction in its legal opinion and certification (assuming that the copies maintained in that jurisdiction are stored in compliance with Commission record retention rules or comparable foreign rules);

- ***Covered Books and Records.*** The Commission should exclude from the definition of "covered books and records" the financial records of a non-U.S. SBSD that is subject to the Commission's margin and capital requirements but relying on a substituted compliance determination;

- ***Consents.*** The Commission should adopt the Proposal's clarification regarding the relevance of consents to the non-U.S. SBSD certification and legal opinion requirements, and in addition it should clarify the scope and timing for obtaining consents as noted below in relation to "Recordkeeping and Reporting";

- ***Protected Personal Data.*** To address situations where obtaining consent or relocating records is not an effective means for overcoming restrictions on sharing the personal data of individuals, the Commission should provide SBSDs targeted relief from the certification and legal opinion requirements for such protected personal data and execute memoranda of understanding ("**MOUs**") or other arrangements that enable it to access this data in a manner compliant with foreign law;

- ***Conditional Registration.*** The Commission should adopt its proposed 24-month conditional registration period;

- ***Substituted Compliance.*** To be consistent with the foregoing guidance and relief, the Commission should eliminate the requirement to provide, in connection with an application for substituted compliance, the non-U.S. SBSD certification and legal opinion or, for foreign regulators submitting these applications, assurances regarding prompt Commission access to books and records or onsite inspection or examination; and

- ***Changes in Foreign Laws.*** The Commission should clarify that non-U.S. SBSDs may conduct annual reviews to confirm the continued accuracy and validity of the non-U.S. SBSD certification and legal opinion. If there has been a change in law that affects the

validity of the certification or the conclusions of the legal opinion, then a non-U.S. SBSD should be required to notify the Commission of the issue within 90 days and propose a plan for addressing such issue. Upon receiving this notification, the Commission would have the discretion to accept, reject, or modify the plan and should work with the affected non-U.S. SBSD to ensure the issue is resolved to the Commission's satisfaction.

- ***Recordkeeping and Reporting.***

  - ***Consents and Masking.*** The Commission should clarify that a non-U.S. SBSD need only obtain the consents necessary to provide access to its covered books and records. In addition, the Commission should provide SBSDs with 24 months following registration to obtain consents and allow SBSDs to report SBS using masked identifiers during this period for counterparties who have not yet provided consents;

  - ***Location of Record Access.*** The Commission should clarify that an SBSD should only be required to provide access to its books and records in any one jurisdiction even if the SBSD maintains copies in multiple jurisdictions (assuming that the copies maintained in that one jurisdiction are stored in compliance with Commission record retention requirements or comparable foreign requirements); and

  - ***Protected Personal Data.*** As with the non-U.S. SBSD certification and legal opinion, the Commission should provide relief from direct record access requirements for protected personal data.

- ***Background Checks for APs of SBSDs.***

  - ***Proposed Relief for Non-U.S. APs.*** As proposed, the Commission should modify Rule of Practice 194 and Rule 18a-5 to provide relief for non-U.S. APs who do not effect and are not involved in effecting SBS with or for U.S. counterparties (other than foreign branches) or who are located or employed in jurisdictions that restrict the creation or maintenance of certain sensitive information.

  - ***Harmonization with the CFTC.*** The Commission should further harmonize its AP rules with the CFTC by:

    - amending Rule of Practice 194 to exempt APs who do not solicit or accept SBS, and do not supervise APs who solicit or accept SBS (*i.e.*, back-office APs); and

    - eliminating the requirement that an SBSD's Chief Compliance Officer ("**CCO**") or his or her designee review and sign each employment questionnaire or application, thus allowing an SBSD's

human resources or similar expert personnel to review employment documents.

- ***Compliance Dates.*** We continue to recommend that the Commission extend the compliance date for its registration requirements to 18 months after the date on which it has made all applicable substituted compliance determinations covering the same range of rules and foreign jurisdictions currently covered by the CFTC's corollary determinations and related no-action relief. In the alternative, the Commission should adopt a provisional substituted compliance framework. The Commission should also provide additional transition periods for certain rules that are not harmonized with the CFTC.

DISCUSSION

I. ANE Transactions

a. The Commission Should Harmonize its Treatment of ANE Transactions with the CFTC's Existing Treatment of These Transactions

The Commission's rules would currently require a non-U.S. person to (1) count ANE transactions toward whether, together with its affiliates, it exceeds any of the thresholds for qualifying for the *de minimis* exception from the SBSD definition;[4] (2) report ANE transactions to an SBS data repository under Regulation SBSR for regulatory reporting and public dissemination purposes;[5] and (3) if the non-U.S. person registers with the Commission as an SBSD, comply with EBC requirements.[6]

The CFTC, in contrast, has never required a non-U.S. person to count ANE transactions toward the parallel swap dealer *de minimis* thresholds. In addition, shortly after the CFTC staff published guidance that would have applied certain "transaction-level" requirements,[7] including reporting and EBC requirements, to ANE transactions, the staff granted no-action relief from those requirements, which remains in effect.[8]

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4 17 C.F.R. § 240.3a71-3(b)(1)(iii)(C).

5 17 C.F.R. § 242.908(a)(1)(v).

6 17 C.F.R. § 240.3a71-3(c).

7 *See* CFTC Staff Advisory No. 13-69 (Nov. 14, 2013).

8 CFTC No-Action Letter No. 13-71; *see also* CFTC No-Action Letter No. 17-36 (Jul. 25, 2017). In October 2016, the CFTC published a proposal that would apply a subset of EBC standards to ANE transactions. *See* Cross-Border Application of the Registration Thresholds and [EBC] Standards Applicable to Swap Dealers and Major Swap Participants, 81 Fed. Reg. 71,946 (Oct. 18, 2016). In October 2018, former CFTC Chairman Giancarlo issued a white paper suggesting that the CFTC, in certain circumstances, should apply clearing, trade execution, and swap dealer registration requirements to ANE transactions. *See* J. Christopher Giancarlo, Former Chairman CFTC, "Cross-Border Swaps Regulation Version 2.0: A Risk-Based Approach with Deference to Comparable Non-U.S. Regulation" (Oct. 1, 2018).

The costs of the Commission taking this different approach would be significant. Applying SBSD registration, reporting, and EBC requirements to ANE transactions that are already subject to foreign regulation will discourage non-U.S. clients from interacting with U.S. personnel. It may also lead to a loss of skilled trading and risk management expertise from U.S. markets when SBSDs reorganize their SBS business, as well as impeding risk management by expert trading personnel who remain located in the U.S.

Under the Commission's different approach, non-U.S. counterparties that interact with U.S. personnel would be required to bear the costs (direct or indirect) of compliance with registration or EBC or reporting requirements in circumstances where, unlike U.S. counterparties, they can avoid these costs by moving their business outside of the U.S. To avoid the duplicative U.S. requirements or the additional costs of compliance, many non-U.S. counterparties are likely to refuse to interact with U.S. front office personnel. To accommodate those non-U.S. counterparties, a non-U.S. SBSD would need to have front office personnel located abroad who could interact with non-U.S. counterparties in connection with U.S. SBS markets and during U.S. market hours. The geographic dislocation of such non-U.S. personnel from U.S. colleagues, counterparties, and markets would necessarily inhibit the SBSD's ability to engage in centralized risk management practices. Additionally, if foreign counterparties are no longer interacting with U.S. APs of SBSDs, it is likely that SBSDs will remove many front office jobs from the U.S., resulting in both a decrease of U.S. jobs and a loss of skilled trading and risk management expertise from U.S. markets.

Further, any approach to ANE transactions that requires a transaction-by-transaction determination (as opposed to party-by-party) as to whether the Commission's rules apply would also incentivize SBSDs to move personnel and operations away from the U.S. market, causing both reduced liquidity in the U.S. market and increased fragmentation in the global SBS markets. Non-U.S. SBSDs will be required either to modify their systems and practices to detect transaction-by-transaction involvement of U.S. personnel on a systematic basis or to limit the involvement of such personnel. Identifying ANE transactions will be particularly challenging and costly in situations where transactions are negotiated over longer periods of time and in multiple time zones or where the locations of both parties' personnel are relevant, such as in the inter-dealer reporting context (as described further in Section I.b.iv below). Such a transaction-by-transaction approach to ANE transactions would also cause competitive disparities that impair global firms' ability to manage risk and execute transactions effectively using U.S.-located personnel.

Even though the Proposal would mitigate some of these issues, it would not eliminate them completely. In particular, as described in greater detail in Section I.b below, even as modified by the Proposal, the Commission's ANE rules would still impose burdensome and duplicative documentation and public dissemination requirements on transactions with non-U.S. clients, which would create strong

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However, the Associations and others have raised significant concerns with respect to both of these proposals, and the CFTC has not advanced them.

disincentives to those clients interacting with U.S. personnel. Non-U.S. SBSDs would also still need to modify their systems to monitor for ANE activity on a transaction-by-transaction basis, thus requiring significant operational builds on the part of non-U.S. SBSDs. Non-registrants would also suffer the costs of building systems to report ANE transactions.

