September 10, 2020

Carol McGee
Assistant Director
Office of Derivatives Policy, Division of Trading and Markets
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Re: Order Extending Temporary Exemptions from Exchange Act Section 8 and Exchange Act Rules 8c-1, 10b-16, 15a-1, 15c2-1 and 15c2-5 in Connection with the Revision of the Definition of "Security" to Encompass Security-Based Swaps (Release No. 34-87943; File No. S7-27-11)

Dear Ms. McGee,

This letter responds to the request by staff of the U.S. Securities and Exchange Commission (the "Commission") that the Securities Industry and Financial Markets Association ("SIFMA")[1] supplement our previous submissions[2] regarding the Commission's Order Extending Temporary Exemptions under the Securities Exchange Act Section 8 Exchange Act Rules 8c-1, 10b-16, 15a-1, 15c2-1 and 15c2-5 in Connection with the Revision of the Definition of "Security" to Encompass Security-Based (the "2020 Extension Order")[3] extending temporary exemptions until November 5, 2020. This supplemental submission provides additional details regarding certain of the exemptions and guidance that we have previously requested in the form of responses to the questions received from Commission staff.

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[1] SIFMA is the voice of the U.S. securities industry. We represent the broker-dealers, banks and asset managers whose nearly 1 million employees provide access to the capital markets, raising over $2.5 trillion for businesses and municipalities in the U.S., serving clients with over $20 trillion in assets and managing more than $67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. 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.

[2] *See* SIFMA comments on limited exemptions of definitions under the Securities Exchange Act (January 8, 2020) ("January 2020 Submission"), *available at* https://www.sifma.org/wp-content/uploads/2020/01/SIFMA-SBS-Exemption-Request-January-8-2020.pdf; *see also* SIFMA comments on temporary exemptions in connection with the definition of "security" to encompass SBS (December 20, 2018) ("December 2018 Submission"), *available at* https://www.sifma.org/wp-content/uploads/2019/01/SIFMA-SBS-Exemption-Request-December-20-2018.pdf; Proposed Guidance and Exemptions to Clarify Treatment of Security-Based Swaps Under the Exchange Act (November 8, 2018) ("November 2018 Submission"), *available at* https://www.sifma.org/wp-content/uploads/2019/01/Proposed-Guidance-and-Exemptions-to-Clarify-Treatment-of-SBS-Under-the-Exchange-Act-11.8.18.pdf.

[3] *See* Order Extending Temporary Exemptions from Exchange Act Section 8 and Exchange Act Rules 8c-1, 10b-16, 15a-1, 15c2-1 and 15c2-5 in Connection with the Revision of the Definition of "Security" to Encompass Security-Based Swaps, Exchange Release No. 34-87943, 85 Fed. Reg. 2763 (Jan. 16, 2020).

I. Background

In 2011, the Commission issued an order (the "Exchange Act Exemptive Order")[4] granting certain temporary exemptive relief (the "Temporary Exemptions") in connection with the revision of the definition of "security" in the Securities Exchange Act of 1934 ("Exchange Act") to encompass security-based swaps ("SBS"). In 2014, the Commission issued an order (the "2014 Extension Order")[5] extended the expiration dates for the Temporary Exemptions. In the 2014 Extension Order, the Commission distinguished between: (i) the Temporary Exemptions related to pending SBS rulemakings ("Linked Temporary Exemptions"); and (ii) the Temporary Exemptions that generally were not directly related to a specific SBS rulemaking ("Unlinked Temporary Exemptions"). The expiration dates for the Linked Temporary Exemptions established by the 2014 Extension Order were the compliance dates for the specific rulemakings to which they were "linked," and the expiration date for the Unlinked Temporary Exemptions was three years following the effective date of the 2014 Extension Order (*i.e.*, February 5, 2017), or such time that the Commission issues an order or rule determining whether continuing exemptive relief is appropriate for SBS with respect to any such Unlinked Temporary Exemptions.