Moreover, there is no compelling justification for the Commission to treat ANE transactions in a different manner than the CFTC. The CFTC's approach to ANE transactions has not impeded achievement of its goals of reducing systemic risk, promoting market transparency and integrity, and protecting customers. On the contrary, the CFTC's rules have led over 100 swap dealers to register,[9] over $348 trillion[10] in gross notional of outstanding positions to be reported to swap data repositories, over 80% of the interest rate derivative and credit derivative markets to be centrally cleared,[11] and over 50% of those markets to be traded on swap execution facilities.[12]

Nor is there evidence that the SBS markets exhibit distinguishing characteristics from the swaps markets that would merit a different approach to regulating ANE transactions. Market participants transact in single-name and narrow-based index equity and credit default swaps through the same legal entities, on the same trading desks, and as part of the same trading strategies, as they transact in broad-based index equity and credit default swaps. For both types of swaps, ANE transactions do not pose any risks to the U.S. financial system because no U.S. person is a party to such transactions either directly or as a guarantor. For both types of swaps, the market is almost entirely institutional, with transactions negotiated privately either over-the-counter or on electronic trading platforms. For both types of swaps, an integrated regulatory framework applies in other G20 jurisdictions, and this framework is not the same one that those jurisdictions apply to stocks, bonds, and other cash market securities transactions.

The SBS markets also differ significantly from other securities markets. These differences make it inappropriate for the Commission to model the cross-border application of its Title VII rules on the Commission's traditional, territorial approach to broker-dealer regulation. There is greater cross-border participation in the SBS markets than other securities markets. There is no retail participation because SBS transactions typically must take place between eligible contract participants ("**ECPs**"). SBS are

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[9] National Futures Association ("**NFA**"), *Membership and Directories*, *available at* https://www.nfa.futures.org/registration-membership/membership-and-directories.html (last visited July 23, 2019).

[10] CFTC, *Gross Notional Outstanding by Cleared Status (Millions of USD) – Open Interest Equivalent (Single-Count)*, *available at* https://www.cftc.gov/MarketReports/SwapsReports/L1GrossExpCS.html (last visited July 23, 2019).

[11] *Id.*

[12] International Swaps and Derivatives Association, *Interest Rate and Credit Derivatives Weekly Trading Volume: Week Ending July 19, 2019, available at* http://analysis.swapsinfo.org/ (last visited July 23, 2019).

generally not regulated like securities in other major jurisdictions, as noted above. Although Congress defined SBS as a type of security, it also codified an extensive new regulatory framework for them that parallels the CFTC's swaps framework. It did not subject SBSDs to regulation as broker-dealers or require them to become members of the Financial Industry Regulatory Authority ("**FINRA**").

Congress did, however, require a person engaged in the business of effecting SBS transactions for others (*i.e.*, acting as broker) to register as a broker-dealer and become a FINRA member, subject to pre-existing exceptions and exemptions (*e.g.*, for banks transacting in "swap agreements" as defined by the Gramm-Leach-Bliley Act). ANE activity is quintessential brokerage activity because the U.S. personnel or agents conducting the activity act as agent, not principal. The only U.S. nexus for an ANE transaction is this agency activity. Both principal counterparties (and any guarantors) to the transaction—and thus any risks arising from the transaction—are outside of the U.S. Consequently, it would be more consistent with congressional intent to regulate ANE activity under the broker-dealer framework rather than the SBSD framework.[13]

For these reasons, the Commission should repeal its rules that would require a non-U.S. person to count ANE transactions toward its SBSD *de minimis* thresholds and its rules that would apply additional EBC and reporting requirements to such transactions.

b. If It Does Not Harmonize with the CFTC by Repealing its ANE Rules, the Commission Should Adopt Additional Clarifications and Modifications to its Treatment of ANE Transactions

If the Commission continues to apply SBSD registration, EBC, and reporting requirements to ANE transactions, it should adopt additional clarifications and modifications designed to mitigate the negative consequences described above.

i. The Commission Should Adopt the Proposed Market Color Guidance

The Proposal would clarify that U.S. personnel who provide market color in connection with SBS transactions do not trigger the Title VII requirements that use an ANE test where such personnel (1) have not been assigned, and do not otherwise exercise, client responsibility in connection with the transaction and (2) do not receive compensation based on or otherwise linked to the completion of transactions on which such personnel provide market color.[14] We agree with the Commission that limited market-facing activity by U.S. personnel does not raise any concerns or regulatory

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[13] Further, as we discuss in footnote 19 below, the SEC should not subject a U.S. SBSD to regulation as a broker-dealer simply because its APs conduct ANE activity for a majority-owned affiliate.

[14] Proposal, 84 Fed. Reg. at 24,216–17.

interests that would merit triggering SBSD registration, EBC, or reporting requirements. Accordingly, we support this proposed guidance.

ii. The Commission Should Modify its Proposed *De Minimis* Threshold Counting Exception

As discussed above, we recommend that the Commission no longer require a non-U.S. person to count ANE transactions toward the SBSD *de minimis* threshold. If the Commission does not adopt this recommendation, however, it should adopt a modified version of the Proposal's conditional exception from the *de minimis* calculation (the "**ANE Counting Exception**") for ANE transactions in which all the relevant ANE activity is conducted by U.S. personnel in their capacity as persons associated with an entity (the "**Registered Affiliate**") that is (1) registered with the Commission in a qualifying capacity and (2) a majority-owned affiliate of the non-U.S. person relying on the ANE Counting Exception (the "**Relying Affiliate**").[15] We discuss our recommended modifications below.

1. Both Broker-Dealers and SBSDs Should Qualify as Registered Affiliates

The Proposal contains two alternatives for which types of entities could qualify as Registered Affiliates for purposes of the ANE Counting Exception. Under "Alternative 1," Registered Affiliates would be limited to entities registered as SBSDs. Under "Alternative 2," a Registered Affiliate could be registered as either an SBSD or a broker-dealer.

The Commission should adopt Alternative 2. Many of the U.S. entities whose APs engage in ANE activity on behalf of non-U.S. affiliates are registered solely as broker-dealers. Alternative 1 would require these U.S. entities to register dually as SBSDs in order to permit their non-U.S. affiliates to qualify for the ANE Counting Exception. Dually registering would subject these U.S. broker-dealers to significantly higher minimum net capital requirements under the Commission's capital rules for nonbank SBSDs.[16] These increased capital requirements would be far disproportional to the risk to a U.S. broker-dealer of merely facilitating these otherwise foreign transactions as agent. Very few firms would, as a practical matter, wish to incur these increased capital requirements solely to rely on the ANE Counting Exception. Instead, they would either need to establish special purpose U.S. SBSD affiliates—a step that would conflict with global resolution planning objectives for the rationalization of firms' legal entity structures—or curtail ANE activity by relocating jobs outside the U.S.

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15 *Id.* at 24,218–33.

16 *See* Capital, Margin, and Segregation Requirements for [SBSDs] and Major [SBS] Participants and Capital and Segregation Requirements for Broker-Dealers; Final Rule, SEC Release No. 34-86175 (June 21, 2019) (amending SEC Rule 15c3-1 to impose a higher, $20 million minimum net capital requirement on a broker-dealer registered as an SBSD, versus requirements ranging from $5,000 to $250,000 for other broker-dealers).

We also note that ANE transactions where the Registered Affiliate is a broker-dealer but not an SBSD would be no less protected than those where the Registered Affiliate was an SBSD. In either case, the ANE Counting Exception would require compliance with the same conditions, including specified SBSD requirements, Commission access to books and records, and additional disclosure requirements.

Additionally, we appreciate the clarification that the Registered Affiliate need not separately count ANE transactions toward its *de minimis* calculation,[17] but we recommend that the Commission make clear as a more general matter that such agency activity does not constitute "dealing" activity that would count towards the SBSD *de minimis* thresholds.

Finally, the Commission should adopt an exemption from broker-dealer registration for a registered SBSD whose only securities brokerage activity is the ANE activity that its APs conduct for a majority-owned affiliate. Otherwise, such a registered SBSD would in many cases need to register as a broker-dealer and thereby become subject to significantly increased minimum net capital requirements,[18] notwithstanding that it does not conduct the retail or other cash market securities business that justifies those increased requirements. In addition, the registered SBSD would be required to satisfy broker-dealer confirmation requirements and FINRA sales practice requirements that overlap or conflict with parallel SBSD requirements. It would be inconsistent with the Commission's goal of applying a uniform framework to SBS dealing activity[19] for it to require a registered SBSD to dually register as a broker-dealer in these circumstances.

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[17] *See* Proposal, 84 Fed. Reg. at 24,227 ("To avoid ambiguity regarding whether a registered broker's U.S. activity under this alternative independently must be counted against the applicable *de minimis* thresholds—and hence potentially require the registered broker also to register as [an SBSD]—Alternative 2 would provide that the persons that engage in such conduct pursuant to the exception would not have to count the associated [SBS] transactions against the *de minimis* thresholds.").