In 2017, the Commission issued an order (the "2017 Extension Order")[6] extending the expiration date of the Unlinked Temporary Exemptions until February 5, 2018, and then in 2018, the Commission issued an order (the "2018 Extension Order")[7] extending that expiration date until February 5, 2019. In 2019, the Commission issued an order (the 2019 Extension Order")[8] granting a permanent exemption from the Exchange Act definition of "penny stock" for SBS transactions between eligible contract participants, granted a limited exemption from the Exchange Act definition of "municipal securities" for SBS, and extending other Unlinked Temporary Exemptions until February 5, 2020. The 2020 Extension Order extended the Unlinked Temporary Exemptions from Section 8 of the Exchange Act and from Exchange Act Rules 8c-1, 15c2-1, 10b-16, 15c2-5, and 15a-1, in connection with the revision of the Exchange Act definition of "security" to encompass SBS, in each case contained in the 2011 Exchange Act Exemptive Order and extended in the January 2019 Extension Order. The remainder of the Unlinked Temporary Exemptions expired on February 5, 2020, as provided in the January 2019 Extension Order.

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[4] *See* Order Granting Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with the Pending Revisions of the Definition of "Security" to Encompass Security-Based Swaps, Exchange Act Release No. 64795 (July 1, 2011), 76 FR 39927 (July 7, 2011).

[5] *See* Order Extending Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with the Revision of the Definition of "Security" to Encompass Security-Based Swaps, and Request for Comment, Exchange Act Release No. 71485 (Feb. 5, 2014), 79 FR 7731 (Feb. 10, 2014) (extending the expiration date for certain Temporary Exemptions to February 5, 2017).

[6] *See* Order Extending Certain Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with the Revision of the Definition of "Security" to Encompass Security-Based Swaps and Request for Comment, Exchange Act Release No. 79833 (Jan. 18, 2017), 82 FR 8467 (Jan. 25, 2017).

[7] *See* Order Extending Until February 5, 2019 Certain Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with the Pending Revision of the Definition of "Security" to Encompass Security-Based Swaps and Request for Comment, Exchange Act Release No. 82626 (Feb. 2, 2018), 83 FR 5665 (Feb. 18, 2018).

[8] *See* Order Granting a Limited Exemption from the Exchange Act Definition of "Penny Stock" for Security-Based Swap Transactions between Eligible Contract Participants; Granting a Limited Exemption from the Exchange Act Definition of "Municipal Securities" for Security-Based Swaps; and Extending Certain Temporary Exemptions under the Exchange Act in Connection with the Revision of the Definition of "Security" to Encompass Security-Based Swaps, Exchange Act Release No. 84991 (Jan. 25, 2019), 84 FR 863 (Jan. 31, 2019).

II. Supplemental Responses

A. Linked Temporary Exemptions

1. Broker-Dealer Registration

- **Please clarify your request for an exemption from the broker and dealer registration requirement in Exchange Act Section 15(a)(1). In particular, please confirm whether you are seeking assurance that a foreign broker or dealer that is otherwise operating in compliance with the terms of the registration exemption available under Rule 15a-6 should not be required to register under Exchange Act Section 15(a) solely because it engages in U.S. security-based swap dealing activity with or for eligible contract participants (*i.e.*, activity that is excepted from the definition of "dealer" under Exchange Act Section 3(a)(5)). Please also confirm whether you are seeking similar assurance with respect to a foreign broker or dealer engaged in U.S. security-based swap brokerage activity with or for eligible contract participants. In your response, please provide a detailed analysis supporting your request.**

Response: We are requesting the following exemptions from the broker and dealer registration requirement in Exchange Act Section 15(a)(1):

a. *Foreign SBSDs*. We request an exemption for a foreign broker or dealer that is otherwise operating in compliance with the terms of the registration exemption available under Exchange Act Rule 15a-6 solely in connection with U.S. SBS dealing activity with eligible contract participants (*i.e.*, activity that is excepted from the definition of "dealer" under Exchange Act Section 3(a)(5)). This exemption is necessary to address a technical issue raised by the way Exchange Act Section 15(a)(1) would otherwise apply to a foreign SBS dealer ("SBSD") that is, in unrelated respects, also a foreign broker or dealer. Specifically, subject to certain exceptions not relevant here, Exchange Act Section 15(a)(1) makes it "unlawful for any broker or dealer . . . to make use of the mails or any means or instrumentality of interstate commerce to effect transactions in, or to induce or attempt to induce the purchase or sale of, any security . . . unless such broker or dealer is registered in accordance with subsection (b) of this section." In addition, SBS constitute "securities." Therefore, any person who falls within the definition of "broker" or "dealer," even for reasons unrelated to SBS, will trigger the broker and dealer registration requirement if it transacts in SBS, even with eligible contract participants.