[18] A standalone SBSD approved to use models to compute market and credit risk charges is subject to a minimum net capital requirement of $20 million and a minimum tentative net capital requirement of $100 million, versus requirements of $1 billion and $5 billion, respectively, for an alternative net capital broker-dealer. *See* Capital, Margin, and Segregation Requirements for [SBSDs] and Major [SBS] Participants and Capital and Segregation Requirements for Broker-Dealers; Final Rule, SEC Release No. 34-86175 (June 21, 2019).

[19] *See* Proposal, 84 Fed. Reg. at 24,209. As noted above, we do not agree with the Commission's view that ANE activity constitutes "dealing" activity requiring application of the SBSD regulatory framework. But if the Commission continues to take that view, it should do so in a consistent manner by not subjecting a U.S. SBSD to regulation as a broker-dealer merely because its APs conduct ANE activity for a majority-owned affiliate.

2. The Commission Should Modify Which SBSD Requirements Apply as Conditions to the ANE Counting Exception

The Proposal would require that the Registered Affiliate comply with SBSD requirements for (1) disclosure of material information (including disclosure of material incentives and conflicts of interest of the Relying Affiliate), (2) suitability, (3) fair and balanced communications, (4) trade acknowledgement and verification, and (5) portfolio reconciliation (but only the initial reconciliation of a transaction), to the same extent as those requirements would apply to the Registered Affiliate if it was a counterparty to the transaction and if the Registered Affiliate was registered as an SBSD, if that was not the case. In addition, generally applicable anti-fraud provisions of the federal securities laws and restrictions on SBS transactions with counterparties that are not ECPs would apply to transactions conducted in reliance on the ANE Counting Exception. In contrast, requirements to (1) verify a counterparty's status as an ECP or special entity, (2) disclose daily marks, (3) disclose a counterparty's right to elect clearing and choose the clearing agency, (4) establish, maintain, and enforce know your counterparty policies and procedures, (5) execute written trading relationship documentation, and (6) conduct portfolio compressions, would not apply to transactions conducted in reliance on the ANE Counting Exception.

We support the Proposal's application of fair and balanced communications requirements, anti-fraud provisions, and restrictions on transactions with non-ECPs to transactions conducted in reliance on the ANE Counting Exception. We also support the Commission's decision not to apply counterparty ECP/special entity status verification, daily mark disclosure, clearing disclosure, know your counterparty, trading relationship documentation, and portfolio compression requirements to such transactions. These latter requirements should not apply because they either would require non-U.S. counterparties to execute special, U.S.-compliant documentation—which would strongly deter those counterparties from having the interactions with U.S. personnel that could trigger these requirements—or they would unduly impose obligations throughout the life of an SBS transaction, long after any U.S. ANE activity has concluded.

However, certain aspects of the SBSD requirements that the Proposal *would* apply to the Registered Affiliate would also impose similar documentation burdens on non-U.S. counterparties or overlap unnecessarily with foreign requirements. To address these issues, the Commission should modify or eliminate the SBSD requirements as follows:

- **Disclosures of Material Information.** Although we generally support requiring the Registered Affiliate to disclose material information under SEC Rule 15Fh-3(b), the Commission should limit the requirement to disclose material incentives and conflicts of interest to those of the Registered Affiliate instead of extending to any conflicts of interest of the Relying Affiliate. Any incentives or conflicts of interest of the Relying Affiliate would be defined and subject to regulation by its home country authorities and would not relate to any ANE activity that took place in the

U.S. On the other hand, the Registered Affiliate's disclosure of its material incentives and conflicts of interest should address any concerns arising out of its ANE activity.

- **Suitability.** In situations where the Registered Affiliate is not assigned primary client responsibility for a non-U.S. counterparty (*e.g.*, the counterparty's primary point of contact is not one of the Registered Affiliate's APs), the Commission should limit the ANE Counting Exception's suitability condition to requiring that the Registered Affiliate disclose that it is acting in its capacity as agent for the Relying Affiliate, which in turn is acting in its capacity as counterparty, and that neither of them is undertaking to assess the suitability of the SBS transaction or trading strategy. This modification would avoid requiring the non-U.S. counterparty to adhere to the August 2012 ISDA DF Protocol or execute similar documentation designed to satisfy safe harbors from U.S. suitability rules merely to interact with U.S. personnel, which would discourage such interactions. In addition, if primary client responsibility for a non-U.S. counterparty is held by the Relying Affiliate outside the U.S., the counterparty is less likely to expect the protections of U.S. suitability rules and more likely to be subject to parallel protections under foreign law.

  For similar reasons, the Commission should also work with FINRA to adopt a parallel exemption from FINRA Rule 2111 for situations when a U.S. broker-dealer acts as the Registered Affiliate, such that the broker-dealer is only required to disclose that it is acting in its capacity as agent for the Relying Affiliate, which in turn is acting in its capacity as counterparty, and that neither of them is undertaking to assess the suitability of the SBS transaction or trading strategy. Otherwise, the counterparty would likely need to provide the broker-dealer with an institutional account certification or other documentation or information designed to satisfy FINRA Rule 2111.

- **Trade Acknowledgment and Verification.** In order to avoid requiring both the Relying Affiliate and Registered Affiliate to provide a non-U.S. counterparty with duplicative trade acknowledgments, the ANE Counting Exception's trade acknowledgement and verification condition should be satisfied if the Relying Affiliate provides written documentation of the SBS's terms to the counterparty in compliance with the Relying Affiliate's home country confirmation requirements. Similarly, in connection with a Registered Affiliate that is registered as a broker-dealer, the Commission and FINRA should exempt such Registered Affiliate from compliance with the confirmation requirements of SEC Rule 10b-10 and FINRA Rule 2232, respectively, if the Relying Affiliate provides this documentation to

the counterparty and discloses that the Registered Affiliate is acting as agent.[20]

- **Portfolio Reconciliation.** In order to avoid undue burdens on non-U.S. counterparties, the Commission should eliminate the proposed portfolio reconciliation condition to the ANE Counting Exception or, at a minimum, permit a Registered Affiliate to satisfy the condition if the Relying Affiliate is subject to portfolio reconciliation requirements in its home country jurisdiction. Otherwise, compliance with this condition would require non-U.S. counterparties to agree in writing regarding the terms of the portfolio reconciliation, which, like other written documentation requirements, would likely discourage non-U.S. counterparties from having the interactions with U.S. personnel that could trigger the condition. In addition, the reconciliation process would itself be burdensome on non-U.S. counterparties because, as currently proposed by the Commission, it would encompass non-economic terms of SBS transactions.[21] We understand that the Commission is proposing this approach so that the portfolio reconciliation process could be used to validate data reported under SEC Regulation SBSR. As discussed further below, however, we recommend that ANE transactions not be subject to Regulation SBSR. Also, portfolio reconciliation and trade reporting are two different processes involving different systems and third-party vendors and subject to different requirements in foreign jurisdictions; non-U.S. counterparties would accordingly need to develop new systems to satisfy this condition, which likewise would deter them from interacting with U.S. personnel.

3. The Commission Should Permit a Registered Affiliate to Provide the Proposal's Additional Disclosures on a Relationship-Wide Basis

The Proposal would require that a Registered Affiliate, in connection with a transaction conducted in reliance on the ANE Counting Exception (other than one in which the identity of the counterparty is not known to the Registered Affiliate at a reasonably sufficient time prior to execution of the transaction), notify the counterparty of the Relying Affiliate that the Relying Affiliate is not registered with the Commission as an SBSD and that certain other Securities Exchange Act of 1934 ("**Exchange Act**") provisions or rules addressing the regulation of SBS would not be applicable to the transaction, including provisions affording clearing rights to counterparties. The Proposal would require the Registered Affiliate to provide this disclosure contemporaneously with, and in the same manner as, the ANE activity at issue.

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[20] *See also* Letter from SIFMA, *Proposed Guidance and Exemptions to Clarify Treatment of [SBS] Under the Exchange Act* (Nov. 8, 2018).

[21] *See* Letter from ISDA and SIFMA, *Re: Risk Mitigation Techniques for Uncleared [SBS]; Proposed Rule – RIN 3235-AL83* (Apr. 16, 2019) (expressing general concern with this approach).

The Commission should modify this condition to permit the Registered Affiliate to provide this disclosure on a relationship-wide basis. Requiring a Registered Affiliate to provide such disclosures at the same time and in the same manner as any ANE activity would be highly cumbersome and disruptive to APs' normal behaviors and relationships (*e.g.*, requiring an AP to interrupt a telephone call or electronic chat to provide a legalistic disclosure). Also, for transactions negotiated over longer periods of time or when multiple transactions are negotiated at around the same time, it would be nearly impossible to track whether the required disclosure was provided in connection with each transaction. It moreover would be highly incongruous, and unjustified, to require this disclosure on a transaction-by-transaction basis when most of the Exchange Act requirements that the Registered Affiliate is disclaiming may be satisfied through relationship-wide disclosure (*e.g.*, were the Relying Affiliate registered as an SBSD, it could provide the counterparty with disclosures regarding its clearing rights on a relationship-wide basis).

4. All G20 Jurisdictions Should Qualify as Listed Jurisdictions

The Proposal would require that a Relying Affiliate be located in a "listed jurisdiction," which would be a foreign jurisdiction that the Commission has determined to satisfy public interest criteria relating to margin and capital requirements and supervisory compliance programs. We generally support this condition and agree with the Commission that Australia, Canada, France, Germany, Hong Kong, Japan, Singapore, Switzerland, and the United Kingdom should satisfy these criteria. In addition, we think that the remaining G20 jurisdictions should satisfy this criteria given their progress toward adopting capital and margin requirements consistent with international standards.[22]

We also support the Commission's proposal to provide the public with notice and an opportunity to comment on any withdrawal of a "listed jurisdiction" determination; this process is critical in order to allow market participants to respond to any such proposed withdrawal and, if necessary, adjust their SBS business accordingly.

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[22] We note that the concentration of the SBS markets in the G20 jurisdictions limits the negative consequences of conditioning the ANE Counting Exception on the SBSD being located in a "listed jurisdiction." In comparison, the swaps markets in emerging markets are significantly larger, and any expansion of U.S. swaps regulation to dealers in those markets would have implications beyond those discussed here.

iii. The Commission Should Harmonize the EBC Requirements That Apply to a Registered Non-U.S. SBSD's ANE Transactions with the More Limited Set of EBC Requirements That Apply Under the ANE Counting Exception

Commission rules currently apply the full range of EBC requirements to a registered non-U.S. SBSD's ANE transactions, not just the subset of EBC requirements that would apply as conditions to the ANE Counting Exception.[23] However, as discussed above in connection with that exception, several EBC requirements would impose documentation burdens on non-U.S. counterparties that would deter them from having the interactions with U.S. personnel that would trigger these requirements. These requirements include counterparty ECP/special entity status verification, suitability (other than disclosure that a non-U.S. SBSD is acting in its capacity as a counterparty and is not undertaking to assess the suitability of the SBS transaction or trading strategy), and know your counterparty requirements. In addition, daily mark disclosure requirements would unduly impose obligations throughout the life of an SBS transaction, long after any U.S. ANE activity has concluded.

Consistent with the ANE Counting Exception as it would be modified by our recommendations set forth above, the foregoing EBC requirements should not be triggered by ANE transactions so long as the U.S. personnel acting for the non-U.S. SBSD have not been assigned primary client responsibility for the relevant non-U.S. counterparty (*e.g.*, the counterparty's primary point of contact is not one of the non-U.S. SBSD's U.S. APs). In these situations, the non-U.S. counterparty would not expect the protections of these U.S. EBC requirements. Such a non-U.S. counterparty would also not expect to be required to provide the onboarding information required by these EBC requirements, such as adhering to industry protocols, providing representations, agreeing to covenants, and filling out questionnaires designed to comply with the EBC requirements. Moreover, non-U.S. SBSDs are often subject to home country relationship-level rules. Subjecting non-U.S. SBSDs engaging in ANE transactions to duplicative EBC requirements is unnecessary, particularly given that the home country regulators have a more compelling interest in providing protections to foreign counterparties than the Commission. Imposing such additional requirements adds significant burden without corresponding benefit and may persuade foreign counterparties to move their transactions away from the U.S. market or avoid interacting with U.S. personnel.

iv. Regulation SBSR Should Not Be Triggered by ANE Transactions

Regulation SBSR would currently be triggered by ANE transactions. In particular, in connection with ANE transactions entered into by a non-U.S. person that is not registered as an SBSD, ANE activity would trigger both regulatory reporting and public dissemination requirements; if the non-U.S. person was registered as an SBSD,

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[23] 17 C.F.R. § 240.3a71-3(c).

regulatory reporting would already apply to the transaction by virtue of the non-U.S. person's SBSD registration status, but ANE activity would trigger public dissemination requirements.[24] Also, SBS transactions between non-U.S. persons that are effected by a registered broker-dealer would trigger Regulation SBSR.[25] Because in many instances the personnel who engage in ANE activity are APs of a registered broker-dealer, this prong of Regulation SBSR would also capture ANE transactions.

Although we continue to recommend that ANE activity generally should not trigger additional requirements under Regulation SBSR, if the Commission nonetheless maintains its current approach, it should exclude ANE transactions where one or both of the parties is organized or located in a jurisdiction that applies trade reporting rules to SBS, including a jurisdiction where SBS are generally in-scope for trade reporting rules but the relevant regulatory authority has determined that one or more types of SBS are not sufficiently liquid to be subject to public dissemination rules. Because, as noted above, ANE activity will in many cases be performed by APs of a registered broker-dealer, this exclusion should apply to both the prong of Regulation SBSR that captures ANE transactions[26] and the prong that captures transactions effected by a registered broker-dealer.[27]

The Commission should defer to foreign reporting standards in connection with ANE transactions, without requiring a full-blown comparability analysis, because the Commission has relatively less interest in data for such transactions due to the limited U.S. nexus and absence of risk to the U.S. financial markets. Such an approach is consistent with FINRA Rule 6622, which exempts a foreign equity securities transaction from U.S. trade reporting requirements "if (1) the transaction is executed on and reported through a foreign securities exchange or (2) the transaction is executed OTC and reported to the regulator of a foreign securities markets."[28]

If the Commission does not adopt this approach, then duplicative U.S. trade reporting requirements (as well as public dissemination requirements when they solely apply in the U.S.) would likely dissuade non-U.S. clients from interacting with U.S. personnel. These clients would have concerns that public dissemination of their transactions in two jurisdictions would more likely identify their transactional activity to other market participants (and, at a minimum, such double dissemination is likely to be confusing to the market). Public dissemination in the U.S. under Regulation SBSR might also be inconsistent with the balance between transparency and liquidity objectives the

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24 17 C.F.R. § 242.908(a)(v).

25 17 C.F.R. § 242.908(a)(iv).

26 17 C.F.R. § 242.908(a)(v).

27 17 C.F.R. § 242.908(a)(iv).

28 FINRA, *Trade Reporting FAQ,* Question 700, *available at* https://www.finra.org/industry/trade-reporting-faq#700 (last visited June 29, 2019).

home country regulator sought to achieve when it calibrated its own public dissemination requirements.

In addition, based on some firms' experience with implementing CFTC trade reporting rules in foreign jurisdictions, we believe many non-U.S. clients will find it intrusive for their identifying information to be disclosed directly to U.S. regulators in connection with transactions where they face a non-U.S. dealing entity, as opposed to U.S. regulators obtaining such information through information-sharing agreements with foreign regulators and trade repositories.

The operational burdens associated with tracking ANE transactions that would trigger the application of Regulation SBSR would further cause a loss of U.S. jobs. The burden of implementing the requirements would, in many cases, outweigh the benefits of using U.S.-located personnel. This operational burden is particularly pronounced for inter-dealer transactions in which the SBSD on the reporting side would have to track ANE activity by the other dealer counterparty in order to tell the SBS data repository whether the transaction is subject to public dissemination rules; similarly, for transactions between two non-U.S. persons not registered as SBSDs, if one side is engaged in ANE activity it must ascertain whether the other side is as well in order to determine which side is the reporting side.

II. Certifications and Legal Opinions for Non-U.S. SBSDs

a. The Commission Should Modify its Non-U.S. SBSD Certification Requirement and Repeal its Non-U.S. SBSD Legal Opinion Requirement to Harmonize with the CFTC's Existing Approach to Non-U.S. Swap Dealers

The Commission's rules currently require that any non-U.S. SBSD[29] applying for registration submits with its application (1) a certification that it can, as a matter of law, and will provide the Commission with prompt access to the books and records of such non-U.S. SBSD, and can, as a matter of law, and will submit to onsite inspection and examination by the Commission and (2) an opinion of counsel that the non-U.S. SBSD can, as a matter of law, provide the Commission with prompt access to the books and records of such non-U.S. SBSD, and can, as a matter of law, submit to onsite inspection and examination by the Commission (the "**non-U.S. SBSD certification and legal opinion requirements**").[30]

There is no equivalent requirement for an opinion of counsel under the CFTC's parallel Title VII rules for swaps and swap dealers. Additionally, although the registration form for swap dealers, NFA Form 7-R, requires a non-U.S. swap dealer to

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[29] In this letter, when we refer to a non-U.S. SBSD, we mean one that qualifies as a nonresident SBSD. A "nonresident SBSD" is one that is organized, resides, or has its, his or her principal place of business in any place not in the U.S. SEC Rule 15Fb2-4(a).

[30] SEC Rule 15Fb2-4(c).

agree to provide the CFTC, U.S. Department of Justice, and NFA access to records and to permit them to inspect the non-U.S. swap dealer, that agreement contains an exception for those foreign blocking, privacy, and secrecy laws about which a swap dealer informs the CFTC in writing.[31] In practice, the CFTC and NFA have worked with swap dealers and their home country regulators to facilitate U.S. access to books and records and exams without violating these foreign blocking, privacy, or secrecy laws. As a result, in the over six years since non-U.S. swap dealers initially registered with the CFTC, we are not aware of any material obstacles that the absence of a legal opinion requirement or unqualified certification requirement has posed to the CFTC or NFA's oversight of swap dealers.