By way of example, consider a UK entity that engages in cash equity securities brokerage activity solely for UK customers; such entity is, as a definitional matter, a "broker" as defined by Exchange Act Section 3(a)(4), but its securities brokerage activity does not subject it to registration with the Commission. However, because such UK entity is a "broker" due to this cash equities business, it would need to register as a broker-dealer (or rely on Exchange Act Rule 15a-6) if it engaged in SBS dealing activity with a U.S. eligible contract participant—even though that activity would not cause the UK entity to be a "dealer" under Exchange Act Section 3(a)(5)

and the UK entity would separately need to count the activity towards the SBSD *de minimis* threshold.

This requested exemption would not extend to a foreign broker or dealer engaged in SBS activity that would fall within the "broker" definition in Exchange Act Section 3(a)(4); any such activity would instead need to satisfy Exchange Act Rule 15a-6 in order to be exempt from the broker and dealer registration requirement in Exchange Act Section 15(a)(1).

b. *Agent SBSDs*. We also request an exemption for a registered SBSD and its associated persons who arrange, negotiate, or execute SBS with or for a person that is an eligible contract participant (an "Agent SBSD"), where that Agent SBSD is acting on behalf of another registered SBSD that is a majority-owned affiliate of the Agent SBSD, provided that (1) the Agent SBSD creates and maintains the books and records relating to the transactions subject to the exemption that are required by Exchange Act Rules 18a-5 and 18a-6 and (2) if Exchange Act Rule 10b-10 would apply to the activity, the Agent SBSD provides to the customer the disclosures required by Exchange Act Rules 10b-10(a)(2) (excluding (a)(2)(i) and (ii)) and 10b-10(a)(8) in accordance with the time and form requirements set forth in Exchange Act Rules 15Fi-2(b) and (c) or, alternatively, promptly after discovery of any defect in the Agent SBSD's good faith efforts to comply with such requirements.

Essentially, we are requesting a parallel exemption to Exchange Act Rule 3a71-3(d)(4) for situations when an Agent SBSD acts for an affiliate that is registered as an SBSD as opposed to one that is relying on an exception from such registration. The same issues that led the Commission to adopt Exchange Act Rule 3a71-3(d)(4) would arise in this situation as well (*e.g.*, application of heightened broker-dealer capital requirements to a registered SBSD whose only brokerage activity relates to SBS arranged, negotiated, or executed on behalf of an affiliate). In our view, the justification for adopting an exemption from broker-dealer registration for a registered SBSD is arguably stronger in this situation than it was in the one covered by Exchange Act Rule 3a71-3(d)(4) because in this situation both affiliates involved in the transactions are already registered with the Commission. Also, because the principal to the SBS transactions would be registered with the Commission as an SBSD, we do not think that it should be necessary to apply the additional conditions set forth in Exchange Act Rule 3a71-3(d)(4) beyond the recordkeeping and confirmation requirements set forth above.

2. Confirmation Requirements

- **Please explain in greater detail why market participants expect that the brokerage-related disclosures required by Exchange Act Rule 10b-10 but not by Exchange Act Rule 15Fi-2—in particular, the introductory paragraph in Rule 10b-10(a)(2), Rule 10b-10(a)(2)(i)(B), Rule 10b-10(a)(2)(i)(D)—should not apply to a broker that engages in security-based swap brokerage transactions. Please also describe any challenges for a dually-registered broker and security-based swap dealer in complying with the different timing requirements of Rule 10b-10 and Rule 15Fi-2.**