Accordingly, it is doubtful that the Commission would derive material benefits from its non-U.S. SBSD certification and legal opinion requirements. On the other hand, the costs of those requirements would be significant. Because of their business in branches or with counterparties located in jurisdictions that restrict foreign access to information, virtually no non-U.S. SBSDs could register with the Commission without the changes reflected in the Proposal and our comments herein.[32] Based on the Commission's own economic analysis, fully 88% of the market for North American corporate single-name credit default swaps involves at least one non-U.S. counterparty.[33] The sudden withdrawal of non-U.S. SBSDs from the U.S. market would thus have a devastating effect on market liquidity, competition for investors, and U.S. jobs.

Although the Proposal's clarifications and modifications to the non-U.S. SBSD certification and legal opinion requirements might mitigate these consequences by permitting some non-U.S. SBSDs to register with the Commission, to do so those non-U.S. SBSDs would still need to restructure their businesses and operations significantly. In particular, they would need to prevent personnel located in jurisdictions with problematic blocking, privacy, or secrecy laws from interacting with U.S. counterparties. They also would need to overhaul their booking and recordkeeping systems in order to ensure that any records relating to their U.S. business and any financial records are maintained outside those problematic jurisdictions. As noted above, the CFTC and NFA have been able to oversee non-U.S. swap dealers effectively without mandating these expensive and burdensome restructurings.

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[31] *See* NFA Form 7-R at p. 41, *available at* https://www.nfa.futures.org/registration-membership/templates-and-forms/Form7-R-entire.pdf (last visited June 29, 2019).

[32] We note that the cost-benefit analysis accompanying the 2015 finalization of the non-U.S. SBSD certification and legal opinion requirements was incorrect because it assumed that the only non-U.S. SBSDs who might need to withdraw from the market because of those requirements would be those non-U.S. SBSDs organized in jurisdictions with problematic blocking, privacy, or secrecy laws. Registration Process for [SBSDs] and Major [SBS] Participants, SEC Release No. 34-75611 (Aug. 5, 2015), 80 Fed. Reg. 48,964, 49,008 (Aug. 14, 2015) (the "**SBSD Registration Release**"). In reality, because those laws apply to anyone doing business in those jurisdictions—not just companies organized there—a far greater number of non-U.S. SBSDs would be impacted.

[33] Proposal, 84 Fed. Reg. at 24,249.

We also are concerned that the Commission's non-U.S. SBSD certification and legal opinion requirements violate national treatment principles. U.S. SBSDs who conduct business abroad are subject to the same foreign blocking, privacy, and secrecy laws as non-U.S. SBSDs who conduct business in the same foreign jurisdictions. But the Commission's certification and legal opinion requirements unfairly target only non-U.S. SBSDs.

In light of these considerations, the Commission should harmonize with the CFTC by eliminating the non-U.S. SBSD legal opinion requirement and adopting exclusions from the non-U.S. SBSD certification requirement for foreign blocking, privacy, and secrecy laws about which the non-U.S. SBSD informs the Commission in writing.[34]

b. <u>If It Does Not Harmonize with the CFTC, the Commission Should Adopt Additional Clarifications and Modifications to its Non-U.S. SBSD Certification and Legal Opinion Requirements</u>

The Proposal would clarify and modify the non-U.S. SBSD certification and legal opinion requirements by: (1) clarifying what foreign jurisdictions are covered by the requirements; (2) clarifying what books and records are covered by the requirements; (3) permitting a non-U.S. SBSD to predicate the certification and legal opinion on obtaining certain consents; (4) excluding books and records of SBS transactions entered into prior to the date on which a non-U.S. SBSD applies to register with the Commission; (5) permitting the certification and legal opinion to take into account certain approvals, authorizations, waivers, consents, or MOUs or other arrangements from or involving foreign regulators; and (6) extending the deadline for submitting the certification and legal opinion to 24 months after a non-U.S. SBSD applies to register, during which period the non-U.S. SBSD would be conditionally registered with the Commission.[35]

Although helpful, these clarifications and modifications would not be sufficient to prevent the non-U.S. SBSD certification and legal opinion requirements from forcing a material number of SBSDs to exit the U.S. market. To mitigate this risk, if the Commission does not harmonize with the CFTC as we recommended above, then in the alternative the Commission should adopt the clarifications and modifications described below.

i. <u>The Commission Should Narrow the Covered Foreign Jurisdictions for Firms Who Maintain Covered Books and Records Outside Their Home Countries</u>

The Proposal would clarify that the non-U.S. SBSD certification and legal opinion requirements would only need to address the laws of the jurisdiction or jurisdictions where the non-U.S. SBSD maintains its "covered books and records" (as defined below), not other jurisdictions where customers or counterparties of the non-U.S.

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[34] *See* Letter from IIB and SIFMA, *SEC-CFTC Harmonization: Key Issues under Title VII of the Dodd-Frank Act* (June 21, 2018).

[35] Proposal, 84 Fed. Reg. at 24,233–38.

SBSD may be located or where the non-U.S. SBSD may have additional offices or conduct business. If the non-U.S. SBSD maintained its covered books and records in the jurisdiction of its incorporation or principal place of business, the certification and legal opinion would only need to address that jurisdiction; if it maintained its covered books and records in a different jurisdiction, the certification and legal opinion would need to address that other jurisdiction *provided that* the laws of the jurisdiction where the firm is incorporated or in which it is doing business would not prevent the Commission from having direct access to the covered books and records or prevent the non-U.S. SBSD from promptly furnishing them to the Commission or opening them up to the Commission for an onsite inspection and examination.

We generally support this clarification. It would unfairly disadvantage non-U.S. SBSDs if they could not register with the Commission merely because they do business with SBS counterparties in jurisdictions that have blocking, privacy, or secrecy laws or if they have offices in such jurisdictions but do not conduct U.S.-facing SBS business there, even though U.S. SBSDs engaged in exactly the same activity would face no similar obstacle to registration. This proposed clarification would help to reverse this inappropriate un-level playing field.

The Commission should modify the clarification further, however, in connection with a non-U.S. SBSD that maintains its covered books and records in a location outside the jurisdiction where it is incorporated or has its principal place of business. In this case, the non-U.S. SBSD should not need to address its jurisdiction of incorporation and the other jurisdictions where it does business. Expanding the non-U.S. SBSD certification and legal opinion requirements in this manner would increase such non-U.S. SBSD's costs quite substantially, especially for firms who do business via global branch networks in dozens or hundreds of jurisdictions, even though blocking, privacy, and secrecy laws typically would not apply extraterritorially to a different jurisdiction where a firm maintains its covered books and records. In this regard, we are not aware of any U.S. regulators (including the CFTC and NFA) facing any problems obtaining books and records from or examining the U.S. branches of foreign firms merely because those firms are organized abroad.

In addition, non-U.S. SBSDs may comply with certification and legal opinion requirements by maintaining a copy of a record in a jurisdiction for which the requisite certification and legal opinion can be provided; therefore, the access requirements for other jurisdictions would not meaningfully increase the Commission's ability to review covered books and records. Similarly, SBSDs may maintain copies of the same covered books and records in multiple jurisdictions. Consequently, the Commission should clarify that the direct access requirement is satisfied by access to the covered books and records of an SBSD in any one jurisdiction and the non-U.S. SBSD certification and legal opinion requirements should only be required to cover any one jurisdiction. Otherwise, records in transit, which could be understood to touch multiple jurisdictions, would unrealistically broaden the scope of the non-U.S. SBSD certification and legal opinion requirements.

Furthermore, if a non-U.S. SBSD's U.S. broker-dealer or SBSD affiliate maintains copies of some or all of the non-U.S. SBSD's covered books and records, the non-U.S. SBSD certification and legal opinion requirements should exclude such covered books and records for the same reasons that U.S. SBSDs are not subject to the non-U.S. SBSD certification and legal opinion requirements. The Commission would already have direct access to the covered books and records maintained by the U.S. broker-dealer or SBSD affiliate and would not need to be able to access the same covered books and records in another jurisdiction.

ii. The Commission Should Narrow the Covered Books and Records for Firms Relying on Substituted Compliance

The Proposal would clarify that the non-U.S. SBSD certification and legal opinion requirements only need to address: (1) books and records that relate to the "U.S. business" of the non-U.S. SBSD (as defined in SEC Rule 3a71-3(a)(8)) (*i.e.*, the non-U.S. SBSD's ANE transactions and SBS transactions with U.S. person counterparties); and (2) financial records necessary for the Commission to assess the compliance of the non-U.S. SBSD with capital and margin requirements under the Exchange Act and SEC rules thereunder, if these capital and margin requirements apply to the non-U.S. SBSD (together, "**covered books and records**").

We generally support this clarification. However, we recommend that the Commission exclude from the definition of covered books and records the financial records of a non-U.S. SBSD that is subject to the Commission's margin and capital requirements but relying on a substituted compliance determination with respect to such non-U.S. SBSD's home country margin and capital requirements.