Response: To clarify, we are only requesting an exemption from Exchange Act Rule 10b-10 in connection with a situation in which a broker-dealer arranges, negotiates, or executes an SBS transaction on behalf of a registered SBSD that is a majority-owned affiliate of the broker-dealer. In this situation, our experience is that the broker-dealer is solely compensated by its SBSD affiliate, not by any third-party customer involved in the transaction, which in our view makes some of the additional brokerage-related disclosures irrelevant. In addition, applying Exchange Act Rule 10b-10 in this situation would potentially create some timing issues because Exchange Act Rule 10b-10 requires that a broker-dealer provide the requisite disclosures to its customer at or before "the completion of the transaction," which Exchange Act Rule 10b-10(d)(2) defines (by cross-reference to Exchange Act Rule 15c1-1) in terms of delivery and payment mechanics that do not clearly apply to bilateral SBS because they are not "delivered" in the same sense as a cash market security. In contrast, Exchange Act Rule 15F1-2 provides a clear deadline, requiring an SBSD to provide a trade acknowledgment by the end of the first business day following the day of execution of an SBS.

For these reasons, we request a parallel exemption to Exchange Act Rule 3a71-3(d)(5) to cover a situation in which a broker-dealer is acting for an affiliate that is registered as an SBSD as opposed to one that is relying on an exception from such registration. Specifically, we request an exemption from Exchange Act Rule 10b-10 for a broker or dealer that is also a registered SBSD or registered broker with respect to arranging, negotiating, or executing SBS with or for a person that is an eligible contract participant, where such broker or dealer is acting on behalf of a registered SBSD that is a majority-owned affiliate of the broker or dealer, provided that (1) the affiliated SBSD complies with Exchange Act Rules 15F1-1 and 15Fi-2 and (2) the broker or dealer provides to the customer the disclosures required by Exchange Act Rule 10b-10(a)(2) (excluding (a)(2)(i) and (ii)) and 10b-10(a)(8) in accordance with the time and form requirements set forth in Exchange Act Rule 15Fi-2(b) and (c) or, alternatively, promptly after discovery of any defect in the broker or dealer's good faith efforts to comply with such requirements. In our view, the justification for adopting an exemption from Exchange Act Rule 10b-10 for a broker-dealer is arguably stronger in this situation than it was in the one covered by Exchange Act Rule 3a71-3(d)(4) because in this situation both affiliates involved in the transactions are already registered with the Commission.

Considering that Rule 10b-10 applies regardless of the registration status of the broker or dealer, the foregoing exemption would apply regardless of whether the broker or dealer is registered as either an SBSD, a broker, or both. We note that an SBSD that is also a broker or dealer and is acting as principal in connection with an SBS transaction for which it complies with Exchange Act Rule 15Fi-2 is already exempt from Rule 10b-10 pursuant to Rule 15Fi-2(g), and so we do not address that scenario here.

3. Margin Regulations

- **SEC staff has received a request for an exemption from Regulation T for uncleared swaps, uncleared security-based swaps, and other securities positions held in a Regulation T margin account for a broker-dealer/swap dealer/security-based swap dealer, which was included in the SIFMA Portfolio Margin Working**

Group proposals, dated November 13, 2019.[9] If any additional margin-related exemptions are currently requested, please provide examples of circumstances under which market participants should be eligible for such exemptions and the specific margin requirements from which relief is requested.

Response: We are not requesting any additional margin-related exemptions beyond those set forth in the November 13, 2019 presentation.

B. Unlinked Temporary Exemptions

1. Disclosure Requirements Relating to Extensions of Credit

- **Please describe the types of security-based swap contracts to which market participants expect Rules 10b-16 and 15c2-5 could apply. Please provide specific example of fact patterns that market participants anticipate would trigger application of these rules.**

  Response: As stated in the January 2020 Submission, in our view SBS should not in and of themselves constitute extensions of credit subject to Exchange Act Rule 10b-16 *or* 15c2-5, which is consistent with the position the Commission previously took in connection with security futures. However, also consistent with that position, extensions of credit related to SBS, such as an extension of credit to fund a margin obligation, would be subject to those rules.

- **For the security-based swap contracts identified above, please describe with specificity (1) the circumstances under which market participants expect that the disclosure requirements in Rule 15c2-5(a)(1) could result in disclosures that are additional to or inconsistent with the disclosure requirements applicable to stand-alone security-based swap entities and (2) the disclosures that would be additional or inconsistent.**

  Response: If the Commission agrees with our interpretation that an SBS itself does not constitute an extension of credit subject to Exchange Act Rule 15c2-5, then we do not think that Exchange Act Rule 15c2-5(a)(1) should impose unwarranted disclosure requirements. However, if the Commission viewed an SBS itself to constitute an extension of credit within the meaning of Exchange Act Rule 15c2-5, then paragraph (a)(1) of the rule would impose disclosure requirements that overlap in ambiguous respects with the SBS-specific disclosures required by Exchange Act Rule 15Fh-3(b) because it would treat an SBS as a "loan arrangement" instead of a derivatives transaction. Specifically: clause (i) of Exchange Act Rule 15c2-5(a)(1) would overlap with the material economic terms disclosure requirement in Exchange Act Rule 15Fh-3(b)(1)(ii); clause (ii) of Exchange Act Rule 15c2-5(a)(1) would overlap with the material risk disclosure requirement in Exchange Act Rule 15Fh-3(b)(1)(i); and clause (iii) of Exchange Act Rule

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[9] *See* SIFMA discussion document on portfolio margining (November 13, 2019), *available at* https://www.sifma.org/sifma-portfolio-margin-discussion-deck-20191113/.

15c2-5(a)(1) would overlap with the material incentives and conflicts of interest disclosure requirement in Exchange Act Rule 15Fh-3(b)(2).

- **For the security-based swap contracts identified above, please describe with specificity (1) the circumstances under which market participants expect that the suitability requirements in Rule 15c2-5(a)(2) could result in suitability-related obligations for security-based swaps that are additional to or inconsistent with Rule 15Fh-3(f)'s suitability requirements for stand-alone security-based swap entities and (2) the suitability-related obligations that would be additional or inconsistent.**

  Response: If the Commission agrees with our interpretation that an SBS itself does not constitute an extension of credit subject to Exchange Act Rule 15c2-5, then we do not think that Exchange Act Rule 15c2-5(a)(2) should impose unwarranted suitability requirements. However, if the Commission viewed an SBS itself to constitute an extension of credit within the meaning of Exchange Act Rule 15c2-5, then paragraph (a)(2) of the rule would require the broker or dealer to obtain information concerning its counterparty's financial situation and needs and reasonably determine that the transaction is suitable for the counterparty even in circumstances when the corresponding suitability rule for SBSDs, Exchange Act Rule 15Fh-3(f), does not require any similar counterparty-specific suitability assessment, *i.e.*, for institutional counterparties that satisfy the safe harbor in Exchange Act Rule 15Fh-3(f)(2).

2. Securities Activities of OTC Derivatives Dealers

- **Please describe whether any OTC derivatives dealers currently clear single-name credit default swaps. If yes, please describe whether this activity is part of an ancillary portfolio management securities activity. If no, please describe whether OTC derivatives dealers plan to do so in the near term.**

  Response: We are not aware of any OTC derivatives dealers that currently, or in the near-term plan to, clear single-name credit default swaps for others. To clarify, our request for an exemption from Exchange Act Rule 15a-1 was referencing *dealing* activities in single-name credit default swaps, not *clearing* activities. Specifically, we were referencing situations in which an OTC derivatives dealer enters into a single-name credit default swap as principal that is then given up for central clearing, but where the OTC derivatives dealer's counterparty clears its side of the swap through someone else other than the OTC derivatives dealer.

- **Please also describe whether OTC derivatives dealers may deal in any types of security-based swaps in addition to single-name credit default swaps.**

  Response: In addition to single-name credit default swaps, OTC derivatives dealers also deal in equity swaps (of various types) and debt total return swaps.

Further, as a follow up to the November 2018 Submission, we are no longer requesting exemptions from research requirements or municipal advisor regulation.[10]

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Please feel free to reach out to the undersigned should you have any questions.

Sincerely,

Kyle L Brandon
Managing Director, Head of Derivatives Policy
SIFMA

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[10] *See* November 2018 Submission, p. 3.