The financial records of such a non-U.S. SBSD would already be subject to the applicable home country's review and supervision (and related recordkeeping requirements) of such SBSD's compliance with home country margin and capital requirements. In granting substituted compliance, the Commission would have already determined that the relevant home country requirements and supervision were sufficiently comparable with its own, and home country regulators would be better situated to supervise the non-U.S. SBSD's compliance with home country margin and capital requirements.

iii. The Commission Should Adopt the Proposed Guidance Regarding Counterparty Consents, But With Additional Relief and Clarifications Relating to Recordkeeping and Reporting

The Proposal would permit the non-U.S. SBSD certification and legal opinion requirements to be predicated, as necessary, on a non-U.S. SBSD obtaining the prior consent of the persons whose information is or will be included in the covered books and records to allow the firm to promptly provide the Commission with direct access to such books and records and to submit to onsite inspection and examination.

We generally support this clarification with respect to required (non-individual) counterparty consents. However, in order to allow SBSDs to take advantage of this guidance, the Commission should provide the additional relief and clarifications discussed in Section III below.

iv. The Commission Should Address Protected Personal Data with Relevant Foreign Regulatory Authorities

The Commission's proposals with respect to the non-U.S. SBSD certification and legal opinion requirements will not be sufficient to address the fundamental issues raised by the need to provide the Commission with access to personal data of individuals ("**protected personal data**") that is protected by certain foreign laws, such as the European Union General Data Protection Regulation ("**GDPR**"). The two key methods that non-U.S. SBSDs otherwise employ to address blocking or secrecy laws typically will not address personal data protection laws.

First, as noted in the Proposal, under certain regulations, consents will likely not effectively address data protection issues for protected personal data. For example, under the GDPR, consents must be freely given in order to be effective. However, guidance suggests that employee consent may not be considered freely given due to the nature of the relationship between employees and employers.[36] Additionally, consents may be withdrawn under certain foreign regulations, including under the GDPR. These restrictions make it untenable for SBSDs covered by GDPR or similar regulatory regimes to rely on consents to satisfy either the non-U.S. SBSD certification and legal opinion requirements or the Commission's recordkeeping requirements.

Second, SBSDs cannot avoid restrictions on protected personal data merely by ensuring that covered books and records containing that data or copies of such covered books and records are located in a jurisdiction that imposes no restraints on the Commission's access or conduct of onsite inspections or examinations. Personal data protection laws applicable to non-U.S. SBSDs (*e.g.*, GDPR for an EU-based SBSD) frequently restrict the transfer of data to a non-protective jurisdiction such as the United States.

If the Commission allows these impediments to act as a bar against any firms covered by GDPR or similar personal data protection regimes from registering as SBSDs, there will be extremely negative consequences to the SBS market due to the extensive current participation by dealers subject to these laws, including EU-based dealers. Unable to mediate a solution between the conflicting requirements of their global regulators, non-U.S. SBSDs would be forced to withdraw from the U.S. market due to an inability to comply with these competing requirements and U.S. SBSDs may be forced to relocate personnel out of jurisdictions with such data protection laws. As discussed

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[36] *See* Article 29 Working Party, *Guidelines on consent under Regulation 2016/679* (adopted Apr. 10, 2018), *available at* https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_guidelines_2_2018_derogations_en.pdf.

above in Section I.a, this would result in fragmentation in the market and a loss of U.S. jobs as well as skilled trading and risk management expertise from U.S. markets.

Consequently, the Commission should address such conflicts with personal data protection laws through MOUs with the appropriate foreign regulatory agencies.[37] Through these MOUs, the Commission would gain access to protected personal data. Although we appreciate the Commission's overall desire for direct access to books and records, we note that protected personal data is a relatively narrow category of the information required by the Commission. Even if it provided relief from the non-U.S. SBSD certification and legal opinion requirements and direct record access requirements for protected personal data, the Commission would still preserve its direct access to the vast majority of books and records it requires regarding (non-individual) counterparties and transaction terms.

v. The Commission Should Adopt its Proposed Clarification Regarding Open Contracts

The Proposal would exclude books and records of SBS transactions entered into prior to the date on which a non-U.S. SBSD applies to register with the Commission from the non-U.S. SBSD certification and legal opinion requirements. We support this proposal. Otherwise, a non-U.S. SBSD would need to renegotiate these open contracts, and counterparties may refuse to do so, which would prevent the non-U.S. SBSD from registering, absent this clarification.

vi. The Commission Should Adopt its Proposed Clarification Regarding Arrangements With Foreign Regulators

The Proposal would permit a non-U.S. SBSD's certification and legal opinion to take into account whether a relevant foreign authority has: (1) issued an approval, authorization, waiver, or consent; or (2) entered into an MOU or other arrangement with the Commission facilitating direct access to books and records. We support this proposal. These arrangements are, in our experience, the most appropriate and effective way to overcome conflicts with foreign blocking, privacy, and secrecy laws, and this proposal would provide a strong incentive for foreign regulators to enter into these arrangements.

vii. The Commission Should Adopt the Proposed Conditional Registration Framework and Eliminate Inconsistent Aspects of its Substituted Compliance Framework

The Proposal would extend the deadline for submitting the certification and legal opinion to 24 months after a non-U.S. SBSD applies to register, during which period the non-U.S. SBSD would be conditionally registered with the Commission. We support this

[37] For example, the Commission could provide a mechanism for the lawful transfer of protected personal data from the European Economic Area under an established Mutual Legal Assistance Treaty and/or an approved Administrative Arrangement.

proposal. However, in order for the conditional registration regime to be effective, the Commission would need to provide additional relief relating to substituted compliance.

Currently, the Commission requires that a party or group of parties (other than foreign financial regulatory authorities) that request substituted compliance provide the non-U.S. SBSD certification and legal opinion as if subject to those requirements at the time of the request, and foreign financial regulatory authorities making such a request must provide adequate assurances that no law or policy of any relevant foreign jurisdiction would impede prompt Commission access to books and records or onsite inspection or examination.[38] The Proposal suggests that the Commission may not grant substituted compliance if the Commission has not received the required certification and legal opinion or assurances.

As an initial matter, it is not necessary to tie substituted compliance to access to books and records, inspections, and examinations. The certification and legal opinion provide a separate, independent, and sufficient means of assuring the Commission that it can obtain direct access to books and records and conduct onsite inspections and examinations. The only reason to link substituted compliance to these topics is so that the Commission does not need to consider a substituted compliance request from a jurisdiction that imposes blocking, privacy, or secrecy laws. But since the Commission is now acknowledging, in connection with the Proposal, that non-U.S. SBSDs should be afforded a transition period following registration for them and their regulators to address these laws, that approach no longer makes sense.

In particular, linking substituted compliance to access to books and records, inspections, and examinations would make the proposed 24-month conditional registration period illusory for non-U.S. SBSDs. SBSDs, in practice, will not be able to take advantage of the conditional registration period before they receive all relevant substituted compliance determinations. Most SBS rules eligible for substituted compliance will be effective upon the conditional registration of the SBSD. Consequently, substituted compliance determinations will need to be finalized well in advance of the effectiveness of the registration requirements in order for SBSDs to evaluate whether they will be able to comply with the SBS regulations or will need to reorganize their SBS business lines or relocate U.S. personnel to avoid overlapping or conflicting rules. Even if an SBSD elected to conditionally register with the Commission, delaying substituted compliance determinations would force such SBSD to implement potentially duplicative Commission requirements in addition to its home country requirements.

Also, the linkage between substituted compliance requests and non-U.S. SBSD certification and legal opinion requirements is inconsistent with the Commission's recognition in the Proposal that a non-U.S. SBSD could comply with requirements for access to books and records, inspections, and examinations by maintaining its covered books and records outside of its home country in a jurisdiction that supports such access, inspections, and examinations. Such a non-U.S. SBSD might, however, still request

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[38] 17 C.F.R. § 240.3a71-6(c).

substituted compliance with its home country regulatory requirements. In this situation, the non-U.S. SBSD certification and legal opinion requirements should be irrelevant to a substituted compliance determination for the non-U.S. SBSD's home country.

In light of these considerations, the Commission should eliminate the requirement to provide, in connection with a substituted compliance request, the non-U.S. SBSD certification and legal opinion or, for foreign financial regulators, assurances regarding prompt Commission access to books and records or onsite inspection or examination.

viii. The Commission Should Revise its Approach to Updating the Non-U.S. SBSD Certification and Legal Opinion Upon Changes in the Relevant Foreign Laws

SEC Rule 15Fb2-4 requires non-U.S. SBSDs to re-certify within 90 days after any changes in the legal or regulatory framework covered by such certification and legal opinion.[39] Such re-certification must also be accompanied by a revised opinion of counsel.

The Commission should clarify what would constitute a reasonable approach for a non-U.S. SBSD to identify changes in the laws covered by its non-U.S. SBSD certification and legal opinion. We recommend that together with the compliance review that would take place in connection with their annual CCO reports, non-U.S. SBSDs also conduct a review to confirm the continued accuracy and validity of the non-U.S. SBSD certification and legal opinion. This review would include, as necessary, consultation with outside legal counsel. A more frequent review or evergreen approach to identify changes in relevant laws would be unreasonably costly, and, moreover, it should not be necessary given that most material changes in law will be accompanied by lengthy transition periods (*e.g.*, the two-year transition period for GDPR).

Under this approach, if there has been a change in law that would affect the content of the legal opinion but not the validity of its ultimate conclusions, then a non-U.S. SBSD should be able to provide the Commission with the required re-certification and refreshed legal opinion within the 90-day timeframe. On the other hand, if there was a change in law that affected the validity of the certification or the conclusions of the legal opinion, then 90 days would not be enough time for a non-U.S. SBSD to address this issue. Addressing such a change in law could require significant changes to a non-U.S. SBSD's business or operations (*e.g.*, altering how it maintains its covered books and records or the locations from which it conducts its SBS business); in most cases, these changes would take longer than 90 days to complete. In some cases, changes in law could even pose an intractable legal conflict, such as the conflict posed by GDPR, which the non-U.S. SBSD would not be in a position to resolve on its own. In these latter cases, it may be necessary for the Commission and relevant foreign authorities to work together to address the conflict. In either case, a non-U.S. SBSD should be required to notify the Commission of the issue within 90 days of the SBSD's annual review and propose a plan for addressing the issue. Upon receiving this

[39] SEC Rule 15Fb2-4(c)(2).

notification, the Commission would have the discretion to accept, reject, or modify the plan and should work with the affected non-U.S. SBSD to ensure the issue is resolved to the Commission's satisfaction.

III. Recordkeeping and Reporting

a. The Commission Should Provide Additional Relief and Clarifications Regarding Counterparty Consents in Connection With Recordkeeping and Reporting Requirements

The Proposal notes that the Commission's recordkeeping rule has an independent requirement that the Commission be able to directly access the books and records of an SBSD, which is distinct from the non-U.S. SBSD certification and legal opinion requirements. This requirement would conflict with foreign laws for many SBSDs, both U.S. and non-U.S. To address these conflicts while still maximizing the Commission's direct access to books and records relevant to its regulatory oversight responsibilities, the Commission should provide the following additional relief and clarifications:

- **Scope of Required Consents.** The Proposal indicates that, to comply with SBS recordkeeping rules, a non-U.S. SBSD that intends to rely on consents must obtain them. The Commission should clarify the scope of the consents the non-U.S. SBSD is required to obtain. A non-U.S. SBSD should only be required to obtain the consents necessary to provide access to, and permit inspection and examination of, its covered books and records relating to SBS entered into on or after the date on which it applies for registration with the Commission. For the same reasons that the Commission believes that other books and records should not be covered by the non-U.S. SBSD certification and legal opinion requirements, a non-U.S. SBSD should not need to obtain consents in relation to those other books and records, at least unless and until the Commission requests access to them.

- **Withdrawal of Consents.** Under some foreign jurisdictions' data protection laws, a counterparty may subsequently withdraw its consent to sharing information after previously granting such consent to an SBSD. In the Proposal, the SEC asked how SBSDs plan to address situations where consent is withdrawn. If a counterparty withdraws its consent, an SBSD's approach would likely be to stop executing new trades with such counterparty.[40] This would be the same approach an SBSD would take if the counterparty did not give its consent in the first instance. The Commission should permit this approach, which is consistent with its view, as set forth in the Proposal, that "if a customer or counterparty provides a consent then later withdraws that consent, the firm may need to

[40] As noted above in the discussion of "Scope of Required Consents," for a non-U.S. SBSD, this approach would generally only be relevant for U.S. counterparties of the SBSD.

cease conducting a[n SBSD] business with that person." A withdrawal of consent by a counterparty should not affect transactions an SBSD entered into with such counterparty when the counterparty's initial consent was in force, because otherwise there would be confusion and disruptions in the market. Requiring an SBSD to take steps with respect to existing transactions upon the withdrawal of consents may force SBSDs to unwind existing transactions or take other steps that would have destabilizing effects and cause uncertainty within the U.S. and global markets.

- **Deadline for Obtaining Consents.** Under the Proposal, although a non-U.S. SBSD is not required to submit a legal opinion and certification until 24 months after it applies for registration, such SBSD would be required to have obtained all the necessary consents by the date it conditionally registers. This timing would limit the usefulness of this additional 24-month period as an SBSD would need to conduct significant analysis, obtain required consents, and potentially reorganize its personnel or business prior to conditional registration. Therefore, the 24-month period should apply to obtaining consents as well as submitting a legal opinion and certification.

- **Protected Personal Data.** As noted above in Section II.b.iv, targeted relief for protected personal data from direct record access requirements is necessary to address intractable legal conflicts that could otherwise cause a large number of non-U.S. SBSDs to exit the U.S. market. Such relief is also relevant for U.S. SBSDs doing business internationally; even though they are not subject to certification and legal opinion requirements that would bar them from registering absent relief, they will still face the same conflicts between the Commission's direct record access requirements and non-U.S. personal data protections.

b. The Commission Should Provide Masking Relief for Certain Foreign Counterparties

Shortly after becoming conditionally registered, an SBSD will be required to comply with Regulation SBSR, which may conflict with the privacy laws of some foreign jurisdictions. Applicable law in a non-U.S. jurisdiction may require counterparty consent, regulatory authorization, or both prior to the disclosure of trade information.

The CFTC has issued and extended no-action relief allowing swap dealers to use substitute, "masked" privacy identifiers for counterparties who reside in enumerated jurisdictions where the local privacy or similar laws prohibit reporting un-masked identifiers.[41] The Commission should provide similar relief until it can establish an information-sharing agreement (or other arrangement) with the relevant foreign regulatory authority.

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[41] CFTC No-Action Letter No. 17-16 (Mar. 10, 2017).

Additionally, if the Commission follows our recommendation above and does not require consents be obtained prior to an SBSD's conditional registration, the Commission should also allow an SBSD to use masked identifiers for the 24-month conditional registration period for those counterparties from which such SBSD has not yet obtained the requisite consents.

IV. Background Checks for APs of SBSDs

a. The Commission Should Adopt its Proposed Amendments to Rule of Practice 194 and Proposed Rule 18a-5, as Modified Herein

SEC Rule of Practice 194 establishes, among other things, a process by which an SBSD may seek an exemption from the prohibition against APs subject to a statutory disqualification.[42] The Proposal would amend the Rule of Practice 194 to provide an exclusion for an AP of an SBSD subject to a statutory disqualification who (1) is not a U.S. person and (2) does not effect and is not involved in effecting SBS transactions with or for U.S. counterparties, other than through a foreign branch of such U.S. counterparties.[43] This exclusion is conditioned on the AP not being currently subject to an order prohibiting participation in the U.S. financial markets or a foreign financial market where the individual is employed or located.

We support this proposed amendment, which would help harmonize the Commission's rules with the CFTC's approach to APs[44] by providing an appropriate territorial scope for background checks of APs of SBSDs, except as stated below.

Proposed SEC Rule 18a-5, in turn, would require an SBSD to make and keep current a questionnaire or application for employment for each AP who is a natural person that covers a broad range of background information regarding the AP.[45] The Proposal would modify this requirement by exempting (1) APs excluded from the Exchange Act's statutory disqualification prohibition, including under amended Rule of Practice 194 as described above and (2) for non-U.S. APs, certain information if the receipt of that information, or the creation or maintenance of records reflecting that information, would result in violation of applicable law in the jurisdiction where the AP is employed or located.[46]

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42 17 C.F.R. 240.194.

43 Proposal, 84 Fed. Reg. at 24,238–42.

44 CFTC No-Action Letter No. 12-43 (Dec. 7, 2012).

45 Recordkeeping and Reporting Requirements for [SBSDs], Major [SBS] Participants, and Broker-Dealers; Capital Rule for Certain [SBSDs], SEC Release No. 34-71958 (Apr. 17, 2014), 79 Fed. Reg. 24,194, 25,205 (May 2, 2014).

46 Proposal, 84 Fed. Reg. at 24,242–44.

We also support these proposed amendments, which would be consistent with the fact that the Exchange Act only requires an SBSD to exercise reasonable care to determine whether an AP is subject to a statutory disqualification, and it would not be reasonable to receive or maintain information in violation of applicable law.

b. The Commission Should Amend Rule of Practice 194 to Exempt APs Who Do Not Solicit or Accept SBS

The Commission has interpreted Exchange Act Section 15F(b)(6)'s statutory disqualification requirement to extend beyond APs engaged in front office activities, including APs who draft and negotiate master agreements and confirmations, manage collateral, or screen potential counterparties for creditworthiness.[47] The APs who perform these functions are typically in the middle or back office or a control group. Their discretion is frequently constrained in respects that make the potential for bad acts that could harm counterparties very limited, not only through detailed procedures but also multiple layers of controls. Accordingly, the benefits of subjecting these APs to the statutory disqualification requirement would be relatively low.

On the other hand, the costs of extending this requirement to these APs would be quite high. The number of APs implicated would be significant, and many of them would be located in non-U.S. jurisdictions. However, because they perform these functions centrally for U.S. and non-U.S. counterparties alike, it would not be feasible for them to rely on the proposed amendment to Rule of Practice 194. In addition, these APs frequently perform functions for a broad range of products not limited to SBS.

The CFTC, in contrast, does not subject swap dealers' middle office, back office, or control personnel to its parallel statutory disqualification prohibition. Instead, it only applies that prohibition to personnel who solicit or accept swaps or supervise such personnel. We are not aware of this more limited approach leading to material counterparty abuses or other problems.

To better balance the costs and benefits of the statutory disqualification requirement and harmonize with the CFTC, the Commission should amend Rule of Practice 194 to exempt APs who do not solicit or accept SBS, and do not supervise APs who solicit or accept SBS, from Exchange Act Section 15F(b)(6)'s statutory disqualification requirement. Should the Commission fail to adopt this exemption, it should adopt one for APs who neither engage in these front office functions nor exercise managerial or other discretionary, supervisory authority over the SBS business of an SBSD, which would be consistent with FINRA's approach to operations professionals.[48]

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47 SBSD Registration Release, 80 Fed. Reg. at 48,976.

48 *See* FINRA Rule 1220(b)(3).

c. An SBSD's Chief Compliance Officer Should Not Be Required to Review and Sign Each Employment Application

The Commission's rules currently require that an SBSD's CCO or his or her designee review and sign each employment questionnaire or application.[49] This requirement is overly burdensome on the SBSD's compliance staff and should be eliminated in favor of the SBSD's standing operating procedures for review of employment documents (such as human resources personnel).

Compliance staff are not typically involved in reviewing employment applications and so are not the most expert staff to handle such matters, and the Commission should not be involved in dictating the manner in which employment policies and procedures are executed. SBSDs should instead be allowed to follow their ordinary course personnel review and background check procedures. An SBSD's compliance staff will approve all of the requisite policies and procedures related to employment questionnaires and applications for APs of an SBSD, which can then be more effectively and efficiently carried out by those at the SBSD that have the requisite knowledge and time to review such questionnaires and applications.

Additionally, the CFTC does not require such review and signature by the CCO or his or her designee of each employment questionnaire or application. As a lack of this requirement has not hampered the CFTC's review of swap dealers, the Commission should likewise not necessitate this in order to effectively oversee SBSDs.

If the Commission does not eliminate the requirement that the CCO or his or her designee review and sign each employment questionnaire or application, the Commission should clarify that existing SBSD APs who were subject to background check policies and procedures reasonably designed to identify statutory disqualifications, as defined by the Commodity Exchange Act, should not be subject to this requirement. Requiring SBSDs to revisit their determinations regarding existing APs who were previously reviewed for purposes of the CFTC's regulations for swap dealers would result in essentially a double expenditure for SBSDs with respect to such employees, which would provide no additional regulatory benefit to the Commission. Instead, the employment questionnaires or applications to be reviewed and signed by the CCO or his or her designee should only be those for employees that only transact in SBS and have not previously been subjected to employment questionnaires or applications to comply with the CFTC's swap dealer requirements.

V. Compliance Dates

When the Commission finalized its rules concerning capital, margin and segregation requirements for SBSDs and major SBS participants, it provided that the compliance date (the "**Registration Compliance Date**") for its registration requirements would be 18 months after the later of: (1) the effective date of the final rules establishing

[49] 17 C.F.R. § 240.15Fb6-2(b).

recordkeeping and reporting requirements for SBSDs and major SBS participants; or (2) the effective date of final rules addressing the Proposal.[50]

Implementing the Commission's SBSD regulatory framework will be a time-consuming exercise for both market participants and the Commission. Once SBSDs know the exact scope of the Commission regulations with which they must comply, they will need time both to adjust their internal systems and businesses and to build any new systems required for compliance. In addition, if the Commission does not remove its requirements that non-U.S. persons count ANE transactions toward their SBS *de minimis* thresholds or apply additional EBC and reporting requirements to such transactions, non-U.S. SBSDs will need to create processes and systems to track its ANE activity internally and potentially also the ANE activity of other dealer counterparties.

Additionally, non-U.S. SBSDs and foreign authorities will need time to submit, and the Commission will need time to review, substituted compliance applications. As discussed above, most SBS rules eligible for substituted compliance will be effective upon the conditional registration, or registration, of an SBSD. Consequently, substituted compliance determinations will need to be finalized well in advance of the effectiveness of the registration requirements in order for SBSDs to organize their regulatory implementation projects around the rules they need to come into compliance with, and to evaluate whether they will be able to comply with the SBS regulations or will need to reorganize their SBS business lines or relocate U.S. personnel. Therefore, we continue to recommend that the Commission extend the Registration Compliance Date to 18 months after the date on which it has made all applicable substituted compliance determinations covering the same range of rules and foreign jurisdictions currently covered by the CFTC's corollary determinations and related no-action relief.[51]

If, however, the Commission does not take this approach, then it should adopt a provisional substituted compliance framework. Under this framework, if a requirement is already covered by a CFTC comparability determination for a particular foreign jurisdiction or the Commission has received a complete request for substituted compliance (subject to the recommendations above) at least 6 months prior to the Registration Compliance Date but has not yet granted or rejected the request by that date, then it should permit SBSDs from the relevant foreign jurisdiction to rely on substituted compliance on a provisional basis until 18 months after the Commission completes its review. This 18-month post-review period would permit affected SBSDs to conform their SBS activity to the *de minimis* threshold and accordingly withdraw from registration in the event the Commission rejects the substituted compliance request.

In addition, we recommend that the Commission adopt the following measures designed to avoid potentially significant disruption to the SBS markets.

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[50] *See* Capital, Margin, and Segregation Requirements for [SBSDs] and Major [SBS] Participants and Capital and Segregation Requirements for Broker-Dealers; Final Rule, SEC Release No. 34-86175 (June 21, 2019).

[51] *See* CFTC No-Action Letter No. 13-45 Corrected (July 11, 2013).

- **ANE Transactions.** If the Commission does not eliminate its requirements with respect to ANE transactions, we recommend a 24-month implementation period after the Registration Compliance Date for the application of requirements to ANE transactions. SBSDs will require time to determine whether they will be able to comply with the requirements for ANE transactions or whether they will need to undertake internal reorganizations of their SBS business lines and U.S. personnel. SBSDs also will need time to develop industry standard documentation (*e.g.,* representation letters) with respect to the requirements applicable to ANE transactions. To the extent SBSDs continue to engage in ANE activity, they will need time to identify ANE transactions on a transaction-by-transaction basis to determine whether the Commission's rules apply, which will require additional internal operational builds that will be costly and time consuming. SBSDs will also need to determine how such identification will be operationalized among SBSDs and counterparties.

- **Reporting Non-U.S. Transactions.** The CFTC has, since 2012, provided exemptive or no-action relief for a non-U.S. swap dealer established in Australia, Canada, the European Union, Japan, or Switzerland, that is not part of an affiliated group in which the ultimate parent entity is a U.S. swap dealer, U.S. major swap participant, U.S. bank, U.S. financial holding company, or U.S. bank holding company, from reporting swaps with non-U.S. persons who are not guaranteed or conduit affiliates.[52] This relief has been designed to facilitate dialogue with foreign regulators regarding substituted compliance with foreign reporting rules. The Commission should take a similar approach by extending the compliance date for applying Regulation SBSR until 24 months after the Registration Compliance Date for SBS between (1) a non-U.S. SBSD whose ultimate parent entity is not a U.S. person and whose obligations under the SBS are not guaranteed by a U.S. person and (2) a non-U.S. person whose obligations under the SBS are not guaranteed by a U.S. person.

- **WORM Recordkeeping.** The Commission's SBSD recordkeeping proposal would subject SBSDs to the same "write-once, read-many" ("**WORM**") recordkeeping requirements as currently apply to broker-dealers. We oppose this proposal, which does not afford registrants sufficient flexibility to adapt their recordkeeping systems to address new forms of electronic data, instead requiring anachronistic and costly systems not often compatible with changing business technology. Similar considerations led the CFTC to repeal its own WORM requirements in 2017. If, however, the Commission imposes WORM requirements on SBSDs, it should provide SBSDs an additional 24 months after the Registration Compliance Date before they become subject to the WORM requirements.

- **Consents.** As noted above in Section III.a, the Commission should not require an SBSD to obtain required consents until 24 months after it applies for registration with the Commission (and not require any consents where foreign personal data

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52 *See* CFTC Letter No. 17-64 (Nov. 30, 2017).

protection laws make this an ineffective means of achieving unmitigated records access, notably with respect to employee data) and should permit the identities of counterparties who have not yet provided consents to be masked when the SBSD reports SBS with those counterparties pursuant to Regulation SBSR.

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We would be pleased to provide further information or assistance at the request of the Commission or its staff. Please do not hesitate to contact the undersigned if you should have any questions with regard to the foregoing.

Respectfully submitted,

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cc: Honorable Jay Clayton, Chairman, U.S. Securities and Exchange Commission
Honorable Robert J. Jackson, Jr., Commissioner, U.S. Securities and Exchange Commission
Honorable Hester M. Peirce, Commissioner, U.S. Securities and Exchange Commission
Honorable Elad L. Roisman, Commissioner, U.S. Securities and Exchange Commission
Honorable Allison Herren Lee, Commissioner, U.S. Securities and Exchange Commission